

## OFFICIAL OPINIONS

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(The opinions in this volume have been considered in conference by the members of this Department, approved, certified by the Attorney General, and recorded in the permanent records of this office.)



Op. No. 2489, Bk. 58, P. 65.

APPROPRIATION—PRISON SYSTEM—WHEN AVAILABLE—METHOD OF HANDLING.

1. An appropriation made for the support, maintenance and operation of the State penitentiary system, declared by the act "to be available immediately upon the passage" of same, is a general appropriation act within the meaning of Section 39 of Article 3 of our State Constitution, and became effective upon its approval by the Governor.

2. An act making an appropriation for the support, maintenance and operation of the penitentiary system and providing that the money thereby appropriated shall be "drawn from the Treasury and expended by the Board of Prison Commissioners in the manner provided by law," there being no other statute to the contrary, is sufficient authority for the Comptroller of Public Accounts to draw his warrant or warrants upon the State Treasury in favor of the Board of Prison Commissioners for an amount or amounts not in excess of such appropriation, without requisition or verified claims or accounts as required by Article 4333 of the Revised Civil Statutes of 1911.

3. Money received by the Board of Prison Commissioners from the State Treasurer upon warrant or warrants drawn by the Comptroller under an act making an appropriation for the support, maintenance and operation of the penitentiary system should be reported to and deposited with the State Treasurer as bailee, and drawn upon by the Board of Prison Commissioners as provided by Articles 6188 and 6192 of the Revised Civil Statutes of 1911 as amended.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 30, 1923.

*Hon. Lon A. Smith, Comptroller of Public Accounts, Capitol.*

DEAR SIR: We have your request of recent date asking the opinion of the Attorney General as to when Senate bill No. 400, passed at the recent Regular Session of the Thirty-eighth Legislature, making an appropriation of \$600,000 for the support, maintenance and operation of the State Penitentiary System, becomes effective, and as to the method to be employed in paying out or disbursing same.

This is a general appropriation act within the meaning of Section 39 of Article 3 of our State Constitution, and became effective as a law on March 19, 1923, that being the date on which it was approved by the Governor. (Rep. and Op. Atty. Gen., 1914-1916, p. 691.) The act speaks from that date. It consists of only two sections. Section 1 reads:

"There is hereby appropriated out of the State Treasury the sum of Six Hundred Thousand (\$600,000.00) Dollars for the support, maintenance and operation of the State Penitentiary System, same to be available immediately upon the passage of this Act, and to be drawn from the Treasury and expended by the Board of Prison Commissioners in the manner provided by law."

Section 2 prohibits the use for certain purposes of the money appropriated and has no bearing on these questions.

From the foregoing it is clear not only that this act became effective as a law on March 19, 1923, but also that the appropriation made by it became "available immediately" upon the passage of the act, that is, on March 19, 1923. By this we mean that upon the approval of this act by the Governor it thereupon became the law and that the proper officers of the government were then authorized and charged with the duty to draw upon the Treasury for the purposes designated in the act proper warrants, vouchers or orders in a sum or sums

equal to, but not in excess of, the amount of the appropriation, and this although there may not be at the time sufficient or any cash money in the Treasury to pay same. *Lightfoot vs. Lane*, 104 Texas, 447 (140 S. W., 89); *Fulmore vs. Lane*, 104 Texas, 499 (140 S. W., 405); *State vs. Wilson*, 71 Texas, 291 (9 S. W., 155).

Under our fiscal system, particularly in the absence of some statute to the contrary, appropriations are made, not with respect to or only as from actual cash money in the Treasury at the time, but in relation to the revenue available and subject to appropriation for the purposes provided for by the appropriation act. (Op. Atty. Gen., Book 30, p. 83.)

The next question is as to the method of drawing this money from the Treasury. The act says, "to be drawn from the Treasury and expended by the Board of Prison Commissioners in the manner provided by law."

This language cannot mean that the money thus appropriated is "to be drawn from the Treasury \* \* \* by the Board of Prison Commissioners in the manner provided by law," because there is no law providing a manner for withdrawing money from the Treasury by the Board of Prison Commissioners. Neither can it mean that this money is "to be \* \* \* expended by the Board of Prison Commissioners in the manner provided by law" so long as it remains in the Treasury, because there is no law providing a manner by which the Board of Prison Commissioners can expend money, or authoritatively check or draw orders or vouchers upon or against same, so long as it remains in the Treasury. Expenditures by the Board of Prison Commissioners can only be lawfully made from the "Prison Commission Account" kept with and by the State Treasurer as bailee under Article 6188 of the Revised Civil Statutes.

In order, then, that the money thus appropriated may be "expended by the Board of Prison Commissioners in the manner provided by law," and that effect may be given to these words as used in this act, it must be in some way "drawn from the Treasury" and passed into this "Prison Commission Account." How may this be done? Article 4368 of the Revised Civil Statutes provides that:

*"The Treasurer shall countersign and pay all warrants drawn by the Comptroller of Public Accounts on the Treasury, which are authorized by law; and no money shall be paid out of the Treasury except on the warrants of the Comptroller."*

It is true that this article uses the words, "paid out of the Treasury," while the language of this act is "drawn from the Treasury," but this difference in verbiage is not such as to warrant the conclusion that the money appropriated by this act was intended to be taken from the Treasury otherwise than by the State Treasurer upon warrant or warrants drawn upon him by the Comptroller, in the absence of some other statute to the contrary, and there is none.

We conclude, then, that since neither this act nor any other statute provides otherwise, the money appropriated by this act can only be "drawn from the Treasury" upon warrant therefor drawn on the Treasurer by the Comptroller. What is necessary to authorize the Comptroller, and place upon him the duty, to draw his warrant or warrants upon the State Treasurer with respect to this appropriation?



The general law governing the issuance or drawing of warrants by the Comptroller of Public Accounts on the State Treasury is Chapter 2 of Title 65 of the Revised Civil Statutes of 1911, particularly Articles 4332 and 4333. These articles read:

"Art. 4332. He shall draw warrants on the Treasurer for the payment of all moneys directed by law to be paid out of the Treasury; and no warrant shall be drawn unless authorized by law; and every warrant shall refer to the law under which it is drawn; and no warrant shall be issued in favor of any person, or the agent or assignee of any person indebted to the State, until such debt be paid."

"Art. 4333. No warrant shall be drawn on the Treasury of this State by the Comptroller based alone on the requisition of any individual or board, except as otherwise provided by law; but, in all cases, an account must first be made in pursuance of some specific appropriation and filed with the Comptroller by some one duly authorized and verified by affidavit."

As to said Article 4332, we have here \$600,000 appropriated and "directed by law to be paid out of the Treasury," that is, "to be drawn from the Treasury," and which act, in view of its provision that the money appropriated by it is to be "expended by the Board of Prison Commissioners in the manner provided by law," and in view of the provisions of said Articles 4368 and 6188 hereinbefore referred to, must be regarded as a law authorizing the drawing of a warrant or warrants against this appropriation, and a law, that is, this act, that can and should be referred to in such warrant or warrants as the law under which same may be drawn. From this we conclude that the Comptroller, by virtue of this act and said Article 4332, is authorized to draw his warrant or warrants upon the State Treasurer against this appropriation in favor of the Board of Prison Commissioners to the end that this sum of money may be "drawn from the Treasury and expended by the Board of Prison Commissioners in the manner provided by law," and that without other prerequisite or requirement than this act itself, unless this is precluded by said Article 4333, and we do not think that article does so.

The sense of said Article 4333 is that a simple order or requisition of an individual or board shall not be sufficient authority for the Comptroller to draw his warrant on the Treasurer in favor of the person or persons for the amount or amounts specified in such order or requisition, but that in all cases, before the warrant shall be drawn, a statement of some accrued and matured claim or account against the State, for which an appropriation has been made, duly verified by affidavit, must be filed with the Comptroller by someone duly authorized to do so, *except as otherwise provided by law*. One exception to this requirement, as has been held by our Supreme Court, is that of the drawing of warrants by the Comptroller in payment of officers' salaries. Art. 7087; Lightfoot vs. Lane, 104 Texas, 447 (140 S. W., 89); Fulmore vs. Lane, 104 Texas, 499 (140 S. W., 405). Our opinion is that this act is also an exception from this requirement. Our reasons are:

First. The words "to be drawn from the Treasury and expended by the Board of Prison Commissioners (or other board or head of a department) in the manner provided by law" are not ordinarily used in appropriation acts, and are unnecessary in this act if it was intended that this appropriation was to be handled in the usual way.

Second. If this appropriation is to be handled under said Article

4333, then it must follow that the money appropriated cannot be "expended by the Board of Prison Commissioners" at all, much less "in the manner provided by law." In such case the Board of Prison Commissioners could only contract claims or accounts to be approved or not by the Comptroller, and, if approved, paid by the State Treasurer.

Third. A wholly different method for expenditures by the Board of Prison Commissioners from that of paying the expenses of other State institutions is provided by law, and since this act provides that the money appropriated by it is to be "expended by the Board of Prison Commissioners," we think the words "in the manner provided by law" refers to the law governing expenditures by the Board of Prison Commissioners rather than to the general law governing expenditures in the conduct of other State affairs.

Fourth. Since the Legislature has deemed it expedient and wise to provide a separate, distinct and altogether different method of handling the financial affairs of the prison system from that prescribed by general law with respect to other State departments, institutions and the like, it is not reasonable to say by construction, and in the absence of clear language so requiring, that this appropriation was intended to be handled under the latter and not under the former, thereby requiring that the less expedient and wise policy be adopted as to this appropriation.

Fifth. We do not think the language of this act sufficient to indicate an intention on the part of the Legislature to single out this item of expenditures for the support, maintenance and operation of the prison system and require that it be handled through the Comptroller's Department and leave all the other financial transactions of the prison system to be handled in an entirely different manner, that is, under the particular statutes governing expenditures by the Board of Prison Commissioners.

Having received the money appropriated by this act from the State Treasurer upon order or warrant from the Comptroller, it will be the duty of the Board of Prison Commissioners to report same to the State Treasurer and to deposit same with him to the credit of the "Prison Commission Account" provided for by Article 6188 of the Revised Civil Statutes and to expend same in accordance with said Article 6186 and 6192 and other statutes governing expenditures of funds by the Board of Prison Commissioners.

It is our opinion, therefore, and you are so advised:

First. That an appropriation made for the support, maintenance and operation of the State penitentiary system, declared by the act "to be available immediately upon the passage" of same, is a general appropriation act within the meaning of Section 39 of Article 3 of our State Constitution, and became effective upon its approval by the Governor.

Second. That an act making an appropriation for the support, maintenance and operation of the penitentiary system and providing that the money thereby appropriated shall be "drawn from the Treasury and expended by the Board of Prison Commissioners in the manner provided by law," there being no other statute to the contrary, is sufficient authority for the Comptroller of Public Accounts to draw his warrant or warrants upon the State Treasury in favor of the Board of Prison Commissioners, or in favor of the "Prison Commission

Account," for an amount or amounts not in excess of such appropriation, without requisition or verified claims or accounts as required by Article 4333 of the Revised Civil Statutes of 1911.

Third. Money received by the Board of Prison Commissioners from the State Treasurer upon warrant or warrants drawn by the Comptroller under an act making an appropriation for the support, maintenance and operation of the penitentiary system should be reported to and deposited with the State Treasurer as bailee, and drawn upon by the Board of Prison Commissioners as provided by Articles 6188 and 6192 of the Revised Civil Statutes of 1911 as amended.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2556, Bk. —, P. —.

CORPUS CHRISTI—DONATION OF STATE AD VALOREM TAXES.

Chapter 116, General Laws Thirty-fifth Legislature, 1917, and Chapter 138, Acts Thirty-seventh Legislature, Regular Session, 1921, donating to the City of Corpus Christi certain taxes, construed to mean that all State ad valorem taxes collected, regardless of when they were assessed and levied, are donated to the said City of Corpus Christi.

Penalty and interest on delinquent taxes are not donated.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 3, 1924.

*Hon. George C. Westervelt, County Attorney, Corpus Christi, Texas.*

DEAR SIR: In your letter of the 11th instant to the Attorney General, you request an opinion as to the proper interpretation of the grant of State ad valorem taxes to the City of Corpus Christi made in Chapter 116, General Laws of the Thirty-fifth Legislature, 1917, and Chapter 138, Acts of the Thirty-seventh Legislature, 1921. The particular question upon which you request an opinion is whether or not said acts donated all taxes collected during the term provided in the respective acts, regardless of when they were assessed and levied, or whether they merely donated the taxes assessed, levied and collected during said term of years covered by the acts.

Chapter 116, General Laws of the Thirty-fifth Legislature, 1917, in Section 1 of said act, provides as follows:

"Section 1. That for a period of fifteen years, commencing with the fiscal year beginning September 1, 1917, there be and hereby are donated and granted by the State of Texas to the City of Corpus Christi the net amounts of the State ad valorem taxes collected upon the property and from persons in the county of Nueces, including the railroading stock belonging to railroad companies which shall be ascertained and apportioned as now provided by law."

Chapter 138, Acts of the Thirty-seventh Legislature, Regular Session, 1921, in Section 1 thereof, provides as follows:

"Section 1. That for a period of twenty-five years commencing with the fiscal year, beginning September 1, 1921, there be and hereby are donated and granted by the State of Texas, to the City of Corpus Christi the net amounts of all State ad valorem taxes collected upon the property and from persons in counties of Jim Wells, Jim Hogg, Brooks, Kleberg, Willacy and Duval and all the net amounts of all State ad valorem taxes collected upon the property and from

persons in the County of Nueces not heretofore donated to the City of Corpus Christi by Act of the Thirty-fifth Legislature of the State of Texas known as House Bill No. 694, including such State ad valorem taxes as may be due said counties on the railroading stock belonging to railroad companies which shall be ascertained and apportioned to said counties as now provided by law."

It will be seen from the above that in both of said acts the Legislature grants and donates to the City of Corpus Christi the net amounts of all State ad valorem taxes *collected*, and, in our opinion, all taxes *collected*, regardless of when they were assessed and levied, are donated by the provisions of the sections quoted. The language plainly states this and the fact that the acts cease to be operative at the expiration of the terms provided therein, is conclusive that the city would not get the benefit of any taxes collected after the date of expiration of time during which said taxes are donated. In other words, the city could not collect for taxes levied and assessed during the period of time mentioned but which were not collected until after the expiration of said period.

It will be observed that both acts donate only the State ad valorem taxes, and it is our opinion that the City of Corpus Christi would not be entitled to any penalties or interest on delinquent taxes but would be entitled to the *ad valorem taxes* only. Of course, the city would not be entitled to any poll taxes.

Very truly yours,

C. F. GIBSON,  
Assistant Attorney General.

Op. No. 2492, Bk. 58, P. 1.

#### APPROPRIATION—DONATION STATE AD VALOREM TAXES.

Chapter 138, Acts Regular Session of the Thirty-seventh Legislature, donating State ad valorem taxes of certain counties to the City of Corpus Christi to aid said city in paying interest and sinking fund upon an issue or issues of bonds for the construction of a sea wall or breakwater, is a specific appropriation of said taxes, and any part of such taxes collected since September 1, 1921, and paid into the State Treasury constitutes a trust fund belonging to the City of Corpus Christi for the purposes named in said Act.

No further Act of the Legislature is necessary to authorize the Comptroller to issue a warrant for the net amount of all State ad valorem taxes collected upon the property and from persons in said counties commencing with the fiscal year beginning September 1, 1921, when "the Federal Government shall have approved the plan of constructing a sea wall or breakwater for port purposes at the City of Corpus Christi, after said city has been designated as a deep water port by the Federal Government."

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 10, 1923.

Hon. Lon A. Smith, Comptroller, Capitol.

DEAR SIR: Your letter of recent date to the Attorney General was duly received and has been referred to me for reply.

Your communication reads as follows:

"Under the provisions of Chapter 138, Acts Regular Session of the Thirty-seventh Legislature, for a period of twenty-five years, beginning with September 1st, 1921, aid was granted to the City of Corpus Christi in the construction of a sea wall by donating to the city the State ad valorem taxes collected from certain counties adjacent thereto. However, before such aid can be extended,

Section 5a of said chapter provides that the plan of constructing a sea wall shall be approved and the city designated as a deep water port by the Federal Government.

"As no official information had been received by this Department September 1st, 1921, nor since, advising that the plan of construction had been approved and the city designated as a deep water port by the Federal Government, and further that the matter of such approval and designation being an uncertainty by reason of other cities contesting with Corpus Christi for a deep water port, we instructed tax collectors of the counties designated to continue their remittances of State ad valorem taxes to the State Treasurer until otherwise notified. This procedure, of course, placed such taxes in the State Treasury.

"It now seems likely from unofficial information that the plan of construction, with respect to making Corpus Christi a deep water port, has been, or will be approved by the Federal Government, and in order that this Department may pursue a proper and legal course when definite information has been received showing such approval we would like that you read said Chapter 138 in connection with letter from Honorable T. S. Johnson, herewith enclosed, and give us your opinion as to whether or not the provisions of Section 5a of said chapter would deprive the City of Corpus Christi of such State ad valorem taxes as may have been collected from September 1st, 1921, to the date of approval and designation by the Federal Government.

"Also advise whether or not, in your opinion, any such State ad valorem taxes placed in the State Treasury since September 1st, 1921, or since date of approval and designation by the Federal Government, accordingly as you may hold on the above question as to the date from which Corpus Christi would be entitled to such taxes, can be withdrawn from the State Treasury without further Act of the Legislature."

Omitting the caption, Chapter 138, Acts Regular Session of the Thirty-seventh Legislature, reads as follows:

"Whereas, the City of Corpus Christi was in the years 1875, 1880, 1883, 1916 and 1919 greatly damaged by gulf storms and calamitous overflows, whereby great damage was done, many inhabitants drowned, and all the people of the said city threatened with a loss of life which caused and constitutes a great public calamity; and

"Whereas, the agricultural, commercial, manufacturing, mining and stock raising interests of the State of Texas require the speedy protection of said city and port and with a view of the State of Texas aiding and protecting said city and port and inhabitants thereof, and inhabitants of the State of Texas who annually visit the said city and port, from calamitous overflow, therefore,

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

"Section 1. That for a period of twenty-five years commencing with the fiscal year, beginning September 1, 1921, there be and hereby are donated and granted by the State of Texas, to the City of Corpus Christi the net amounts of all State ad valorem taxes collected upon the property and from persons in counties of Jim Wells, Jim Hogg, Brooks, Kleberg, Willacy and Duval and all the net amounts of all State ad valorem taxes collected upon the property and from persons in the County of Nueces not heretofore donated to the City of Corpus Christi by Act of the Thirty-fifth Legislature of the State of Texas known as House Bill No. 694, including such State ad valorem taxes as may be due said counties on the railroading stock belonging to railroad companies which shall be ascertained and apportioned to said counties as now provided by law.

"Sec. 2. At the end of each month the collector of taxes for Nueces, for Jim Wells, for Jim Hogg, for Brooks, for Kleberg, for Willacy and for Duval counties shall, on forms to be furnished by the Comptroller of Public Accounts, make itemized reports, under oath, to said Comptroller, showing each and every item of State ad valorem taxes collected by them, respectively, as provided for in this Act, upon property and from persons within said counties including said railroading stock belonging to railroad companies, and accompany the same with a summarized statement showing full disposition of all such State taxes collected; each of said collectors shall present their respective reports together with the tax receipt stubs, authorized by law to be kept, to the county clerk of his county, who shall, within two days, compare said

report with the said stubs, and if the same agree in every particular, as regards names, dates, and amounts, said clerk shall certify to its correctness, for which examination and certificate he shall be paid by the commissioners court of his county twenty-five cents for each certificate and twenty-five cents for each two hundred taxpayers on said report. The said collectors of Jim Wells, Jim Hogg, Brooks, Kleberg, Willacy, Duval and Nueces counties shall then immediately forward their respective reports so certified to the Comptroller and shall pay over, respectively, to the City Treasurer of the City of Corpus Christi all moneys collected by them or either of them, during said month, under the provisions of this Act, from said counties, except such amounts as are allowed by law for assessing and collecting the same, and said collectors shall forward a duplicate copy of the receipts given to them, respectively, by the Treasurer of the City of Corpus Christi for such moneys to the Comptroller.

"Sec. 3. The Treasurer of the City of Corpus Christi shall, at the end of each month make an itemized report, under oath, to the Comptroller of Public Accounts, showing the amount of money received by him from the collector of taxes for said respective counties and what disbursements, if any, have been made during said month, of such moneys.

"Sec. 4. The municipal authorities of the City of Corpus Christi shall, on the first day of January of each year, cause to be made an itemized statement, under oath, and in triplicate for each county, showing the amount of money received by the City of Corpus Christi under this Act, and how, to whom, and for what purpose the same has been expended. One copy of such statement as it relates to each county, after having been audited, shall be forwarded to and filed by the County Clerk of each of said counties as hereinafter provided, and the other to the Comptroller of Public Accounts. The said statements shall be sworn to by the Treasurer of said City of Corpus Christi and the correctness of each statement shall be certified to by a Board of Auditors, one member appointed by the commissioners court of said respective counties, who shall, while auditing said statement, have before them all vouchers upon which expenditures have been made from said fund. And no item of expenditure shall be allowed or passed by said auditors unless they have in their possession legal and proper vouchers therefor, showing compliance with this Act. And upon the completion of said audit the said report and all vouchers shall be attached together, numbered consecutively, and be by said auditors returned to and thereafter safely kept by the county clerks of said counties as a part of the records of their office.

"Sec. 5. The moneys herein and hereby granted and donated to the City of Corpus Christi are declared to be a trust fund, for the purpose of aiding the City of Corpus Christi in paying the interest and sinking fund upon an issue or issues of bonds, the proceeds of which bonds are to be used exclusively for the construction of a sea wall or breakwater so as to protect said city from calamitous overflows. The use or diversion of such moneys for any other purpose whatsoever is hereby prohibited; provided, that whenever the moneys in the hands of the City Treasurer, received from the State under the provisions of this or any previous law, shall exceed the sum of one year's interest, and two per cent sinking fund on the bonds herein referred to that have been issued and are then outstanding, such excess shall be invested by said city in the purchase of their said bonds, or bonds of the United States, the State of Texas, or the bonds of any county, city or town of the State of Texas, bearing interest at the rate of not less than four per cent per annum; and provided, further, that the entire sinking fund, when received by the City Treasurer of said city shall be invested by the municipal authorities of said city as received, in the bonds herein referred to, or bonds of the United States, the State of Texas, or the bonds of any county, city or town of the State of Texas, bearing interest at the rate of not less than four per cent per annum. A violation of the provisions of this section shall constitute a misapplication of public money, and the person or persons so offending shall be punished as provided for in Article 96 of the Penal Code of Texas.

"Sec. 5a. It is expressly provided that until the Federal Government shall have approved the plan of constructing a sea wall or breakwater for port purposes at the City of Corpus Christi, after said city has been designated as a deep water port by the Federal Government, the funds hereby donated shall not be retained or paid to the City of Corpus Christi; and provided that when the sinking fund created under the provisions of this Act shall become sufficient

to retire the bonds issued hereunder based on the 1921 valuation as an average, this act shall cease to be operative and the donation hereby made shall cease.

"Sec. 6. The fact that the greater portion of the business part of the City of Corpus Christi and all of the shipping district is located on the edge of Corpus Christi Bay, only a few feet above sea level and the fact that the waves are daily eroding the shore line of said bay and destroying valuable properties, and the fact that a great number of Texas people and a great number of people living at Corpus Christi and a great number of visitors from the State of Texas, and other States are living in small houses on the bay front and located in such manner as to be wholly unprotected from gulf storms and the fact that a great number of said houses are nearly all the boats in the shipping district of Corpus Christi were destroyed by the storm of August 18, 1916, and September 14, 1919, create an emergency and an imperative public necessity, that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage, and it is so enacted."

The Thirty-sixth Legislature, at its Third Called Session, passed an act to aid the City of Aransas Pass in constructing and maintaining the sea walls, which act is similar to the act above quoted, granting aid to the City of Corpus Christi. The constitutionality of the Aransas Pass act was raised in the case of City of Aransas Pass et al. vs. Keeling, Attorney General, 247 S. W., 818. The Supreme Court in its opinion in that case said:

"The Act makes no grant of public money as forbidden by Section 51 of Article 3 of the Constitution. The State here bestows no gratuity. The people of the State at large have a direct and vital interest in protecting the coast cities from the perils of violent storms. The destruction of ports, through which moves the commerce of the State, is a state-wide calamity. Hence sea walls and breakwaters on the gulf coast, though of special benefit to particular communities, must be regarded as promoting the general welfare and prosperity of the State. It is because of the special benefits to particular cities and counties that special burdens on property within their boundaries, through taxation, are justified. But the State, in promoting the welfare, advancement, and prosperity of all her citizens, or in aiding to avert injury to her entire citizenship, cannot be regarded otherwise than as performing a proper function of State government. Cities or counties furnish convenient and appropriate agencies through which the State may perform duties resting on the State, in the performance of which the cities or counties have a special interest. The use of the cities or counties as agents of the State in the discharge of the State's duty is in no wise inhibited by the Constitution in Section 51 of Article 3. Bexar County vs. Linden, 110 Texas, 344 to 348, 220 S. W., 761; City of Galveston vs. Posnainsky, 62 Texas, 127; 50 Am. Rep., 517; Weaver vs. Scurry County (Texas Civ. App.), 28 S. W., 836.

"To the extent that the State aids in protecting Aransas Pass from the menace of storms through the grant of part of the State taxes, she discharges a State obligation, and hence no question arises as to lending or pledging the State's credit to a municipal corporation or for payment of the liabilities of such a corporation. Under the legislative act, the City of Aransas Pass alone issues and promises to pay the bonds. While the State undertakes to aid Aransas Pass to meet the bonds by granting the city certain taxes, yet the State does not guarantee payment of the bonds. The State's credit is in no wise involved. The State's obligation is completely discharged by surrendering to the proper officials of the city eight-ninths of San Patricio County's State taxes for twenty years. This obligation, as already shown, is one assumed and performed in the interest of the people of the whole State. The act is not repugnant to Section 50 of Article 3.

"\* \* \* Any doubt as to the intent of the Constitution to authorize the grant of public money in case of public calamity is removed by the language of original Section 51 of Article 3 of the Constitution. For it expressly provided that the denial to the Legislature of the power to make 'any grant, of public money' should 'not be so construed as to prevent the grant of aid in case of public calamity.' Keeping in mind these related provisions of the Constitu-

tion, it seems clear to us that it was the design of Section 8 of Article 11, when it was adopted, to empower the Legislature to give the State's aid, by grant of the public domain or State taxes, or in any other appropriate manner, to the construction by coast cities and counties, through bond issues, or protective sea walls and breakwaters; and that, in the exercise of this power, the Legislature was not limited by the terms of Section 6 of Article 8, forbidding the appropriation of public money for a longer period than two years."

The purpose of Chapter 138 was to grant to the City of Corpus Christi the State ad valorem taxes of the counties named to aid that city in the construction of sea walls and breakwaters. Whether we call the act an appropriation or donation is immaterial. It appropriates said taxes for the purposes named. Your question as to whether it would require an act of the Legislature to authorize the payment of such part of the State ad valorem taxes of these seven counties that has been paid into the State Treasury was prompted, no doubt, by the provision in the Constitution, which says, "no money shall be drawn from the Treasury but in pursuance of specific appropriations made by law, nor shall any appropriation of money be made for a longer term than two years." In the Aransas Pass case, *supra*, the court held that the Legislature was not limited by the terms of Section 6 of Article 8 forbidding the appropriation of public money for a longer period than two years. The donation act itself is a specific appropriation of the State ad valorem taxes of the seven counties. The act itself provides that "the moneys herein and hereby granted and donated to the City of Corpus Christi are declared to be a trust fund," and provides that the proceeds are to be used exclusively for the construction of a sea wall or breakwater to protect said city from calamitous overflows. The State of Minnesota has a similar provision in its Constitution prohibiting the payment of money out of the State Treasury except in pursuance of an appropriation made by law, and the Supreme Court of that State, in the case of *State vs. Iverson*, 145 N. W., 607, held that such provision had no application to the issuance by the State Auditor of the warrant on the State Treasurer for the distribution of the gross earnings tax imposed upon and collected from suburban railroad companies. Such railroad companies are subject to the payment of the gross earnings tax, which tax is paid to the State Treasurer and by the statute of that State becomes the property of and is distributed to the municipalities and taxing districts through which the line of railroad extends. In the case referred to the State Auditor refused to issue his warrant on the Treasurer for the amount of the tax apportioned to the municipal divisions of Washington County on the grounds that the statute imposed a tax and providing for the apportionment thereof, made no appropriation of money for the payment of same. The court said:

"No specific appropriation of the money by legislative action is necessary to the performance of this act of distribution. The Legislature by the statute imposing this tax expressly and in so many words requires that it be apportioned and distributed, and any further legislation upon the subject would amount to nothing more, as we view the subject, than a repetition of the purpose already declared."

In the case of *Commonwealth vs. Powell*, in the Supreme Court of Pennsylvania, 94 Atl., 750, in which the court was passing upon a mandamus suit against the State Auditor to compel him to approve an account against the highway fund, the court said:



"In the case at bar the act fixes the maximum beyond which the payments cannot go; that being the total amount of the money paid into the State Treasury under its provisions. The Auditor General is expressly forbidden to draw his warrant in payment of any requisition which exceeds the amount in the 'separate fund' at the time it is made. The statute does not provide that the money derived from registration and license fees shall be paid into the State Treasury generally, so as to become part of the general revenues of the commonwealth. The State Treasury is merely made a depository for such fees. They are to be paid into it 'for safe-keeping,' and are to be 'placed in a separate fund' available for the use of the State's Highway Department. The act then expressly appropriates or dedicates the fund to be thus created to the construction, maintenance, improvement, and repair of the highways. That the Legislature has the power, in the absence of any constitutional limitation to the contrary, to provide for the creation of a special fund for a particular use and to dedicate the fund so created to the use intended, will not be seriously controverted by any one familiar with the subject. Our Constitution contains no provision limiting the power of the Legislature in this respect, and indeed such power has been exercised without challenge many times both before and since the adoption of our present Constitution. When a fund is thus created and dedicated to a particular use by an act of assembly, which provides for its safe-keeping and prescribes how it shall be made available, no further legislation is needed to make the act effective. Whether it be called an appropriation, or a dedication of a particular fund, makes no essential difference, because the fund being set apart for the specified use must be so held and paid out in the manner prescribed, as long as the act which provides for its creation remains in force. The requirements of Section 16, Article 3, of the Constitution, that 'no money shall be paid out of the Treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof,' simply means that the public funds are not to be expended in any way, except as directed by the lawmaking power. In so far as the present case is concerned, there is no occasion to consider whether the Act of 1913, under which automobile license fees are paid, deprives the Auditor General and State Treasurer of any of their functions under the Act of March 30, 1811. (5 sm. Lr., 228.)"

A similar provision, with reference to specific appropriation, is found in the Constitution of Nebraska. In the case of the State vs. Searle, 112 N. W., 382, the Supreme Court of Nebraska, in a mandamus suit to compel the auditor to issue a warrant in payment of a claim payable out of the temporary University fund, which fund was created by a one mill tax and constituted a part of the temporary University fund of that State and appropriated for the maintenance of the University in the act providing for the collection of such tax, used the following language:

"In the case at bar the amount of the grand assessment roll determines the amount of the appropriation, because the rate of taxation is fixed by the statute at one mill on the dollar valuation. What the grand assessment roll will be is not now ascertained, but it will be determined before the money is expended; and this much is certain: the fund will be many times greater than the amount of the relator's claim. Again, the value of the real estate in this State fixed by the State Board of Equalization in 1904, operative until 1908, is \$185,790,000. This will produce for the current year a fund amounting to \$185,790. So it is unnecessary to determine now how much will be added to the grand assessment roll by the valuation of personal property. The same question was before the Supreme Court of Illinois in *People vs. Miner*, 46 Ill., 384. The Illinois Legislature, under a constitutional provision similar to our own, appropriated the proceeds of a certain tax for a specific purpose. The act was vigorously attacked on the ground that the appropriation was not specific within the meaning of the Constitution. The court said: 'There is no force in the objection that the appropriation is for no certain amount. \* \* \* It is not essential or vital to the appropriation that it should be of an amount ascertained prior to the appropriation.' To our minds the case at bar is one which calls for the application of the maxim that 'That is certain which may be

rendered certain.' See *Weston vs. Herdman*, 64 Neb., 31, 89 N. W., 384. In this case the appropriation is certain because it can be made certain. No matter what the valuation of the grand assessment roll may be, the rate of taxation is fixed, and it is merely a question of computation to determine what the tax will yield; and the only concern of the respondent should be to see to it that warrants are not drawn against the fund thus appropriated, in excess of the actual amount thereof now known or to be hereafter ascertained."

From the foregoing we conclude that Chapter 138 specifically appropriated to the City of Corpus Christi the net amounts of all State ad valorem taxes collected upon the property and from persons in the counties of Jim Wells, Jim Hogg, Brooks, Kleberg, Willacy and Duval, and of all the net amounts of all State ad valorem taxes collected upon the property and from persons in the County of Nueces not heretofore donated to the City of Corpus Christi by the act of the Thirty-fifth Legislature, and that said ad valorem taxes for the first mentioned seven counties were for a period of twenty-five years commencing with the fiscal year beginning September 1, 1921; that all such ad valorem taxes so appropriated and donated constitute a trust fund and that no further legislation is necessary to authorize the payment to said city of the funds which have been collected and paid into the Treasury since September 1, 1921. Said act provides "that until the Federal government shall have approved the plans of constructing the sea walls or breakwater for port purposes at the City of Corpus Christi, after said city has been designated as a deep water port by the Federal government, the funds hereby donated shall not be retained or paid to the City of Corpus Christi." The converse of this provision is, that when the plans of constructing the sea walls or breakwater have been approved, and when the city has been designated as a deep water port by the Federal government, then the funds donated may be retained or paid to the City of Corpus Christi. The act itself does not provide by whom the taxes collected prior to the approval of the plans, etc., shall be held, but it does provide that such moneys shall be a trust fund, and we take it that they are to be regarded as a trust fund by whomsoever held and that upon the happening of the provisos mentioned same shall be paid over to the City of Corpus Christi for the purposes for which they were appropriated.

You are, therefore, advised that no further act of the Legislature is necessary to authorize the Comptroller to issue a warrant for the net amount of all State ad valorem taxes collected upon the property and from persons in said counties commencing with the fiscal year beginning September 1, 1921, when "the Federal government shall have approved the plan of constructing a sea wall or breakwater for port purposes at the City of Corpus Christi, after said city has been designated as a deep water port by the Federal government."

Yours very truly,

C. F. GIBSON,  
Assistant Attorney General.

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Op. No. 2505, Bk. 58, P. 178.

CORPUS CHRISTI—SEA WALL—FUNDS DONATED BY THE STATE.

Moneys granted and donated to the City of Corpus Christi by the Act of the Regular Session of the Thirty-seventh Legislature (Chapter 138, General Laws)

can be used only for the construction of a sea wall or breakwater to protect said city from calamitous overflow.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 30, 1923.

*Hon. George Westercell, County Attorney, Corpus Christi, Texas.*

DEAR SIR: Yours of the 19th instant addressed to the Attorney General has reached my desk for attention. Accompanying your letter is one addressed to the mayor and commissioners of the City of Corpus Christi and to the port commissioners of Nueces County Navigation District, signed by Messrs. Cummins, Sands and Coleman, consulting engineers, of date the 14th; and also a letter signed by Mr. Russell Savage, counsel for the City of Corpus Christi, addressed to you and dated the 19th inst. You also enclose copy of a blue print which is labeled "Plan for Shore Protection and Port Development at Corpus Christi, Texas."

From these documents it appears a program of port development at Corpus Christi is on foot in which the Federal government is to cooperate with the navigation district and Corpus Christi. There is available a fund of approximately one million dollars derived from the sale of bonds of the navigation district and also a fund of about one million eight hundred thousand dollars provided for by the Act of 1921 (Chapter 138), donating taxes to the City of Corpus Christi. It appears that the Federal government engineers desire to know how much money will be available for the improvements contemplated before they will know how much the Federal government is willing to spend on the project, and particularly desire an opinion as to whether the moneys donated by the Act of 1921, above mentioned, to the City of Corpus Christi will be available for the purpose of carrying out the work which is to be undertaken in the development of the port.

You state in your communication that the Federal government has required that the local bodies dredge the turning basin and the entrance channel to the port, provide the necessary real estate for port facilities, build the wharves and other port facilities and furnish the necessary equipment, construct a drawbridge across the channel where the railroad and State Highway No. 12 cross the same, and build protective earthen breakwaters around the harbor proper, called the turning basin and the entrance channel. The consulting engineers in attempting to meet the requirements of the Federal government, you state, are forced to ask how much of this work can be paid out of the funds derived from the Donation Act of 1921. The engineers have enumerated thirteen items of the construction work and an opinion is desired whether the donated funds can be used for these purposes. These thirteen items are as follows:

"Item No.

1. Breakwater. This will be an extension of that already in existence in Corpus Christi Bay and will serve to extend the protection of the shore line of the bay northward.
2. Embankment on south side of entrance channel extending from shore line to railroad track. This embankment will afford some measure of protection to the property on the shore east of the railroad track.
3. Embankment on south side of turning basin and extension of same from west end of turning basin to the shore. This embankment will afford protection to the northern part of the city.

4. Embankment on the north and west side of turning basin. This will serve to protect the turning basin from wave action from Nueces Bay.
5. Embankment on north side of entrance channel. This will afford some protection to property north of said channel and between the railroad and Corpus Christi Bay.  
(Note: Items 2, 3, 4 and 5 will be constructed from materials excavated from the entrance channel and turning basin.)
6. Wharf and Shed.
7. Bulkhead from east to west end of turning basin running through the wharf and shed. This will be necessary for the retention of the embankment mentioned under item number 3.
8. Bulkheads on both sides of entrance channel. These are needed to retain the embankments along the entrance channel.
9. Railroad tracks south of turning basin.
10. Bridge and Approaches. This bridge will be necessary to carry the railroad and the highway across the entrance channel leading to the turning basin.
11. Water lines affording fire protection to port facilities.
12. Mechanical equipment such as unloading cranes and conveying apparatus needed in port terminals.
13. Real estate."

Thus it will be seen that the development of a port with all necessary port and terminal facilities is the objective, and the question is whether the moneys donated by the Act of 1921 may be used for such purpose.

*The Statute to Be Construed.*

The Act of 1921 (Chapter 138, General Laws, Regular Session, Thirty-seventh Legislature) is captioned as follows:

"An Act to aid the city of Corpus Christi in the construction of a sea wall or breakwater so as to protect said city from calamitous overflow, by donating to said city all the State ad valorem taxes, collected on property and from persons in Jim Wells, Jim Hogg, Brooks, Kleberg, Willacy and Duval counties and by donating to said city all the State ad valorem taxes, collected on property and from persons in Nueces County not heretofore donated to the city of Corpus Christi by Act of the Thirty-fifth Legislature of Texas, known as House Bill No. 694 for a period of twenty-five years, and to provide a penalty for their misapplication, and declaring an emergency."

A preamble also precedes the enacting clause and is in the following language:

"Whereas, the City of Corpus Christi was in the years 1875, 1880, 1883, 1916 and 1919 greatly damaged by gulf storms and calamitous overflows, whereby great damage was done, many inhabitants drowned, and all the people of the said city threatened with a loss of life which caused and constitutes a great public calamity; and

"Whereas, the agricultural, commercial, manufacturing, mining and stock raising interests of the State of Texas require the speedy protection of said city and port and with a view of the State of Texas aiding and protecting said city and port and inhabitants thereof, and inhabitants of the State of Texas who annually visit the said city and port, from calamitous overflow, therefore,"

Section 1 of the act declares that for a period of twenty-five years commencing with the fiscal year beginning September 1, 1921, there is donated and granted by the State of Texas to the City of Corpus Christi, certain taxes within certain counties.

Section 5 of the act reads as follows:

"The moneys herein and hereby granted and donated to the City of Corpus Christi are declared to be a trust fund, for the purpose of aiding the City of Corpus Christi in paying the interest and sinking fund upon an issue or issues

of bonds, the proceeds of which bonds are to be used exclusively for the construction of a sea wall or breakwater so as to protect said city from calamitous overflows. The use or diversion of such moneys for any other purpose whatsoever is hereby prohibited; provided, that whenever the moneys in the hands of the City Treasurer, received from the State under the provisions of this or any previous law, shall exceed the sum of one year's interest, and two per cent sinking fund on the bonds herein referred to that have been issued and are then outstanding, such excess shall be invested by said city in the purchase of their said bonds, or bonds of the United States, the State of Texas, or the bonds of any county, city or town of the State of Texas, bearing interest at the rate of not less than four per cent per annum; and provided further, that the entire sinking fund, when received by the City Treasurer of said city shall be invested by the municipal authorities of said city as received, in the bonds herein referred to, or bonds of the United States, the State of Texas, or the bonds of any county, city or town of the State of Texas, bearing interest at the rate of not less than four per cent per annum. A violation of the provisions of this section shall constitute a misapplication of public money, and the person or persons so offending shall be punished as provided for in Article 96 of the Penal Code of Texas."

Section 5a is in the following language:

"It is expressly provided that until the Federal Government shall have approved the plan of constructing a sea wall or breakwater for port purposes at the city of Corpus Christi, after said city has been designated as a deep water port by the Federal Government, the funds hereby donated shall not be retained or paid to the City of Corpus Christi; and provided that when the sinking fund created under the provisions of this Act shall become sufficient to retire the bonds issued hereunder based on the 1921 valuation as an average, this Act shall cease to be operative and the donation hereby made shall cease."

Section 6 is the emergency clause and reads as follows:

"The fact that the greater portion of the business part of the city of Corpus Christi and all of the shipping district is located on the edge of Corpus Christi Bay, only a few feet above sea level and the fact that the waves are daily eroding the shore line of said bay and destroying valuable properties, and the fact that a great number of Texas people and a great number of people living at Corpus Christi and a great number of visitors from the State of Texas, and other States are living in small houses on the bay front and located in such manner as to be wholly unprotected from gulf storms and the fact that a great number of said houses and nearly all the boats in the shipping district of Corpus Christi were destroyed by the storm of August 18, 1916, and September 14, 1919, create an emergency and an imperative public necessity, that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage, and it is so enacted."

#### *The Conclusion Reached.*

After careful and deliberate consideration, we have reached the conclusion that the moneys donated by this act can be used for the construction of a sea wall or a breakwater and for no other purpose.

From the beginning to the end of the act the one idea that appears to be uppermost and seems to have actuated the Legislature is protection from the waters of the Gulf caused by storms. Starting with the caption we find that the act is to aid the City of Corpus Christi in the construction of a sea wall or breakwater so as to protect the city from calamitous overflow.

The preamble recites the damage done and the loss of life at Corpus Christi in 1875, 1880, 1883, 1916 and 1919 by gulf storms and calamitous overflows and that the agricultural, commercial, manufacturing, mining and stock raising interests of the State require speedy

protection of the city and port with a view of the State of Texas aiding and protecting said city and port and the inhabitants thereof and of the State who annually visit said city and port from calamitous overflow.

In Section 5, we find that the act states that the money may be used *for the construction of a sea wall or breakwater so as to protect said city from calamitous overflow.*

The emergency clause enumerates as reasons that most of the business part of the City of Corpus Christi and all of the shipping district is located on the edge of Corpus Christi Bay, only a few feet above sea level, and the waves are daily eroding the shore line of said bay and destroying valuable properties, and that a great number of people of Texas and a great number of people living at Corpus Christi and a great number of visitors from the State of Texas or other States are living in small houses on the bay front and located in such manner as to be wholly unprotected from gulf storms and the fact that a great number of said houses and nearly all the boats in the shipping district of the City of Corpus Christi were destroyed by the storm of 1916 and 1919.

It is at once apparent that the Legislature has expressed its purpose in plain language, and we are forced to conclude that the sole purpose of the act was to protect the people in the vicinity of Corpus Christi, with the incidental protection to the people of the State, from calamitous overflow caused by gulf storms. If this was not the purpose of the act, then our language is inadequate to express such a purpose.

Not only is this the only purpose of the act, but the act directs how this purpose shall be accomplished, and that is, by the construction of a sea wall or breakwater. The act says (Section 5): "The proceeds of such bonds are to be used exclusively for the construction of a sea wall or breakwater so as to protect said city from calamitous overflows."

Where the language of an act is clear and unambiguous, rules of construction are unnecessary and inapplicable in order to determine the legislative intent. The first rule of construction is that we must arrive at the intention of the Legislature from the plain language of the statute.

You are, therefore, respectfully advised that it is the opinion of this Department that these funds donated by the Act of 1921 cannot lawfully be used for any purpose other than the construction of a sea wall or breakwater so as to protect the said City of Corpus Christi from calamitous overflows.

It is a question of fact as to whether any of the things enumerated in the thirteen items above mentioned properly come within the definition of a sea wall or breakwater, but unless they do these moneys cannot be expended to construct them.

So that our advice as to this is that the funds may be used for anything properly and reasonably coming within the definition of a sea wall or breakwater, and unless the construction is a sea wall or breakwater, the money cannot be used for such purpose.

We are cognizant of the fact that it would be of inestimable value to the City of Corpus Christi and vicinity as well as to the State to have the port developed in the full sense of that term with all the

necessary terminal and port facilities; this would undoubtedly be an aid to commerce and the material welfare of the city and State; but until the Legislature sees fit to enact a measure worded differently, we are unable to stretch the language to include these objects. There is so sharp a distinction to be drawn between protection of life and property from storm waters by means of a sea wall or breakwater, on the one hand, and the development of a port by the erection of terminal facilities, equipment and improvements, on the other, that there cannot, in our judgment, be any reasonable contention that an act authorizing the expenditure of money for the one purpose, includes the right to expend it for the other. In the one case, we have a specific direction as to expenditure to accomplish protection from calamitous overflows in a specific way, and in the other, improvements in aid of development of commerce and the general welfare of the city and State.

The Act of 1921 not only limits the general purpose of the act to protection from overflows but directs that this protection shall be accomplished in a particular way, and that is by means of a sea wall or breakwater. No discretion is left to those having charge of the moneys to use the same for any other purpose or to accomplish the purpose in any other way.

We have endeavored to consider this question from the viewpoint of those interested in the development of the port as well as from the standpoint of statutory construction, but have been unable to escape the conclusion reached in view of the plain and unequivocal language of the act under consideration.

It is true that the history of the entire undertaking leading up to the enactment of the statute would be entitled to consideration, and in the event of a doubt, might be controlling; but such a consideration could not be controlling where the language of the act is so clear and unmistakable.

This Department cannot undertake to pass upon the thirteen items listed in order to determine how much of the construction, if any, would properly come within the meaning of "sea wall" or "breakwater." Those having authority to use these funds and build a sea wall or breakwater should have no difficulty in determining what character of construction complies with the statute, for the words are used according to their ordinary signification. The act means sea wall or breakwater as those words are ordinarily and commonly understood.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2501, Bk. 58, P. 169.

CONSTITUTIONAL LAW—APPROPRIATIONS.

It would not be violative of the State Constitution for the Legislature in making appropriations for educational institutions to "lump" certain large items without itemizing the same in detail.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 24, 1923.

*Hon. J. W. Thomas, State Senator, Capitol.*

DEAR SIR: Attorney General Keeling has received your inquiry of the 16th instant reading as follows:

"The Second Called Session of the Thirty-eighth Legislature made what we call a 'lump' appropriation in the matter of the educational bill, and I write to respectfully request your opinion of that type of appropriation in the light of the following, which I quote from the Constitution of Texas:

"Sec. 35. Art. III. No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are to be appropriated) shall contain more than one subject, which shall be expressed in the title,' etc.

"Section 44, Article III, 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.*"

"Section 6, Article VIII of the State Constitution, reads as follows:

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

"The question has arisen in my mind as to the authority of the Legislature to make a 'lump' appropriation for the support of our educational institutions. Heretofore, as I understand it, the Legislature has always made specific appropriations designating the amounts to be received by the Dean of the Law School, etc., together with the amount receivable by each assistant professor in all of the departments of the University and of the colleges of this State. But I understand that the bill that has just passed the Legislature made a 'lump' appropriation for the schools and it was left discretionary with the Board of Regents what each professor would receive, etc.

"I am not asking, of course, and I am sure that it would be against the policy of your department, your opinion of the wisdom or unwisdom of the 'lump' appropriation. In face of the pioneer nature of this question it has occurred to me that it would be well for us to study the question in the light of the Constitution, and to that end this communication is addressed to you."

The educational bill referred to by you makes the appropriations in substantially the usual form except that certain of the items are very large items and are "lumped." We here set out enough of the bill to give an idea of the form in which the appropriations are made.

The bill makes biennial appropriations for the University of Texas, the A. and M. College, the normal colleges (now called "teachers colleges") and other State educational institutions. Some of these are as follows:

UNIVERSITY OF TEXAS.

For the maintenance, support and direction of the University of Texas, including the Medical Branch at Galveston, and the College of Mines and Metallurgy at El Paso, including construction of buildings for the years beginning September 1, 1923, and ending August 31, 1925, all the available University funds, including interest from its bonds, land notes, donations, gifts, and all receipts whatsoever from any source; provided, that all available University funds, fees excepted, shall be used for buildings, permanent equipment, improvements and repairs.



For the maintenance, support and direction of the University of Texas, including the Medical Branch at Galveston, and the College of Mines and Metallurgy at El Paso, for the two years, beginning September 1, 1923, and ending August 31, 1925, from the general revenue, provided that one warrant may be used by the State Comptroller to cover signed monthly pay roll; and for bills embracing charges against the several items herein, and with such changes and substitutions within the totals of the following groups for the University of Texas, including the Medical Branch at Galveston, and the College of Mines and Metallurgy at El Paso, as the Board of Regents may deem necessary.

MAIN UNIVERSITY.

	For the Years Ending	
	Aug. 31, 1924.	Aug. 31, 1925.
Total salaries	\$1,100,000.00	\$1,100,000.00
Departments and laboratories	60,000.00	60,000.00
Current expenses	125,000.00	125,000.00
Bureau of Economic Geology and Technology	19,000.00	19,000.00
Bureau of Extension	12,000.00	12,000.00
	<hr/>	<hr/>
Total for Main University	\$1,316,000.00	\$1,316,000.00

MEDICAL BRANCH.

Total salaries	\$ 135,000.00	\$ 135,000.00
Departments and laboratories	18,000.00	18,000.00
Current expenses	10,000.00	10,000.00
	<hr/>	<hr/>
Total for Medical Branch	\$ 163,000.00	\$ 163,000.00

COLLEGE OF MINES AND METALLURGY.

Total salaries	\$ 35,000.00	\$ 35,000.00
Departments and laboratories	5,500.00	5,500.00
Current expenses	7,000.00	7,000.00
	<hr/>	<hr/>
Total for College of Mines and Metallurgy	\$ 47,500.00	\$ 47,500.00

Grand total for the University of Texas and its Branches	\$1,526,500.00	\$1,526,500.00
To pay Miss Lavinia Harville, assistant in the Library in the University of Texas, and we recommend that she be retained for life.	\$ 1,000.00	\$ 1,000.00

Provided that any of the money herein appropriated which may be used for printing and binding is hereby authorized to be used to reimburse the University Press for any printing or binding done for the University and its branches and those having control of any such appropriations are authorized to have the printing and binding done by the University Press.

AGRICULTURAL AND MECHANICAL COLLEGE.

	For the Years Ending	
	Aug. 31, 1924.	Aug. 31, 1925.
Total salaries	\$ 500,000.00	\$ 512,000.00
Administrative and departmental maintenance	106,000.00	106,000.00
Miscellaneous departments.	140,000.00	140,000.00
Anti-hog cholera serum	12,500.00	12,500.00
Repairs and Improvements:		
For general repairs and remodeling of all buildings	25,000.00	25,000.00
Outside improvements, including drives, fences, shade trees and grading	3,500.00	3,500.00
Maintenance and equipment of zoological grounds	800.00	800.00
Extension of mains and plumbing	8,000.00	8,000.00
Poultry husbandry building and equipment		10,000.00
Concrete curbs, sidewalks and drive	3,000.00	3,000.00
Machinery and steam plant, including boiler, feed pump, water meter, oil pump and oil storage tanks	7,500.00	

	For the Years Ending	
	Aug. 31, 1924.	Aug. 31, 1925.
To repair and remodel old Agricultural Building..	15,000.00	
Oil compressor .. . . . .	15,000.00	
	-----	
Total repairs and improvements		
	-----	
Grand total for Agricultural and Mechanical College	\$ 836,300.00	\$ 820,800.00

TEXAS TECHNOLOGICAL COLLEGE.

	For the Years Ending	
	Aug. 31, 1924.	Aug. 31, 1925.
To pay salaries of administrative force, including a president, who shall supervise the construction and look after all business needs and interests of the College, per diem and expenses of members of the board of directors, and for traveling and other expenses	\$ 25,000.00	\$ 25,000.00

SOUTHWEST TEXAS STATE TEACHERS' COLLEGE.

(At San Marcos.)

	For the Years Ending	
	Aug. 31, 1924.	Aug. 31, 1925.
Total salaries	\$ 190,000.00	\$ 190,000.00
Departmental maintenance.	23,630.00	24,890.00
Miscellaneous items.	20,000.00	12,500.00
Repairs and Improvements:		
For improvement of grounds, to purchase additional grounds and improvements, cafeteria equipment and furnishing, for general repairs, fire apparatus and repairs to same, and for steam plant addition.	43,000.00	5,500.00
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Grand total.	\$ 276,630.00	\$ 232,890.00

It will be seen that the appropriations are itemized to a certain extent, but some of the items are very large. For instance, for the Main University the salaries are appropriated in a lump sum of \$1,100,000 for each year without stating what salary each teacher and employee shall receive, evidently intending that in instances where salaries are fixed by general law or the Constitution, if any, the salaries are to conform thereto, and where such is not the case the Board of Regents would have authority to fix the salaries; all within the total amount appropriated.

Does this violate any of the provisions of the Constitution mentioned in your letter? We can not say that it does. In fact, it would scarcely seem to be an open question, in view of the holding of our State Supreme Court in Fulmore vs. Lane, 140 S. W., 405, and Terrell vs. Sparks, 135 S. W., 519.

As to the two constitutional provisions first quoted in your letter, we see no room for reasonable contention that this educational bill would violate either. The first provides against bills containing more than one subject, which must be expressed in the caption, except as to general appropriation bills which may embrace the various subjects and accounts, for and on account of which moneys are appropriated. The educational bill is a general appropriation bill within the meaning of this provision. The second provision cited by you does not seem to be violated, because the bill does not, on its face, purport to grant

any extra compensation to any officer, servant, agent or public contractor; nor does it seem to grant any amount out of the Treasury of the State to any individual on a claim not provided for by pre-existing law, nor authorize the employment of anyone in the name of the State not authorized by pre-existing law.

The pre-existing law is to be found in the law in each instance, creating and providing for these educational institutions, and also the appropriation bill itself (if it becomes a law). Certainly the law providing for the institutions contemplates the employment of the necessary officers and employees, and this under the well-known rule that authority to do a thing or accomplish a result includes, by implication, the authority to do everything reasonably necessary to that end. We do not believe it would be necessary for the law to mention in detail every employee and every particular expenditure in order that there be a pre-existing law for such employee, or expenditure. Such a holding would entail an impracticable, if not impossible, task upon the Legislature. Something must be left to the discretion of officers and employees in all governments and governmental undertakings, and we are unable to reach the conclusion that in this instance the Legislature has gone in this direction beyond its authority under these constitutional provisions.

We now come to a consideration of the provision inhibiting money being drawn from the Treasury except in pursuance of specific appropriations made by law. (Sec. 6, Art. 8, State Constitution.)

As before stated, the question whether a "lump" appropriation for a department, such as those inquired about by you, violates this provision would not appear to be an open one, in view of the holding of our State Supreme Court in *Terrell vs. Sparks*, 135 S. W., 519, and *Fulmore vs. Lane*, 140 S. W., 405.

In that case the validity of a "lump" appropriation for the Attorney General was involved. The appropriation was made in the following form:

"Section 1. For the purpose of enforcing any and all necessary expenses in bringing suits or paying expenses in prosecuting same, there is hereby appropriated out of any money in the State Treasury, not otherwise appropriated, the sum of \$25,000.00 or so much thereof as may be necessary, to be expended under the direction of the Attorney General by and with the approval of the Governor, and to be paid upon warrants drawn by the Comptroller of Public Accounts on vouchers approved by the Attorney General."

In the following language the Supreme Court held this appropriation to be sufficiently specific under Section 6 of Article 8 of the Constitution:

"We are of the opinion that the Act of the Thirty-first Legislature which is copied above is sufficiently specific in making the appropriation therein mentioned and is not violative of Section 6, Article 8, of the Constitution."

This doctrine was reiterated by Mr. Justice Ramsey, then of the Supreme Court, in his opinion in *Fulmore vs. Lane*, 140 S. W., 405, 421, wherein was involved another "lump" appropriation for the Attorney General's Department. Mr. Justice Ramsey said:

"With the wisdom of grouping many items of appropriation into a single item, it is not our province to determine, even if it could be assumed that it was purposely and deliberately done, so as to deny to the Governor the right to prune or cut out any part or portion of the amount appropriated, because it

was within the power of the Legislature to make the appropriation in this manner, and same was not subject to any constitutional or legal objection. It certainly was not obnoxious to the constitutional objection that it was not a specific appropriation. This was clearly held in the case of *Terrell vs. Sparks*, 135 S. W., 519."

In the first case above mentioned the Supreme Court held that the Attorney General had authority to make an agreement with an attorney for legal services and agree upon the amount of compensation to be paid in equal monthly installments, and in the second case held a stenographic clerk entitled to his monthly salary of \$100, although in neither case was the exact amount of the compensation fixed by the appropriation bill; and in both instances the mandamus was allowed, compelling the issuance of warrant in the one case, and the payment of the warrant in the other. Both payments were out of a "lump" appropriation.

We have examined practically all the court decisions in other States which might bear on the subject, but have found none expressing a contrary view. We gather from the cases that the probable purpose in inserting the "specific appropriation" clause in the Constitution was to prevent making appropriations indefinite in amount and duration. If there is a definite amount, or definite maximum amount, for a definite and distinct purpose, or object, and for a period not more than two years, it would seem the constitutional provisions are met. It is true that there must be a particular purpose, but this purpose, or object, may doubtless be large or small. It may be that the Legislature could make an appropriation so general as to purpose that it would not be a specific appropriation within the purview of the Constitution; as, for instance, an appropriation for the support of the entire State government, leaving it to officers how much should be used for the various purposes. But an appropriation such as we have under consideration does not go that far; and since no limit as to generality of the various items is fixed by the Constitution, we are unable to say that the lumping of an appropriation for a departmental, or institutional, purpose, as is done in the instant case, is unconstitutional.

Among the authorities examined may be listed the following:

- 9 Pac., 628.
- 18 N. E., 127; 13 L. R. A., 169.
- 64 N. W., 120.
- 110 N. E., 130.
- 120 N. W., 916.
- 122 N. W., 64.
- 16 L. R. A. (N. S.), 630.
- 123 N. W., 884.
- 49 L. R. A. (N. S.), 67.
- 27 L. R. A. (N. S.), 537.
- 29 So., 478.
- 49 Pac., 764, 758.
- 27 So., 792.
- Vol. 5, Briefs of Atty. Gen., p. 128.
- 28 L. R. A., 187.
- Atkins vs. State Highway Dept.*, 201 S. W., 226.
- 22 Pac., 143.
- Pickle vs. Finley*, 91 Texas, 484.
- 91 Pac., 819, 16 L. R. A. (N. S.), 630.
- 123 N. W., 884.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

Op. No. 2487, Bk. 58, P. 25.

APPROPRIATIONS—PRIORITY OF PAYMENT OUT OF THE STATE  
TREASURY.

1. Construing the act making an appropriation of three million dollars to be added to the available school fund.

2. Where the Legislature makes an appropriation of three million dollars out of "any funds in the State Treasury not otherwise appropriated" and directs that it be placed to the credit of the available school fund and that it shall be used to extend the school terms for the present scholastic year, the act being passed at a time when some schools are about to close and others have closed, and recites in the emergency clause the "imminent danger" of schools closing for lack of funds, *held* that the act is to be construed as directing that the money shall be immediately transferred although to do so will be to place the appropriation on an equal footing with prior appropriations insofar as time of payment is concerned; that no priority of payment is intended in favor of former appropriations by reason of the expression "out of any funds in the State Treasury not otherwise appropriated."

3. It was not the intention of the Legislature by the use of the expression "out of any funds in the State Treasury not otherwise appropriated" in the various appropriation acts to give priority to all appropriations theretofore made, but rather that all should be on an equal footing as has heretofore been the practice.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 29, 1923.

*Hon. C. V. Terrell, State Treasurer, Capitol.*

DEAR SIR: This Department is in receipt of yours of the 14th instant, reading as follows:

"TREASURY DEPARTMENT,  
STATE OF TEXAS.

"AUSTIN, March 14th, 1923.

*"Hon. W. A. Keeling, Attorney General, State of Texas, Capitol.*

"DEAR SIR: Find enclosed a copy of a letter from Mr. Marrs, State Superintendent of Education, asking that \$3,000,000.00 be transferred out of the General Revenue Fund to the Available School Fund, the communication being based upon an appropriation made by the Thirty-eighth Legislature 'out of any funds in the State Treasury not otherwise appropriated.' The Thirty-seventh Legislature made an appropriation to run the State Government and its various institutions and it is perfectly apparent that the funds now in the State Treasury, in the General Revenue Fund, and those that may reasonably be expected to be paid into that fund are not near sufficient to run the Government during the fiscal year ending August 31st, 1923, as appropriated by the Thirty-seventh Legislature, and it also appears that the Thirty-eighth Legislature made an appropriation of \$600,000.00 in the Reclamation Bill, and other measures appropriating money out of the General Revenue Fund, not otherwise appropriated.

"I desire to know if this transfer should now be made out of the General Revenue Fund, and it have precedence over appropriations made by the Thirty-seventh Legislature to run the State Government during the year ending August 31st, 1923, and should the \$600,000.00, and other large appropriations made by the Thirty-eighth Legislature be paid now out of the General Revenue Fund and still further deprive the State Government of money to maintain the various institutions during the year, and what relation should all of the appropriations sustain to each other with respect to time of payment?

"Very truly yours,

"C. V. TERRELL,  
"State Treasurer."

You accompany your letter with one from Hon. S. M. N. Marrs, State Superintendent of Public Instruction, which is in the following language:

"AUSTIN, TEXAS, March 10, 1923.

"*Honorable C. V. Terrell, State Treasurer, Capitol.*

"MY DEAR MR. TERRELL: I wish to direct your attention to the passage by the Thirty-eighth Legislature of House Bill Number One, which appropriated three million dollars from the general revenue to be added to the available school fund and to be appropriated to the counties and independent districts of the State, with certain restrictions as to the purpose of the appropriation.

"Inasmuch as only four dollars of the previous apportionment of ten dollars has been sent to the various counties and independent districts, and inasmuch as the schools have been in session for a term of from four months to six months, and the teachers have been forced to either wait for the payment of their salaries or to discount their vouchers, I am requesting you at this time to place to the credit of the State Available School Fund three million dollars, according to the terms of the law referred to above. When this credit is given to the available school fund it will enable the State Board of Education through this Department to make an additional payment on the State apportionment within the next ten days.

"Very truly yours,

(Signed) "S. M. N. MARRS,  
"State Superintendent."

The act of the Legislature, of which you request a construction, is as follows:

"H. B. No. 1.

"An Act appropriating three million (\$3,000,000) dollars out of the State Treasury to aid and promote all the public schools of this State for the scholastic year beginning September 1, 1922, and ending August 31, 1923; providing for the distribution of same for certain purposes as available funds are now distributed; providing a penalty for violation of provision of the Act, and declaring an emergency.

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

"Section 1. For the purpose of promoting and aiding all the public schools of the State three million (\$3,000,000) dollars is hereby appropriated out of any funds in the State Treasury, not otherwise appropriated, the same to be available school funds for the scholastic year beginning September 1, 1922, and ending August 31, 1923, and to be distributed in accordance with the statutes now controlling the distribution of the available school funds of this State, as shown by Articles Nos. 2725, 2726, Chapter 9, Title 48, Revised Civil Statutes of the State of Texas, and provided the funds herein appropriated shall not be used for school year 1922-23 for any purpose except to extend the school term for the school year 1922-23. And no part of the funds herein appropriated shall ever be used for the purpose of raising salaries.

"Sec. 2. Any person or persons having the authority to expend the funds herein appropriated who shall violate the above provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not less than fifty (\$50) dollars nor more than one hundred (\$100) dollars; and providing further that each and every separate act shall constitute a separate offense.

"Sec. 3. That fact that many of the public schools of this State are in eminent danger of being closed for lack of funds, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three separate days in each House be suspended, and that this Act shall take effect and be in force from and after its passage, and said rule is hereby suspended, and it is so enacted.

"Approved:  
"Feb. 17, 1923,  
"PAT M. NEFF, Governor."

"R. E. SEAGLER,  
"Speaker of the House."  
"T. W. DAVIDSON,  
"President of the Senate."

"Hereby certify that H. B. No. 1 was amended on February 6, 1923, constitutional rule suspended with the following vote: Yeas 108, Nays 8, and finally passed by the following vote: Yeas 107, Nays 10, February 6, 1923.

"C. L. PHINNEY,  
"Chief Clerk of the House."

"I hereby certify that H. B. No. 1 was amended by the Senate February 12, 1923, constitutional rule suspended by four-fifths vote, Yeas 28, Nays 0, and finally passed by two-thirds vote of Yeas 28, Nays 0.

"W. V. HOWERTON,  
"Secretary of the Senate."

"Received in the Executive Office, this 13th day of February, A. D. 1923, at 4 o'clock and forty minutes P. M."

"Received in Department of State, this 17th day of February, A. D. 1923, at 5 o'clock and \_\_\_\_\_ minutes P. M.

"S. L. STAPLES,  
"Secretary of State."

It will be noted that the act contains the emergency clause with language purporting to place it in immediate effect, and since it received more than a two-thirds vote in each house it became effective on February 17, 1923, the date of approval by the Governor.

The question as to this act is whether a legislative intent is disclosed to authorize and direct an immediate transfer of the three million dollars from the general revenue fund to the available school fund in view of the form in which the appropriation is made. That is to say, the act makes an appropriation of three million dollars "out of any funds in the State Treasury not otherwise appropriated," and the question is raised whether the Legislature intended to give priority to appropriations already made, and intended that this three million dollars was to be available only if there are sufficient funds to take care of all prior appropriations.

It is not always that words in a statute or a constitution are to be taken according to their strict dictionary definition. For instance, the word "debt" in Sections 5 and 7 of Article 11 of the State Constitution is not there used in its strict sense. Any purchase by a county, for example, creates a debt until the purchase price is paid, but it is not every purchase made by a county that constitutes a debt within the meaning of these constitutional provisions. *McNeal vs. City of Waco*, 89 Texas, 83, 33 S. W., 322. Another illustration is to be found in the County Auditor's Law. Article 1473, Revised Civil Statutes, provides that the county auditor "shall see that the law is strictly enforced." No one would contend that this language means exactly what it says when standing alone; it would not be contended that it is the duty of the county auditor to see that all laws are enforced. We give still another illustration: a provision in a statute prohibited a corporation from selling any land, but this provision was held not to have the full force of the words used, because in another portion of the same act, the corporation was expressly authorized to sell a particular piece of land, the latter mentioned provision being held to be an exception to the general provision. The point is that the legislative intent must be ascertained from a reading of the entire act, and the words used will be interpreted so as to harmonize with the general purpose and intent of the act.

*"The Intent of a Statute Is the Law.*—If a statute is valid it is to have effect according to the purpose and intent of the law-maker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose

of the act.' 'Intent is the spirit which gives life to a legislative enactment.' 'In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature.' A legislative intention to be efficient as law must be set forth in a statute; it is therefore a written law. How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless. And where the intention of a statute has been ascertained by the application of the rules of interpretation, they have served their purpose, for all such rules are intended to reach that intent." (Lewis' Sutherland Statutory Construction, Vol. 2, p. 693, Sec. 363.)

"It is indispensable to a correct understanding of a statute to inquire first, what is the subject of it, what object is intended to be accomplished by it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it and those of narrower import may be expanded to embrace it to effectuate that intent." (Lewis-Sutherland Statutory Construction, Second Edition, Vol. 2, p. 662, Sec. 347.)

"When the intention can be collected from the statute, words may be modified, altered or supplied, so as to obviate any repugnancy or inconsistency with such intention." (Same authority, p. 663.)

"Instances without number exist where the meaning of words in a statute have been enlarged or restricted and qualified to carry out the intention of the Legislature." (Mr. Justice Field in the Eureka Case, 4 Sawyer, 302, 317, Fed. Cas. No. 4548.)

This doctrine is particularly applicable to the three million dollar appropriation act under consideration, as it seems to us; for the strict meaning of some of the words used must be altered in order to arrive at the legislative intent. The words used in this statute, in our opinion, are not to be construed strictly so as to prevent the paying out of this three million dollars until all other prior appropriations against the general revenue are taken care of. We now state our reasons:

First. It is the intention of the Legislature we are seeking, and to hold that the use of the expression "out of any funds in the State Treasury not otherwise appropriated" creates a priority of payment in favor of former appropriations would defeat the plain purpose and intent of the Legislature, as disclosed by this appropriating act when read as a whole.

The caption of the act declares that the appropriation is to promote all the public schools of this State for the scholastic year beginning September 1, 1922, and ending August 31, 1923. The body of the act declares that the three million dollars is to be added to the available school funds for the scholastic year beginning September 1, 1922, and ending August 31, 1923, and provides that "the funds herein appropriated shall not be used for the school year 1922-1923 for any purpose except to extend the school term for the school year 1922-1923." The emergency clause of the act recites as an emergency, "The fact that many of the public schools of this State are in imminent danger of being closed for lack of funds." The act might have added, very properly, that some of the schools have already closed for lack of funds.

Thus it is seen that it was to meet a present emergency that the appropriation was made. It would not avail anything to make the appropriation and then place a provision in it postponing its availability to some indefinite future time. No distribution could be made



of the funds until they are available. We do not believe the Legislature would have enacted a statute to relieve an existing emergency, making the act immediately effective by the necessary emergency clause and record vote, and containing a clear provision that the appropriation is to be placed to the credit of the available school fund and at the same time place a clause in it which would defeat such purpose. For that reason, we feel that we are called upon and are justified in construing the words under discussion so as to comport with the purpose and intent of the act as disclosed by a reading of it as an entirety; and when we do so, we are forced to conclude that the words used do not create a priority of payment in favor of all former appropriations, but that, on the other hand, this three million dollar fund should be transferred as directed in the act, if the State Treasurer has on hand in the general revenue sufficient funds with which so to do.

Second. The custom and practice in this State furnishes a contemporaneous, practical and departmental interpretation of this expression against the priority rule. The language of this act is the language employed in almost all appropriation acts. It has been used from time immemorial, and so far as we are able to ascertain, it alone has never been construed to prevent the paying out of moneys pursuant to appropriation against the general fund, if at the time of the paying out of same there was sufficient money in the State Treasury to the credit of the general fund to take care of the warrants. As a matter of custom and practice in this State, appropriations payable out of the general fund, so far as we know, have not been given priority by reason of the date of enactment of the appropriation bill on account of this expression in the appropriating act. It is quite usual to make appropriation acts in language such as "there is hereby appropriated out of any funds in the State Treasury not otherwise appropriated"; "there is hereby appropriated out of any money in the State Treasury, not otherwise appropriated"; "there is hereby appropriated out of the general revenue, not otherwise appropriated"; and the like. The Legislature has not seen fit to change the form of the various appropriating acts in this respect notwithstanding the long continued practice to give all appropriation acts with these words in them an interpretation placing them on the equal footing with each other.

For illustration, the Legislature itself, at the recent regular session, enacted a statute making an appropriation of forty thousand dollars for contingent expenses "out of the general revenue, not otherwise appropriated."

Contemporaneously, it made an appropriation of one hundred and twenty-five thousand dollars for mileage and per diem couched in the same language, but, notwithstanding this language, the appropriation was considered by the members of the Legislature and by the State Treasurer's office as immediately available, and the warrants drawn against the same were paid. This was done although the same objection could as well have been made against the payment of these warrants as against the payment at this time of the three million dollars under consideration. On the other hand, an appropriation of eight hundred and twenty-seven thousand five hundred dollars was made by the Legislature at its recent session to take care of what is commonly known as the Prison Commission loan, and although on its face it is to be immediately available, still it was made "out of the general

revenue of the State"; and if there is any special significance to be given the words used, the latter act would have priority because it did not state "out of any funds not otherwise appropriated"; whereas, those acts which were made to meet immediate needs would have to wait because they do contain the stereotyped phrase just mentioned.

An appropriation was also recently made for the American Legion Sanatorium "out of the State Treasury." Another appropriation was made for the benefit of an injured soldier "out of any money in the State Treasury not otherwise appropriated."

The deficiency appropriation of over four hundred thousand dollars, which is certainly supposed to be immediately available, because it takes care of the deficiencies which have arisen in the operation of the State government during the prior fiscal year, as well as certain emergencies which are supposed now to exist, was made "out of any money in the State Treasury, not otherwise appropriated." An appropriation for the College of Industrial Arts for one hundred and ten thousand dollars was made "out of any fund in the State Treasury, not otherwise appropriated."

We have examined appropriating acts back to the beginning of the government of Texas, and find that the form used has been quite uniformly "out of funds not otherwise appropriated," or the like, without any priority of payment, so far as we know, except as to separate funds in the Treasury hereinafter mentioned.

We believe the Legislature used this expression indiscriminately, so far as the question under consideration is concerned, and that in view of the contemporaneous departmental and legislative construction of these words, they have come to have a settled meaning, or rather that it may be considered as settled that they do not make the appropriation act in which they appear depend, for its immediate force and effect, upon whether there are funds in the State Treasury out of which all prior appropriations may be taken care of.

"The contemporaneous construction is that which it receives soon after its enactment. This, after a lapse of time without change of that construction by legislation or judicial decision, has been declared to be generally the best construction." (Lewis-Sutherland, Second Edition, Sec. 422.)

Third. There is a meaning which may very reasonably be attached to these words consistent with our holding, and which in all probability was intended by the Legislature should be attached to them. There are certain funds in the State Treasury which are set apart for particular purposes; and these funds are not usually attempted to be drawn upon when general appropriations are made. It was probably to exclude these funds that the language was used. In other words, the language used was probably inserted more to describe the fund out of which the moneys were to be paid than to create a priority within any particular fund as to the time of payment. For illustration, there are in the State Treasury, the Pension Fund, the Permanent School Fund, the Available School Fund, the State Highway Fund, the Prison Fund, the Game, Fish and Oyster Fund, the Child Hygiene Fund, and perhaps others. These various funds are set apart for particular purposes, and the Legislature evidently did not wish to convey the idea that it was attempting to appropriate any part of these funds when it made this appropriation of three million dollars;

but, on the other hand, was simply identifying the general revenue fund out of which the appropriation was to be paid.

These separate funds in the State Treasury are "*otherwise appropriated*"; that is, each fund is set apart for a particular purpose and is undoubtedly "*otherwise appropriated*"; for the word "*appropriate*" means to set apart for a particular purpose.

"To '*appropriate*' money, or anything else, is to set apart or assign it to a particular use or purpose." (Words and Phrases, Second Series, Vol. 1, p. 256.)

As between the two possible meanings that it might be contended that these words may have as an original proposition, we feel that we are justified in discarding the one which does violence to the purpose and intent of the act, as disclosed by a consideration of it as a whole; and we are of the opinion that the funds above mentioned were to be excluded, and this is the meaning that should be attached to the expression "*any funds not otherwise appropriated.*"

Fourth. The method of handling the various funds in the State Treasurer's office, as prescribed by statute, bears out the idea that all claims against the general revenue fund are on an equal footing as to priority of payment, unless, of course, there is some clear expression to the contrary in the appropriating act, other than the words under consideration. The Legislature, of course, passes the various appropriation acts with a knowledge and in the light of the provisions of the general statutes. The statutes direct that four classes of deposit warrants shall be used, to-wit, State revenue, available school, permanent school, and miscellaneous. See Article 4344, Revised Civil Statutes. The statutes also direct that there shall be printed three classes of pay warrants: general, special, and pension. Each class is required to be serially numbered, and each class shall be of a color of paper different from the other classes used. See Chapter 2, Title 65, Revised Civil Statutes. The fact that all warrants on the general revenue fund constitute one class, and that they are to be numbered serially, indicates somewhat that they are all to be on an equal footing without regard to the date of the various acts making appropriation against the general revenue fund. No separate class of warrants is required to be kept with respect to each appropriation made out of the general revenue fund. There is no classification of funds within the general revenue fund.

Fifth. While, as before stated, the rule of strict or literal interpretation of the words used is not to be applied as against the purpose and intent of the act as a whole, or as against the other considerations before mentioned, we direct attention to the fact that even if a literal interpretation should be insisted upon, it could well be argued that no intention is disclosed to make the appropriation depend upon or give priority to other appropriations heretofore made. It could be argued that this is true, for the reason that the word "*otherwise*" literally means "*in a different manner or way.*" Prior appropriations made in the usual appropriations act are not appropriated in a different manner or way, although appropriated at a prior date. In this sense they are not "*otherwise appropriated.*" On the other hand, the other funds which have been set apart in the State Treasury for particular purposes, such as the pension fund and others above mentioned, have been "*otherwise*" appropriated, even in this strict sense.

It will be conceded that this is a rather fine distinction and we only mention it to illustrate that if the strictest interpretation possible is to be given to the words used, even then it might be argued that "funds otherwise appropriated" does not necessarily mean all prior appropriations against the general revenue fund.

Sixth. A prior opinion of this Department holds that the expression "out of any money not otherwise appropriated" is a stock phrase without any definite meaning. At pages 90 and 91 of the Opinion Book 30 of this Department, in an opinion dated June 2, 1913, prepared by Hon. C. W. Taylor, then Assistant Attorney General, the Department said:

"The use of the phrase 'money in the State Treasury not otherwise appropriated' has come into common use throughout the country in the phraseology of appropriation bills as a stock phrase without any definite or certain meaning. \* \* \* Therefore, the expression above quoted has but little, if any, meaning in our appropriation bill."

In a California case (*Proll vs. Dunn*, 80 Cal., 220, 22 Pac., 143) the court said that this stock expression is usually a fiction. In discussing the expression "out of any moneys in the Treasury, not otherwise appropriated," the court said:

"The Legislature can make no appropriation, except 'out of the Treasury.' The remaining words are not only a form not required by law, but usually a fiction, for at the time of the passage of the appropriation bills, there is not usually any money in the Treasury in excess of the existing appropriation, and whenever the Legislature makes a new appropriation, it is to be assumed that it will provide funds to meet the same."

On the other hand, there are some Colorado decisions which seem to be to the contrary, as will be noted by examining *Parks vs. Commissioners*, 22 Colo., 86, 43 Pac., 542. Although it may be noted that the Supreme Court of Colorado had held that certain expenses of the State government, under the Constitution of that State, have priority of payment out of the funds in the State Treasury, by reason of the nature of certain departments and institutions, which probably had something to do with the holding as to the expression "any moneys in the Treasury, not otherwise appropriated."

There is a Louisiana case (*Klein vs. Pipes*, 43 La. Ann., 362, 8 So., 927), which construes the expression "not otherwise appropriated" as creating a priority right in favor of former appropriations against the general fund.

See also *Reed vs. Huston*, 24 Idaho, 26, 132 Pac., 108, wherein the following language appears:

"This salary is to be paid each year 'out of any money in the Treasury not otherwise appropriated.' This expression, 'not otherwise appropriated,' clearly means money in the Treasury that is not, at the time the payment of a salary becomes due, appropriated by an act of the Legislature to some other special or particular purpose. In other words, any money that may be in the Treasury at the time a salary becomes due, which is not at the time appropriated by the Constitution or act of the Legislature to some other use or purpose, is clearly 'not otherwise appropriated,' and is therefore available and 'appropriated' by this act to the payment of the salaries designated and enumerated in Section 276, Rev. Codes. *Humbert vs. Dunn*, 84 Cal., 57, 24 Pac., 111."

The latter quoted definition would seem to support our idea of what these words mean.

It will be seen from the foregoing that on the one hand the Cali-

fornia case and the prior opinion of this Department state that the words under consideration mean practically nothing, and on the other hand the Louisiana case says they furnish a rule of priority. We think there is no necessity to adopt either extreme view, but that we can give the words a meaning in that they can reasonably refer to other funds set aside in the Treasury for special purposes as before indicated.

It is our opinion that the Legislature in passing the three million dollar school act intended to direct the transfer of this money, immediately, to the extent of any funds on hand.

It is true that the statutes direct that the automatic tax board shall meet and fix the State tax rate within the constitutional limit, and seems to contemplate that the tax board shall take in consideration and shall be made in view of the appropriations made by the Legislature. See Article 7351, Revised Civil Statutes. But this statute could not possibly have the effect of inhibiting the Legislature from making any subsequent appropriations of funds in the State Treasury for the year, or the biennium, and it does not seem that this situation could conclusively decide us upon the question of intent as disclosed by a subsequent act. We do not doubt the power of the Legislature to pass a subsequent act appropriating funds within the available revenues collected, or to be collected, and make the appropriation immediately available notwithstanding prior appropriation. In case of conflict, could not the Legislature cause the prior appropriation to give way to the subsequent one? If not, why could it not do so?

You are, therefore, respectfully advised that in our opinion it is the legislative intent, as disclosed by the act under consideration, that you, as State Treasurer, transfer from the general revenue fund three million dollars to the available school fund, or so much thereof as you may have on hand in the general revenue fund. You will thus treat this appropriation act as on an equal footing with others to be dealt with in the usual way so far as priority of payment is concerned.

Other appropriation acts will be handled in the same manner unless there should be in them clear language to the contrary; and the fact that the usual words "out of any funds not otherwise appropriated" are employed does not, in our opinion, constitute an expression of a contrary intent.

It is our opinion that if the Legislature had intended that there should be a departure from the usual practice in paying these appropriations, it would have made known its intention in words other than this stereotyped expression which by custom from the beginning has never been interpreted to furnish a direction as to strict priority of payment according to the date of the appropriating act.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2485, Bk. 58, P. 43.

APPROPRIATION—LAW ENFORCEMENT.

An appropriation for the Game, Fish and Oyster Commissioner for the enforcement of the game, fish and oyster laws cannot be used to purchase a

moving picture machine nad procure films for the purpose of carrying on an educational campaign in reference to the conservation of fish and game.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 8, 1923.

*Hon. Geo. Finlay Simmons, Chief Deputy, Game, Fish and Oyster Commission, Capitol.*

DEAR SIR: This Department is in receipt of your inquiry of February 21, 1923, reading as follows:

"Instructions to this office at present are to secure enforcement of the game, fish and oyster laws of the State through education and dissemination of information relative to such natural resources of the State. My appointment as Chief Deputy Commissioner last month was based largely on my lecturing and teaching ability; to accept such appointment, and with this policy in mind, I resigned my position as Instructor in Zoology in the University of Texas, which position I have held for the last several years.

"Our General Appropriation Account No. E507 reads as follows:

"For gasoline, oil, repairs for boats, telephone, stamps, incidentals,  
and general running expenses and for the enforcement, game, fish,  
and oyster laws . . . . . \$15,000.00."

"We are well within average expenditures from this amount of \$15,000 for the current fiscal year, and by economical administration should have at least \$1000 surplus at the end of the year. If you are of the opinion that such expenditures would come within the terms of this appropriation, we shall purchase at cost from the Federal Department of Agriculture reels of moving pictures dealing with conservation of fish and game, and of a machine necessary to the handling of same, to be used from town to town by this Commission in securing co-operation of law enforcement."

We have given this matter careful consideration and have had a conference of the members of the Department, and we are forced to the conclusion and so advise you that there would be no authority to use this law enforcement fund for the purpose outlined in your letter.

An examination of the statutes relating to and prescribing the duties of the Game, Fish and Oyster Commissioner will disclose that there is an absence of any express authority to disseminate, generally, information relative to conservation of fish and game, and nowhere in the laws do we find that it is made the duty of the Commissioner or his department to educate the people along this line. In fact, the Game, Fish and Oyster Department, as now constituted, is essentially an executive department, created for the purpose of carrying into effect the general police regulations relative to fish, game, etc.

We find that the statutes enjoin the duty upon the Commissioner to enforce these laws. To enforce a law is to place it in execution. It has been said that to "enforce" is to execute with vigor, to put in force, compel obedience to, cause to be executed or performed; it has the same meaning as "execute." (Words & Phrases, 2nd Series, Vol. 2, p. 378.)

The Game, Fish and Oyster Commissioner does not derive his power and authority to enforce these laws from the appropriation act. He derives his authority and power from the general laws of the State, and the appropriation is made simply to allow him to perform these duties. Therefore, when the appropriation act places a fund at the disposal of the Commissioner to be used for the enforcement of these laws, we must look to the general laws in order to ascertain what are his duties in this connection. Whatever the words "enforcement of the law" may mean, we do not believe that we could fairly construe

them to include the authority to carry on a campaign of education. It is one thing to carry the laws into execution and another thing to educate the people that they ought to obey these laws, or to teach them how to obey these laws. We do not believe that this work would be necessary or reasonably incident to any authority, powers or duties vested by law in the Game, Fish and Oyster Commission.

In order to illustrate that an appropriation for law enforcement is not to be interpreted in its literal and unlimited sense, we call attention to an opinion of this Department rendered to the Comptroller on September 27, 1921. The Live Stock Sanitary Commission had an appropriation available to it "for the enforcement of all laws coming under the supervision of the Live Stock Sanitary Commission and all expenses incident thereto." The question was whether that commission had authority to employ a lawyer out of these funds to assist county and district attorneys in prosecuting those violating the laws which it was the duty of the Live Stock Sanitary Commission to enforce. The Department held that there was no authority to use the funds for such a purpose.

There are several of the State departments whose duty it is to execute and enforce laws pertaining to such departments and have an appropriation in general terms to be used for law enforcement. If one department could use a law enforcement fund for the purpose of educating the people by means of moving pictures, another department operating under a similar appropriation could do it also, and thus we would have our various law enforcing departments engaged in undertaking to educate the people that the various laws ought to be obeyed, and we do not think that this is contemplated under present statutes. Doubtless, if the Legislature had intended that campaigns of this kind were to be carried on, it would have expressly authorized them in the general laws and appropriation acts.

We do not believe, therefore, that we could consistently advise you that your department has authority to use this law enforcement fund in such a manner as you describe.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2514, Bk. 59, P. 129.

COUNTIES—WARRANTS—FUNDING—ROAD FUNDING WARRANTS—COMMISSIONERS COURT.

1. Interest-bearing funding warrants of deferred maturity may be issued by the commissioners court to take up an equal amount of non-interest-bearing road warrants under the following circumstances existing in Johnson County.
2. Johnson County had issued \$2,000,000.00 of road bonds and the proceeds thereof placed in the county depository. Road contracts were entered into at a time when within the reasonable contemplation of the parties these funds were on hand and were ample to take care of the claims growing out of such contracts. Subsequent to the making of the road contracts the county depository failed and there are now no funds to pay the claims of the road contractors under their contracts with the county which had been performed in part at the time of the bank failure and no reasonable expectancy of recovering the funds lost in the depository at any definite time. All things necessary were done in the letting of the contracts, performing the work and auditing and allowing

the claims. It is assumed that a lawful debt against the county represented by these claims had been created and non-interest-bearing warrants issued. No prior agreement existed as to interest or that the contractors would look to the bond issue alone or to any other particular moneys for compensation. The county is threatened with suit if settlement is not effected. The warrant holders will deliver up the old warrants for cancellation in consideration of the issuance and delivery of the interest-bearing warrants, thus the county avoiding litigation and being relieved of the obligation of present payment.

The commissioners court will at the time of creating the new obligations provide out of the fifteen cents road tax for interest and at least two per cent as a sinking fund.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 18, 1923.

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

DEAR SIR: Your letter of July 17, 1923, to Attorney General W. A. Keeling has been received and referred to me for preparation of opinion upon the question submitted. Your letter reads as follows:

"In the Biennial Report of the Attorney General for the term ending August 31st, 1922, is an opinion to the County Judge of Comanche County, wherein it is held that the commissioners court had authority to issue warrants for the construction of roads in any part of the county under a proper contract, said warrants to be issued and delivered after the work has been done—citing *Lasater vs. Lopez*, 217 S. W., 373 (1920-22 Report, p. 122).

"The Commissioners Court and County Auditor of Johnson County desire an opinion from your Department on the authority of the commissioners court to issue interest-bearing warrants for the purpose of funding an equal amount of the warrants of said county heretofore issued for the purpose of paying accounts legally contracted in the construction and improvement of the roads of said county.

"In order that you may have all of the facts before you, I direct attention to the following:

"1. At an election held for the purpose, on May 10th, 1919, more than a two-thirds majority of the qualified property taxpaying voters of Johnson County voted in favor of the issuance of the bonds of said county, aggregating the sum of \$2,000,000.00, under authority of Chapter 2, Title 18, Revised Statutes of 1911; said bonds were duly issued and approved by your Department and registered by the State Comptroller.

"2. The said bonds were on May 13th, 1919, sold to the National Bank of Cleburne, Texas, and the purchase money therefor was placed in the National Bank of Cleburne, at Cleburne, Texas, which was at said time the duly selected depository of said county.

"3. The commissioners court, at the proper time, advertised for bids for the construction of the roads and highways of the county, as contemplated and authorized by the qualified voters at the bond election above mentioned; that all notices inviting competitive bids for said work were duly and legally issued and given by the proper officials, in conformity with the law, and upon due consideration of all bids submitted, contracts were awarded to various contracting companies.

"4. On or about the 16th day of October, 1921, the said The National Bank of Cleburne was found to be insolvent, and was ordered closed by the proper authorities, and said bank is still closed and has remained closed continuously from said date; that it was soon discovered that by reason of the failure of said bank, the road bond money which the county had placed in the custody of said bank, as its duly selected depository, was misappropriated or lost, and said money has not yet been recovered, and may never be recovered.

"5. In pursuance of said road contracts, and otherwise, this county, prior to the closing of said bank, owed, and still owes, valid and subsisting debts and obligations, which were incurred in purchasing the necessary machinery, materials, rights of way, and for labor performed, and other necessary expenses in the improvement and construction of the roads of said county, under authority of the bond election above mentioned.

"6. The failure of the National Bank of Cleburne deprived this county of all



available funds with which to pay said claims and accounts and the commissioners court has found that the depository bond given to the county by said bank to secure or protect said road bond money affords no relief at the present time.

"7. Unless prompt action is taken, looking to an early payment, of the debts and obligations now outstanding against the county, incurred for the construction of its roads, as aforesaid, the holders of such claims or accounts will institute suits to enforce payment, and which will result in expensive litigation and may seriously impair the commercial credit and standing of the county.

"The warrants now outstanding against the special road bond construction fund, in round numbers, amount to approximately \$126,000.00.

"The commissioners court of Johnson County has deemed it necessary and advisable to issue upon the faith and credit of said county, funding warrants bearing 6 per cent interest, maturing serially, for the purpose of 'funding an equal amount of warrants of said county heretofore duly and legally issued for the purpose of the payment of accounts legally contracted in the construction and improvement of the roads in said county, the claims for which were duly audited and allowed by the commissioners court of said county, prior to their issuance, and for which the county received full consideration and value.'

"The tax to be levied for the purpose of creating a special fund with which to pay the interest on said warrants and the principal thereof at maturity is to be levied out of the 15-cent constitutional road and bridge fund tax, authorized by Section 9 of Article 8, of the Constitution.

"Will you please advise me at the earliest date practicable whether or not the commissioners court can legally issue the funding warrants above mentioned?

"In connection with the above, I respectfully direct attention to the following well established propositions and authorities:

"1. Counties have the power to contract for the construction of courthouses, and for the improvement of public roads, on the general credit of the county, and to issue in evidence of the indebtedness thereby created the interest-bearing warrants of the county, maturity in after years:

"Lasater vs. Lopez, 217 S. W., 375.

"Stratton vs. Kinney County, 137 S. W., 1170.

"Allen vs. Abernathy, 151 S. W., 349.

"Cowan vs. Dupree, 139 S. W., 887.

"San Patricio County vs. McClane, 58 Texas, 243.

"2. The commissioners courts of counties in this State have authority to issue interest-bearing time warrants to fund or refund outstanding scrip or warrants issued in regular course for the purposes authorized by law:

"Davis vs. Burney, 58 Texas, 364.

"Ashe vs. Harris County, 55 Texas, 49.

"Commissioners Court vs. Nichols, 142 S. W., 37.

"San Patricio County vs. McClane, 58 Texas, 243."

For the purpose of this opinion we assume the contractors involved did not contract with the county to look exclusively to the proceeds of this bond issue for compensation, but that on the other hand, so far as the road contracts are concerned, the contractors might be paid out of any county funds properly applicable to the construction and improvement of roads.

We assume further that at the time of entering into the road contracts, within the lawful and reasonable contemplation of the parties, the county had sufficient funds on hand or sufficient current revenues for the year to satisfy the pecuniary obligations imposed by the road contracts and that all things necessary had been done in letting the contracts, performing the work and auditing and allowing the claims of the contractors. Which is to say that we assume lawful debts were created for which the ordinary county warrants were issued.

Lawful debts having been created, the issuance of funding warrants in the manner outlined in your inquiry does not involve the creation

of a new debt, except as to the interest. No question is presented as to violation of Section 7 of Article 11 of the State Constitution, since in the issuance of these funding warrants the commissioners court proposes to make provision for the levy and collection of a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund.

There can be no reasonable doubt, however, that a new debt is created to the extent of the interest which the county obligates itself to pay. *City of Tyler vs. Jester*, 74 S. W., 359, 365. This is necessarily true, there having been no contract originally between the county and the road contractors that there should be deferred payments or that the warrants should bear interest. There having been no contract in the beginning contemplating deferred payments and interest, this proposed transaction involves a new contract, and, of course, in order to support it there must be some consideration moving to the county as well as authority in law to enter into it. A county cannot allow extra compensation, fee or allowance to a public contractor after service has been rendered or a contract has been entered into and performed in whole or part; nor can a county pay any claim under any agreement or contract made without authority of law. Section 53, Article 3, Constitution of Texas. The Constitution contains also an inhibition against counties lending their credit or granting public money or thing of value in aid of or to any individual, association or corporation whatsoever. Section 52, Article 3. It is plain, therefore, that we must find some basis for the new contract; these constitutional provisions prevent the granting of county moneys to persons, associations or corporations without something in return; the claim of a contractor must be supported by a pre-existing contract and by a pre-existing law. The pre-existing contract for this funding warrant transaction is not to be found in the original road contracts; let us see whether (1) there is a reasonable basis for a new contract; and (2) whether such contract is authorized by law.

*First.* Is there a basis—a consideration—for the contract involved in the issuance of these funding warrants? We are inclined to the opinion that there is. At the time of entering into the road contracts the county within the reasonable contemplation of the parties had plenty of funds to pay the contractors upon the completion of the work. It was presumably through no fault of either the county or the road contractors that the money was lost and is not now available. The parties did not make their contract in contemplation of conditions as they now exist. The contractors had a right to expect under the circumstances that their claims would be paid upon the completion of the work and allowance by the commissioners court. We have no doubt that the contractors or their assignees could now reduce their claims to judgments, and we have no reason to believe that the judgments would not bear interest. *Sherwood vs. LaSalle County* (Civ. App.), 26 S. W., 650. There seems to be some warrant for the belief that litigation will result if these claims are not taken care of by the issuance of these funding warrants. It goes without saying that the expense of the county's side of the litigation would have to be borne by the county out of county funds. Again, it cannot be said that the deferring of the payments is not a convenience and therefore a benefit

to the county. The arrangement will permit of a setting aside of only a part of the fifteen cents road tax from year to year to take care of these claims, leaving a larger amount than would otherwise be available to take care of other obligations against the road and bridge fund.

We are inclined to the opinion, therefore, that a sufficient consideration and basis for the new contract is to be found in the forbearance on the part of the claim holders both as to the time of payment of their claims and in the matter of suing the county. Under somewhat similar circumstances the Supreme Court of the State of Tennessee in the case of Davidson County vs. State, 4 Lee, 28, said:

"An amicable adjustment by which interest is conceded in consideration of forbearance is within the competency of the county court, whenever it is authorized to levy a tax, or appropriate the public money to pay the debt."

And in the case of Davis vs. Burney, 58 Texas, 364, the paying of interest is recognized as "a consideration for the postponement of their county warrants."

*Second.* But granting the foregoing, has the law authorized the issuance of funding warrants under the circumstances set forth? As has often been said, the commissioners court has no authority except such as is granted to it either by the Constitution or by statute. What provision of the Constitution or the statutes authorizes the issuance of funding warrants under the state of facts now confronting us?

The Constitution does not itself grant this authority. The powers and jurisdiction of the county commissioners court are largely statutory. State Constitution, Section 18, Article 5. The laying out, construction and repairing of county roads shall be provided for by general laws. Section 2, Article 11. The Constitution authorizes the Legislature to grant authority to counties to issue bonds or otherwise grant their credit for the construction, maintenance and operation of macadamized, graveled or paved roads or turnpikes or in aid thereof. Section 52 of Article 3. But this as well as the statute enacted pursuant to it requires a vote of the people of the county in order to authorize the issuance of the bonds or the lending of the credit of the county. Moreover, this method of lending the credit of the county is usually considered as being applicable in advance of the letting of the road contracts only, though we are not passing upon this point.

There are certain inhibitory provisions in the Constitution as to counties. For instance, counties are inhibited from levying more than a certain tax rate for road purposes. Section 9 of Article 8. The Constitution provides also that no debt shall ever be incurred by a county for any purpose unless provision be made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund. Section 7, Article 11. We have seen also that money cannot be granted by counties to individuals, associations or corporations, and that there must be a pre-existing contract and law supporting a claim against the county. But these constitutional provisions are restrictive and contain no affirmative authority to create debts. We must look, therefore, to the statutes for authority, if there be any, to issue these funding warrants.

The statutes do not expressly authorize the issuance of funding war-

rants to take up an equal amount of outstanding road warrants. But we think they do by reasonable implication where conditions exist such as those set forth in your inquiry. This Department has heretofore held that the county commissioners court cannot allow interest on ordinary non-interest-bearing county warrants. Opinion No. 1836, Book 50, page 200, reported at page 840 of the 1916-18 Report and Opinions of the Attorney General of Texas.

The Department has also held that the current warrant indebtedness of a county cannot be funded by the issuance of funding bonds. Opinion No. 1891, Book 51, page 36, printed at page 533 of the 1916-18 Report and Opinions of the Attorney General of Texas.

The Department has also held (following *Lasater vs. Lopez*, 217 S. W., 373) that counties may contract for the construction of roads, the contractor to be paid in interest-bearing warrants. Opinion No. 2419, Book 57, page 59, 1920-22 Report and Opinions of the Attorney General, page 122.

These opinions do not appear to pass upon the exact question here presented.

The commissioners court is granted by statute the following powers, among others:

"3. To lay out and establish, change and discontinue public roads and highways.

"4. To build bridges and keep the same in repair.

"5. To appoint road overseers and apportion hands.

"6. To exercise general control and superintendence over all roads, highways, ferries and bridges in their counties.

"8. To audit and settle all accounts against the county and direct their payment. (Art. 2241, R. C. S. of 1911.)"

Article 2242 authorizes the commissioners court to levy and collect not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation; also an additional tax for road purposes not to exceed fifteen cents on the one hundred dollars valuation of the property subject to taxation under the limitations and in the manner provided for in Article 8, Section 9, of the Constitution, and in pursuance of the laws relating thereto. Provision is made also for the issuance of bonds for road purposes and the proceeds thereof are to be expended by the commissioners court upon the roads, etc. See Chapter 2, Title 18, Revised Civil Statutes of 1911.

It is in this statutory power to construct roads and to raise funds for that purpose and audit and settle the debts of the county that we find the commissioners court's authority to issue these funding warrants. Confronted with a lawful debt against the county for the construction of roads and having no money on hand to settle the debt, but having authority to levy taxes for road purposes and specific authority to audit and settle all accounts against the county and direct their payment, the commissioners court has authority to issue these funding warrants. It is an implied power, a power reasonably necessary to carry out the general authority conferred. It being the duty of the commissioners court to settle the lawful debts of the county, it has implied authority to do anything reasonably appropriate to that end; and we are of the opinion that the issuance of funding warrants under the circumstances confronting the commissioners court of Johnson County is reasonably necessary and therefore authorized in the

settlement of these claims against the county. It would seem that the proposition is supported by the authorities.

The court decision most directly in point is the case of *Davis vs. Burney*, 58 Texas, 364. In that case was involved the validity of an order of the commissioners court of date April 1, 1878, providing for the registration of all scrip issued prior to the 18th day of April, 1876, and providing that the same when registered should bear legal interest (which was at that time at the rate of eight per cent per annum) from that date, and that scrip should not be receivable for taxes. The county tax levy was attacked in the suit on the ground that it included taxes to pay the interest on these warrants, it being alleged that the order of the commissioners court providing for such interest was *ultra vires* and void. The court, however, held that the commissioners court had authority to thus provide for the paying of interest on the registered scrip in consideration of the warrant holders agreeing to forego the privilege of paying taxes with scrip and also in consideration of the postponement of the payment of the warrants by the county. We quote the following from the court's opinion:

"It should be borne in mind that the indebtedness thus sought to be postponed was legal and subsisting, and no question arises as to the power of the court in creating the same."

The following language from this court decision is also pertinent to the question under consideration:

"In all this one fact is prominent, and that is, the citizen to whom scrip is issued is delayed in getting the money that is then due him from the county; in other words, the county detains the money to which the citizen is justly entitled. Now, whether the warrant or the order allowing the claim is the evidence of the debt is immaterial, for such a transaction between individuals would entitle the creditor to legal interest on the principal debt. There is no express provision of law that exempts county warrants or scrip from the operations of the statute regulating interest. Public policy and usage, to prevent embarrassment in county matters, and complication and confusion in its financial accounts, relieves the ordinary county indebtedness, in the absence of a contract to the contrary, from the burdens of legal interest.

"No sufficient reason is perceived for holding that the commissioners court did not have the power to bind the county to pay interest as a consideration for the postponement of their county warrants."

Such cases as *Lasater vs. Lopez*, 202 S. W., 1039 (Civ. App.), and 217 S. W., 373 (Sup. Ct.), and *Stratton vs. Commissioners Court* (Civ. App.), 137 S. W., 1170 (writ of error refused), are also authority for the conclusion reached; for they are based upon the same theory, and that is that express authority vested in the commissioners court to do a certain thing includes authority to issue interest-bearing warrants if that is reasonably necessary to do that thing. In other words, the law makes it the duty of the commissioners court to construct courthouses and roads and to raise funds by taxation for that purpose and to audit and settle claims against the county, and this has been held to include the power to accomplish that object by the issuance of interest-bearing warrants of deferred maturity.

If the reasoning in these cases is sound, we are unable to escape the conclusion that the interest-bearing warrants may be issued in this instance. In principle, we have an analogous situation. Here we have a lawful debt created and a duty imposed upon the commissioners court to audit and settle it. The power of taxation has been placed

in the hands of the commissioners court for the purpose for which the debt was incurred—building roads—and the same reasoning that supported the conclusion of the Supreme Court in the cases above mentioned supports the proposition that the commissioners court has the power to issue these warrants.

As was said by Mr. Justice Moursund in *Lasater vs. Lopez*, 202 S. W., 1039, 1042, “the power to audit and settle necessarily implies the power to fix the time of payment.” We think also that Mr. Justice Moursund’s statement in that case is correct to the effect that the difference in the wording of the statute giving the commissioners court authority to audit and settle accounts against the county and direct their payment as it now exists is not sufficient to change the rule as to the authority of the commissioners court to issue interest-bearing warrants. The statute formerly authorized the commissioners court “to provide courthouses, jails and all necessary public buildings and to allow and settle all county accounts and direct their payment *in such manner and at such times as may meet the public interest.*” The underlined [italicized] words do not now appear in the statute, but general power in the commissioners court to audit and settle undoubtedly includes the power to use some discretion in the selection of the means to accomplish that result. Fixing the time of payment and allowing interest on deferred payments is reasonably necessary in our opinion to exercise the express power granted.

Under the power of the commissioners court indicated by the language just above quoted, it was held in the case of *San Patricio County vs. McClane*, 58 Texas, 243, that the county court had authority to issue interest-bearing warrants in payment for the erection of a courthouse. The court said:

“This power thus expressly given would seem broad enough to authorize the county court to contract to pay interest upon its indebtedness incurred in an improvement it was expressly authorized to make. *Douglas vs. Virginia City*, 5 Nev., 150.”

In *Ashe vs. Harris County*, 55 Texas, 49, it was held that county warrants issued on claims allowed by the county commissioners court which under the statutes could be paid only in the order of their registration according to their class, which were silent as to interest and specified no time of payment, did not bear interest; but in that case the court reversed the question of the power of the commissioners court to issue interest-bearing warrants. In this connection, the court said:

“It is hardly necessary to say that in expressing our conclusion that county warrants in the usual form do not bear interest, we intend to intimate no opinion as to power of the commissioners court to issue interest-bearing warrants.”

The case of *State vs. Wilson*, 71 Texas, 291, is not adverse authority, in our judgment. There the State’s creditor held an ordinary non-interest-bearing warrant which he sold at a discount. He sued the State (under permission) for the amount of the discount, but the court held the State was not liable. The warrants had been paid by the State as soon as there were sufficient funds in the Treasury to meet them. There was no contract whatever for the payment of interest.

We have made no attempt to collect all the authorities on the question of the authority of counties to pay interest, but we call attention

to a rather complete collation to be found beginning at page 552 of 17 L. R. A., N. S. Upon the general subject of interest, see also 15 R. C. L., pages 17-18.

Neither have we cited all the Texas cases dealing with the subject of issuing interest-bearing warrants. Most of them are in connection with the building of courthouses and roads and involve contracts for interest before the construction of the improvements and will be found cited or discussed in the Texas cases we have cited in this opinion.

We are not unaware of the rule that the commissioners court is a governmental agency of delegated and limited authority and is not to be allowed to have authority not clearly conferred upon it by law; but this rule is not to be carried to the extent of denying authority to exercise some discretion in executing the express powers. It does not necessarily call for so strict and narrow interpretation as will hamper the management of county affairs in a reasonably efficient manner. Under the statutes as they exist we do not believe the commissioners court should be denied the authority to make a reasonable arrangement with its creditors looking to the settlement of lawful debts in order that the business of the county may be carried on within the limitations of taxation and revenue and to the best interest of the county.

We are of the opinion that Johnson County in its present predicament, assuming the facts as stated, has authority to issue funding warrants to take up an equal amount of ordinary county road warrants, the commissioners court at the time of creating the new obligations making provision for levying and collecting a sufficient tax to pay interest thereon and provide at least two per cent as a sinking fund, said tax to be set aside out of the fifteen cents maximum which the commissioners court is authorized by Article 2242, Revised Civil Statutes, to levy for roads and bridges, and which is within the constitutional limitation as to counties for roads and bridges to be found in Section 9 of Article 8 of the Constitution of Texas.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

Op. No. 2517, Bk. 59, P. 59.

ROAD DISTRICT BONDS—TAX RATE NOT LIMITED—SALARY COUNTY COMMISSIONERS.

1. The Commissioners Court of Cherokee County is authorized to levy a tax sufficient to pay the interest and provide a sinking fund sufficient to pay the principal of road district bonds, and said court is not limited to a rate of one dollar on the one hundred dollars valuation.

2. The assessed valuation of all property in Cherokee County being more than ten million dollars and less than twenty million dollars, the county commissioners of said county are entitled to receive for their services a salary of twelve hundred dollars per annum, payable in equal monthly installments, and are not entitled to any other fees or per diem.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 5, 1923.

*Hon. M. C. Chiles, County Attorney, Rusk, Texas.*

DEAR SIR: Your letter of the 4th instant to the Attorney General has been referred to me. I quote the following from your letter:

"Certain road districts of this county have voted good road bonds. It seems that the rate of taxation to provide for the interest and sinking fund was not to be more than \$1.00 on each \$100.00 of valuation of property. The \$1.00 rate has been levied and that does not yield enough income to pay off the bonds as they come due and the interest as it matures. The renditions of the value of the property in these districts have decreased as times have become normal.

"Now, will the court be authorized in levying a tax rate of more than \$1.00 upon each \$100.00 in valuation of property to take care of the deficiency?"

"The commissioners of this county are now claiming \$3.00 per day and have since the first of this year under the per diem statute for their services while attending the meetings of the commissioners court.

"Now, can the court pay the commissioners \$3.00 per day for their services before the new law went into effect on August 13th, 1923? If this can be done, can they still receive \$3.00 per day under the new law?"

Replying to your first question, I have to say that the records concerning the road districts in Cherokee County are on file in the Comptroller's Office and reference to them discloses the fact that the tax rate was not limited in any of the proceedings. The law does not limit the tax rate but only limits the amount of bonds which may be issued to one-fourth of the assessed value of the real property in the district. The order of the commissioners court of Cherokee County authorizing the issuance of \$350,000 road bonds of Road District No. 2 provides for the levy of taxes to pay the interest on said bonds and the principal at maturity in the following language:

"It is further ordered that while said bonds or any of them are outstanding and unpaid, there shall be, and it is hereby ordered that there be levied, assessed and collected, in due form and manner, and at the time other county taxes are levied, assessed and collected, in each year, a tax upon all the taxable property in said Road District No. 2 of Cherokee County, Texas, sufficient to pay the current interest thereon and to pay each instalment of the principal as the same becomes due, and to pay the interest on said bonds and the principal to become due the first year, there is hereby levied a tax of one hundred cents on each one hundred dollars valuation of taxable property in said road district for the year 1920, and the same shall be assessed and collected and applied to the purpose named."

This order was passed on the 10th day of August, 1920, and is of record in Book G, page 504, Minutes Commissioners Court, Cherokee County. It will be seen from the language used in the order authorizing the issuance of bonds that a sufficient tax was ordered to be levied and that a tax of one hundred cents on the one hundred dollars was sufficient for the year 1920. The valuation for 1920 of said District No. 2 amounted to \$2,839,185. The order levying taxes in Road Districts Nos. 3 and 4 are in identical language, except as to the rate, as in Road District No. 2. There is nothing whatever in the record to indicate that the rate was to be limited to \$1.00 or to any other amount. The commissioners court is authorized by the terms of the order authorizing the issuance of bonds to levy a tax sufficient to pay the interest and provide necessary sinking fund.

In answer to your second question with respect to the per diem of members of the commissioners court, I have to say that prior to 1918 county commissioners were paid on the per diem basis, but at the Fourth Called Session of the Legislature, in 1918, the law was amended and that part of it which would apply to Cherokee County is found in Article 6901d, Vernon's Complete Texas Statutes, 1920, and reads as follows:



"Provided that in all counties containing a population of not less than twenty-nine thousand and not more than forty thousand population the county commissioners of the several counties shall each receive a salary of twelve hundred dollars per annum, payable in equal monthly installments and this salary shall be *in lieu of all other fees and per diem of all kinds now allowed by law.*"

The Thirty-eighth Legislature, at its Regular Session, amended the law so as to provide for the payment of commissioners' salaries on the basis of the assessed valuation of property based on the assessment for the year 1922, and Article 6901dd now reads as follows:

"Provided that in all counties having an assessed valuation of all taxable properties of ten million dollars and less than twenty million dollars valuation based upon the approved tax rolls for the year 1922, the county commissioners of the several counties may each receive a salary of twelve hundred dollars per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law."

There is no statute now authorizing the commissioners court of any county to receive a per diem of three dollars per day as a member of the commissioners court. Article 6901a provides that in counties having an assessed valuation of less than ten million dollars based upon the approved tax rolls for the year 1922, the county commissioners of the several counties shall each receive five dollars per day for each day served as commissioner and when acting as ex-officio road supervisor of their precinct. In all counties having an assessed valuation of more than ten million dollars the commissioners are on a salary basis and this salary is in lieu of all other fees and per diem of all kinds.

You are therefore advised that the court is not authorized to pay the commissioners \$3.00 per day before the new law went into effect nor to pay them \$3.00 per day under the new law, but that the salary of \$100 per month is all the compensation which is allowed by law to members of commissioners courts in those counties having an assessed valuation of more than ten million dollars and less than twenty million dollars.

Yours very truly,

C. F. GIBSON,  
Assistant Attorney General.

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Op. No. 2520, Bk. 59, P. 122.

COUNTY OFFICERS—REPORTS AND STATEMENTS OF—AUTHORITY OF  
COMMISSIONERS COURT TO PURCHASE AUTOMOBILE FOR SHERIFF.

Except the district attorney, the officers named in Articles 3881 to 3886, in counties having a population of twenty-five thousand inhabitants or less, are not required to make report of fees as provided in Article 3895, or to keep the statement provided for in Article 3894.

Under Article 3897, as amended by the Thirty-eighth Legislature, the commissioners court has the authority to purchase one or more automobiles, paying for the same out of the general funds of the county, for the use of the sheriff of such county in the discharge of his official duty, when in their discretion and judgment they deem such purchase necessary.

The expense of maintaining and operating such automobile or automobiles to be paid out of excess fees due the county in those counties containing a population in excess of twenty-five thousand. The sheriff in counties of twenty-five thousand population, or less, not being liable to the county for excess fees, will have to pay the maintenance and operating expense of such automobiles out of his own funds.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 29, 1923.

*Hon. R. E. Tompkins, County Attorney, Hempstead, Texas.*

DEAR SIR: Your letter of August 15th, addressed to the Attorney General, has been referred to me for attention.

In your letter of above date you inquire if, under the provisions of Chapter 181, page 406, Acts of the Thirty-eighth Legislature, at its Regular Session, the commissioners court of Waller County, such county having a population of less than twenty-five thousand, has the authority to buy an automobile for the use of the sheriff and pay for same out of the general fund of the county.

Chapter 181, page 399, Acts of the Thirty-eighth Legislature, at its Regular Session, amends Article 3898 of the Revised Statutes of 1911 so as to read as follows:

"The officers named in Articles 3881 to 3886, in those counties having a population of 25,000 inhabitants or less, shall not be required to make a report of fees as provided in Article 3895, or to keep the statement provided for in Article 3894; the population of the county to be determined by the last United States census; provided, that all district attorneys shall be required to make the reports and keep the statements required in this chapter."

The sheriff is one of the officers named in Article 3881, therefore, under the provisions made in Article 3898 as amended by the Thirty-eighth Legislature, the sheriffs in those counties having a population of twenty-five thousand inhabitants or less, are not required to make a report of fees as provided in Article 3895, or to keep the statement provided for in Article 3894; the population of the county to be determined by the last United States census.

Under the provisions of Article 3894, prior to the amendment of Article 3898, the sheriffs were required to keep a correct statement of the same coming into their hands as fees and commissions, in a book to be provided for that purpose, and it is the duty of the grand jury to examine such accounts at the session of the district court next succeeding the 1st day of December of each year, and make a report on same to the district court at the conclusion of the session of the grand jury. Article 3895 requires the sheriff at the close of each fiscal year to make to the district court in the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year and the amount of fees charged and not collected and by whom due, and the number of deputies and assistants employed by him during the year and the amount paid or to be paid each. The sheriff of Waller County is relieved by Article 3898, as amended by the Thirty-eighth Legislature, from complying with the requirements of the two last named articles of our statute.

A cardinal rule, in construing statutes, is that they should receive a consistent and uniform interpretation. That is, that each section of a legislative act must be construed so as to give effect to the legislative intent and to harmonize one section of the act with other provisions of the act. It would not be proper to construe one section of an act alone, as it would hardly be probable in this way to ascertain the intent of the Legislature, or to give effect to the meaning and purpose of the particular section of the act unless it was construed along with other provisions of such act.

Section 6a, Chapter 181, pages 405-406, amending Article 3897 of the Revised Civil Statutes of Texas, authorizes the commissioners court, when in their judgment and discretion the same is necessary, to purchase for the sheriff of such county upon the application of the sheriff in writing, and under oath stating the necessity therefor, one or more automobiles to be used by the sheriff in the discharge of his official duties and to be paid for out of the general fund of the county, and such automobile to remain the property of the county. This is the effect of such amendment. The language used preceding this provision is identical with the language contained in such article prior to its amendment, and with the exception of the provision authorizing the commissioners court to purchase such automobile, or automobiles, the purpose and meaning of the language employed in such article is to regulate and control the fees of such officers as are affected by the provisions of this act requiring them to make reports, and an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his office, such as stationery, stamps, telephone, traveling expense and other necessary expense. This provision, however, shall not be taken to include the salaries of assistants or deputies which are elsewhere provided for. This article further provides that the expense of the maintenance and operation of such automobile, or automobiles, as may be allowed, shall be paid for by the sheriff, and the amount thereof shall be reported by the sheriff on the report above provided for, and shall be deducted by him from the amount, if any, due by him to the county in the same manner as the other expenses are deducted which are provided for in this act.

It is obvious that the major portion of Article 3897 as amended by the Thirty-eighth Legislature, pages 405-406, at its Regular Session, is only applicable to those officers residing in counties having a population in excess of twenty-five thousand inhabitants as shown by the last United States census. The question here to be determined is whether or not the provisions made authorizing the commissioners court to purchase, out of the general funds of the county, an automobile, or automobiles, for the use of the sheriff of such county and in the discharge of his official duties, applies to all counties within this State, regardless of the population of such county as shown by the last United States census.

In *Runnels vs. Belden*, 51 Texas, 48, Chief Justice Moore said:

"It is unquestionably a fundamental canon of construction that such interpretation shall be given to acts of the Legislature as effectuate the intent and purpose of the law-makers in their enactments, when the intent of the law is plain and obvious, rather than to follow its literal import or mere grammatical construction."

In *Ellis County vs. Thompson*, 66 S. W., 48, Mr. Justice Brown, speaking for the Supreme Court of this State, said:

"The purpose for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms. If it were true, as claimed, that the object of the Legislature in enacting the law was to enlarge the rights of the officers named, it should be construed so as to accomplish the legislative intent; and our conclusion would not be correct, because it is not reached from that point of view."

Mr. Justice Brown was discussing the same statutory provisions as

are here involved prior to certain amendments thereto and further employed this language:

"The Legislature undertook to regulate this matter so as to give to each officer, out of the fees collected by him, a reasonable compensation for the services rendered, to make the offices self-sustaining, and to apply the excess of fees to public use. To accomplish this end, the business of the offices named is placed strictly on the basis of a public service, and the fees are treated as a part of the public revenue to be raised by the officer and accounted for as directed."

In this case Mr. Justice Brown stated:

"Counsel for Thompson plant themselves upon what they call the literal meaning of Section 10 of the Act of 1897, and seek to subordinate everything to that. \* \* \* If we considered the tenth section alone, this would be a correct interpretation. \* \* \* We cannot, however, consent to be confined to one section of the act in disregard of all other parts, even if the language were unambiguous. The paramount rule of construction is to find out the legislative intent, which is the law, and must prevail. *Suth. St. Const.*, Sec. 218; *Runnels vs. Belden*, 51 Texas, 48; *Russell vs. Farquhar*, 55 Texas, 359."

Since the provisions made in Article 3897, as amended by the Thirty-eighth Legislature, apparently has application to those officers in counties having a population in excess of twenty-five thousand inhabitants, and if construed alone, then the provisions for the purchase of an automobile, or automobiles, for the use of the sheriff of such county in the discharge of his official duties, would only apply to those counties having a population in excess of twenty-five thousand as shown by the last United States census. However, as said in the case of *Ellis County vs. Thompson*: "We cannot consent to be confined to one section of the act in disregard of all other parts, even if the language were unambiguous. The paramount rule of construction is to find out the legislative intent, which is the law, and must prevail."

We are, therefore, of the opinion that the commissioners court have the authority to purchase an automobile, or automobiles, for the sheriff of their county regardless of the population of such county. Whether it be a wise or foolish policy, the Legislature has clearly authorized this action on the part of the commissioners court of the various counties in this State.

We do not wish to be understood to say that as a matter of right the sheriff of such county is entitled under the provisions of this act to one or more automobiles. The act specifically provides that the sheriff must make his application to the commissioners court in writing and under oath stating the necessity for such automobile to be used in the discharge of his official duties. It then becomes a question of fact as to whether or not he is entitled to such automobile, and this can only be determined by the commissioners court of such county in their own sound discretion and judgment. Under the Constitution and statutes of this State the commissioners court has charge of all county business and are accountable to the taxpayers of such county for the expenditure of the county's funds. If the commissioners court deemed the purchase of such automobile as necessary and as a fair, just and reasonable expenditure of the county's funds, they would be authorized to purchase one or more automobiles to be paid for out of the general fund of the county for the use of the sheriff of such county in the discharge of his official duty. However,

the sheriff of those counties having a population in excess of twenty-five thousand as shown by the last United States census, would have to pay the expenses of the maintenance and operation of such automobile, or automobiles, as was purchased for such sheriff by the commissioners court out of excess fees due county.

In construing Article 3897 we have held that such expenses are not allowable and cannot be paid except out of the amount of fees, if any, due the county. That is to say, such sheriff would only be permitted to deduct the expense of maintaining and operating such automobile, or automobiles, from excess fees due the county under the provisions of our statute pertaining thereto. Under the existing statutes certain county officials residing in counties having a population of twenty-five thousand inhabitants or less, are not required to make the reports and statements required of such officers residing in counties having a population of twenty-five thousand or more. Those officers residing in counties having a population of twenty-five thousand or less would be required to pay all expense incurred in the operation and maintenance of such automobile, or automobiles, since under the statute they are not required to pay any excess fees to the county.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2524, Bk. 59, P. 347.

TAXATION—BOARD OF EQUALIZATION—POWER TO LIST PROPERTY.

The board of equalization is not charged with the duty and has no power nor authority to add personal property to the lists or inventories of property listed to or by the tax assessor for taxation, or to the tax rolls properly prepared by the tax assessor from such lists or inventories, nor to list or render personal property for taxation not so listed or rendered, nor to summon persons to appear before it or otherwise to consider evidence for the purpose of investigating whether or not this should be done.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 28, 1923.

*Honorable Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: We have before us an inquiry addressed to you by Clyde Shofner, Tax Assessor of Nacogdoches County, which is as follows:

"The commissioners court of this county has employed some expert assistance in locating notes heretofore not rendered in this county. Should they be successful in locating a number of notes, will it be legal to summon them again before a board of equalization called for that purpose and assess said notes against them for this year?"

You request the advice of the Attorney General in answer to this inquiry. This question relates only to personal property and our answer must be taken as confined to property of that class.

The first question to be determined is whether or not the board of equalization is charged with the duty or has lodged in it the power to add personal property to the lists or inventories of property listed or rendered for taxation, either to or by the tax assessor, or to list for taxation personal property not otherwise listed, or to require that

either be done. If this duty is not laid upon the board of equalization, or if it is not clothed with this power, we think it would follow that it has no power to summon witnesses or otherwise make investigations in that regard. To make the investigations and have no power to carry the result into effect would be futile.

There must be a valid assessment before there can be a valid tax, and that no assessment is valid unless made by the proper authority, are fundamental propositions, and as the listing of property for taxation is one of the essentials of a valid assessment (Cooley on Taxation, 4th Ed., 596), such listing, of course, must be done in the manner prescribed by law. Our statutes plainly enjoin upon each property owner, either in person or by some one designated by statute or otherwise authorized, the duty of listing or rendering for taxation each year all property owned by such person that is subject to taxation, and the refusal or failure to do so, or to swear to the list or rendition as provided by law, is punishable as penal offense. R. C. S., 1911, Arts. 7509, 7516, 7517, 7520, 7544, 7550, 7551 and 7575; P. C., Arts. 134 and 139. It is also made the duty of the tax assessor to list for taxation each year all property subject to taxation in his county not otherwise listed, and he is required to make oath that his tax rolls when made up "constitute a correct and full list of the real and personal property subject to taxation" in his county so far as he has been able to ascertain the same. R. C. S., 1911, Arts. 7551, 7563, 7578 and 7580. It being thus provided quite in detail for the listing of property for taxation by the owner and tax assessor, and the duty and responsibility for doing so being so clearly placed upon them, it must be held that the board of equalization has no duty nor power in that regard unless plainly provided for by statute. In the absence of a statute so authorizing, a board of equalization has no power to list property for taxation. Cooley on Taxation, 4th Ed., 776 and 777.

Our statutes on this general subject are too numerous and lengthy to set out or to discuss here in detail, and are perhaps not as free from doubt on this point as they might be, but from a consideration of them as a whole our conclusion is that they do not vest in the board of equalization any power nor lay upon it any duty in this regard. It is true that before a list or rendition of property "can be looked to in any way to fix the liability on the taxpayer or his property, the list must be approved by the county commissioners court sitting as a board of equalization" (Chisholm vs. Adams, 71 Texas, 678, 10 S. W., 366), and that to this end the board of equalization is charged with certain duties and has vested in it certain powers (R. C. S., 1911, Arts. 7564, 7569, 7670, 7573 and 7576), and that it is made the duty of the board of equalization to approve the tax rolls when finally made up, if correctly compiled from the lists or inventories as previously approved, and if all lands in the county subject to taxation have been assessed (R. C. S., 1911, Arts. 7559, 7576, 7581), and if such rolls are properly sworn to by the tax assessor (R. C. S., 1911, Art. 7580; Clayton vs. Rehm, 67 Texas, 52, 2 S. W., 45; Friedner vs. City of Galveston (Crt. Civ. App.), 229 S. W., 950; but such approvals do not require nor imply a finding, declaration or certificate by the board of equalization that such lists and rolls include all personal property subject to taxation in the county.

In *Sullivan vs. Bitter* (Crt. Civ. App.), 113 S. W., 193, the addition by the board of equalization of "the sum of \$230,000" to a list in the name of the owner by the tax assessor of "money on hand, credits," etc., valued by the tax assessor at \$20,000, was held to be without authority and void. The 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, C. 3, Rev. St., 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 authority is absolutely essential to support a tax. *Galusha 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 cannot 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 (7570), Rev. St., 1895, as amended by Acts 1907, p. 459, C. 11; *Davis vs. Burnett*, 77 Texas, 4, 13 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. The addition and assessment of the \$230,000 by the board of equalization was absolutely void, and it was not necessary for the plaintiff to show that he had applied to such board for relief in order to have such illegal assessment annulled and the collection of the tax enjoined. *Davis vs. Burnett*, 77 Texas, 4, 13 S. W., 613; *Court vs. O'Connor*, 65 Texas, 334; *George vs. Dean*, 47 Texas, 73; *Bank vs. Rogers*, 51 Texas, 606; *S. W. Teleg. & Tel. Co. vs. City of San Antonio*, 32 Texas Civ. App., 101, 73 S. W., 859; *Johnson vs. Holland*, 17 Texas Civ. App., 210, 43 S. W., 71; *Schmidt vs. G. H. & S. A. Ry. Co.* (Texas Civ. App.), 24 S. W., 547; 2 Cooley on Taxation, 1414; High on Injunctions, Sec. 494."

For the same reason the case of *San Antonio Street Railway Company vs. City of San Antonio* (Crt. Civ. App.), 54 S. W., 907, holds that the addition by the board of equalization of "franchise" to the list of property listed by the owner, and the valuing of same at \$250,000, was unauthorized and void. It is true that this was a city matter, but in passing upon the question the court said:

"It has been held by the Supreme Court that county boards of equalization have no authority to add to or to take away property from the list returned by the assessor, but could only act on matters of valuation. *Galveston Gas Company vs. Galveston Co.*, 54 Texas, 287; *Ind.*, 72 Texas, 509, 10 S. W., 583; *Davis vs. Burnett*, 77 Texas, 3, 13 S. W., 613. In passing upon the section of the charter which defines the duties and powers of the board of revision or equalization in the case of *Hoofling vs. City of San Antonio* (Texas Civ. App.), 38 S. W., 1127, it was said: 'None but revisory authority is given to the board, unless it may be in regard to the property of unknown owners. \* \* \* We conclude, therefore, that it was the duty of the assessor to value the property, and that the power of the board consisted in increasing or diminishing such valuation.' The case of *Moody vs. City of Galveston* (Texas Civ. App.), 50 S. W., 481, is cited as authority by appellee to sustain the proposition that the board of revision and appeals had authority to add property to the list accepted by the assessor. It does not sustain the proposition."

It seems reasonably clear to us that this point was not involved in nor decided by our Supreme Court in the decisions of that court cited by these cases, nor in the cases of *Court vs. O'Connor*, 65 Texas, 334; *Duck vs. Peeler*, 74 Texas, 268 (11 S. W., 1111); *Ferris vs. Kemble*, 75 Texas, 476 (12 S. W., 689); *Conner vs. Waxahachie* (Sup. Crt.),

13 S. W., 30; Texas & Pacific Railway Company vs. Harrison County, 54 Texas, 119, and Cook vs. G., H. & S. A. Railway Company (Crt. Civ. App.), 24 S. W., 544, and it is not clear to us why they are cited here and elsewhere as deciding this question, unless because of certain general expressions found in them. Some confusion appears to exist, however, for the reason, possibly, that the duties and powers of the board of equalization concerning the lists of property rendered for taxation and its duties and powers with respect to the tax rolls do not seem always to have been properly borne in mind.

The case of Chisholm vs. Adams, 71 Texas, 678 (10 S. W., 336), was a suit to enjoin the tax assessor from listing for taxation in Kaufman County lands alleged to be situated in Rockwall County, there being a dispute as to the true location of the boundary line between the two counties, and in affirming the judgment of the trial court in denying the writ the Supreme Court said concerning the board of equalization of Kaufman County:

“That tribunal has power to correct any error in lists furnished by assessors, whether consisting of error in valuation or in property listed. (Gen. Laws, 1879, p. 44.) It is not to be presumed that that tribunal would violate its duty and retain on the approved list property situated in another county, simply because the assessor had placed it on the list furnished for the examination and approval of that body. If the facts stated in the petition be true, the presumption is that appellants could have had the relief which they seek through injunction by a presentation of the facts to the tribunal by law given power to give relief, and the petition not showing that relief could be given only through a court of equity, the demurrer was properly sustained.”

The statutes here referred to by the court are now Articles 7576, 7577, 7578 and 7564 of the Revised Civil Statutes of 1911, the Act of 1879 having been slightly changed from what it was when this decision was rendered. We are not here considering, however, what the rule is concerning real property.

We note that in the case of Von Rosenberg vs. Lovett, 173 S. W., 508, our Austin Court of Civil Appeals has expressly held that the county commissioners court has “the power to employ some one to search out and report the personal property subject to taxation which has not been rendered for taxation,” whatever the law may be on that question. This same opinion further states that “upon such report being made to the assessor it would become his duty to assess such property (Art. 7566), and the commissioners court (board of equalization), by referring to such report in connection with the assessor’s books, could determine whether they ought to be corrected or approved as submitted.” We cannot say, therefore, that this case, in conflict with others herein first referred to, holds that the board of equalization has the right to add personal property to the lists or inventories of property listed for taxation by the owner or tax assessor, or to list for taxation personal property not otherwise listed. We are inclined to the view that it indicates the contrary.

It is our opinion, therefore, that under our present statutes as construed by our courts the board of equalization is not charged with the duty and has no power nor authority to add personal property to the lists or inventories of property listed for taxation either by the owner or by the tax assessor, nor to add personal property to the tax rolls after they have been properly prepared by the tax assessor from such



lists, nor to list personal property for taxation not otherwise listed, nor to summon persons to appear before it or otherwise to consider evidence for the purpose of investigating whether or not this should be done.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2474, Bk. 58, P. 428.

PENSION—MOTHER'S PENSION—GRANDMOTHER—ADOPTED CHILDREN.

The commissioners court would not be authorized to make an allowance to the grandmother of children under the provisions of Chapter 120, page 313, General Laws, Regular Session of the Thirty-fifth Legislature, nor to a grandmother or other woman on account of children she may have adopted under the provisions of Title 1 of the Revised Civil Statutes of 1911.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 16, 1922.

*Hon. J. E. Friestman, County Attorney, Rock Springs, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of recent date in which you state that there is a grandmother in your county who has several grandchildren living with her who are under sixteen years of age whose father and mother are both dead and that the grandmother, because of extreme poverty, is unable properly to support and maintain these children. Under these facts you submit to the Attorney General these questions:

1. Whether or not the commissioners court would be authorized to make an allowance to this grandmother under the provisions of Chapter 120, page 313, General Laws, Regular Session, Thirty-fifth Legislature.

2. Whether or not such allowance might be made if this grandmother were to adopt these children under the provisions of Title 1 of the Revised Civil Statutes of 1911.

Sections 1, 2 and 5 of the act here referred to read as follows:

Section 1. 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.

Section 2. Such petition shall be verified and shall set forth the following:

(a) Her name, the date of the death of her husband, the names of her children, and the dates and places of their birth and the time and place of her marriage.

(b) Her residence and the length of time that she has been a resident of the State, the length of time she has lived at said residence and the address or addresses of her place or places of abode for the previous five years, and the date, as near as possible when she moved in and when she left said place or places of residence.

(c) A statement of all the property belonging to her and to each of her children, which statement shall include any future or contingent interest which she or any of them may have.

(d) A statement of the efforts made by her to support her children.

(e) The name, relationships and addresses of all her and her husband's relatives, that may be known.

(f) The name, sex, and age of each of her children, giving date and place of birth of same.

"Section 5. If, upon the completion of the examination provided for under Section 4 hereof, the board concludes that, unless relief is granted, the mother will be unable to properly support and educate her children, and that they may become a public charge, it may make an order directing that there shall be paid to the mother, monthly, out of the county funds, the following amounts, for the maintenance and support of the children under sixteen years old; not more than twelve dollars for one such child; eighteen dollars for two children; and four dollars per month additional for each additional child; and it is provided further that said allowance or relief shall be discontinued after said child or any of said children as mentioned in Section 1 of this Act has reached the age of sixteen years."

The relief provided for by this act is a pension or gratuity and such may be given or withheld, subject to constitutional restrictions, to such persons and upon such terms or conditions as the Legislature may deem wise or expedient, and not otherwise, and one who would claim the benefit of such an act must bring herself clearly within the terms of the act; that is, must show that she is one of the class of persons for whom this act purports to provide relief.

It is evident that this act does not purport to provide assistance for any and all persons who may have assumed or who for any reason may have the care of indigent children under sixteen years of age. Neither does the act purport to provide relief for any and all indigent children within the ages specified. On the contrary, this act quite plainly purports to provide assistance for "a 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," and where, "unless relief is granted, the mother will be unable to properly support and educate her children, and that they may become a public charge."

The only person, then, that can claim under this act must be "the mother" of the child or children in question, and the child or children in question must be "her child or children." No others are included, and for that reason all others are excluded.

The expressions "mother of a child or children" and "the mother will be unable to properly support and educate her children," as here used, are common and ordinary expressions and obviously can have but one meaning. They clearly denote the woman who gave birth to the child or children in question and the child or children born of the woman in question. Neither in this nor in any true sense is a grandmother a mother nor are grandchildren her children. Neither would the adoption of a child or children by a grandmother make her the mother of such child or children nor make such child or children her child or children within the meaning of this act, nor in any true sense.

For the reasons here indicated we answer both of your questions in the negative.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2490, Bk. 58, P. 196.

#### CONSTITUTIONAL LAW—RETROACTIVE LAWS—OFFICERS' BONDS.

1. Statutes passed by the Thirty-eighth Legislature require county judges, county commissioners, sheriffs and county clerks to execute new and different

bonds within thirty days after the acts take effect, even though such officers have already executed bonds and qualified for the present term of office.

2. Such acts do not purport to operate on past conduct and are not retroactive legislation within the meaning of the Constitution.

3. The new bonds would affect only acts performed subsequent to the enactment of the new statutes.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 3, 1923.

*Hon. Thos. M. Jordan, County Attorney, Kountze, Texas.*

DEAR SIR: The Attorney General is in receipt of your inquiry of March 13, 1923, reading as follows:

"County officials of this county have asked me for advice relative to House Bills 77, 78, 79, and 80 passed by the present Legislature, with reference to bonds and oaths of certain officers, whether they should make new bonds for the succeeding two years.

"I have advised them that it is not necessary. That bond and oath that was in effect when such officers qualified is still legal and will be until the present term of office expires. That to require the making of a new bond at this time would place the Legislature in the attitude of passing a *retroactive law*, which is a violation of the Constitution, Article 1, Section 16.

"Please advise as to the opinion of that department relative to this matter."

*The Statutes to Be Construed.*

The statutes to which you refer and request an interpretation are House Bills Nos. 77, 78, 79 and 80 enacted at the Regular Session of the Thirty-eighth Legislature recently adjourned. It is not necessary for the purpose of this opinion to set out these statutes in full. It is sufficient to state that they amend the statutes relating to the official bonds of county judges, county commissioners, sheriffs and county clerks. They are all in substantially the same form except, of course, that the requirements as to the official bond of each officer are different in the various bills. They declare substantially that before entering upon the duties of his office the officer shall take the oath of office and enter into the bond required in these statutes. The conditions of the bond seem to be more onerous upon these officers, that is to say, the obligations of the officer and the sureties on his bond in each case are increased by reason of these statutes.

Each one contains a clause that the officer shall have thirty days from and after the taking effect of the act in which to execute and file said bond.

*The Question for Us to Decide.*

In view of the fact that these county officers all over the State have already qualified for their present terms, the question is presented whether it would not be retroactive legislation to require them to execute these bonds at this time. We have also received inquiries from several sources as to whether this statute contemplates that officers who have already qualified and executed official bonds must now for the present term execute and file bonds as provided in these acts.

*Our Conclusions and Reasons Therefor.*

After careful consideration this Department has concluded that it is the intention of the Legislature as disclosed by these acts that all

officers affected by them should at this time execute and file these bonds. We have further reached the conclusion that this is not retroactive legislation within the meaning of our constitutional inhibition against retroactive laws. We now state our reasons.

It could not be reasonably contended that the acts do not contemplate that these officers execute and file these bonds at this time, in view of Section 2 of each of these acts, which provides in each instance that the officers shall have thirty days from and after the taking effect of this act in which to execute and file said bond. The terms of these statutes make no exception in favor of officers who have already qualified, and this provision seems to have been placed in the bills for the express purpose of giving those officers who have already qualified and others who have not, a reasonable time after the taking effect of these acts in which to file this new bond; also probably to place beyond doubt the question as to whether it was intended that the acts should apply to officers who have been elected and qualified for the present term.

We do not believe the acts are to be stricken down as being retroactive, for the reason that they contain no language indicating any purpose or intent that they are to operate upon acts or conduct performed and happening prior to the taking effect of the acts. If the Legislature should have attempted to increase liabilities growing out of acts performed prior to the taking effect of the act, then it might have very reasonably been contended that they were unconstitutional as being retroactive. This is true because of the language of Section 16, Article 1, Constitution of Texas:

"No bill of attainder, ex post facto law, retroactive law or any other law impairing the obligation of contracts, shall be made."

In our opinion these acts do not come within the definition of retroactive laws. Retrospective statutes relate to past acts and transactions. Retroactive statutes are those which operate on such transactions and change their legal character or effect. Lewis' Sutherland, Vol. 2, Sec. 641, page 1157.

We find no provision in these bills making necessary a presumption that it was intended that they should operate upon past transactions. It is a rule of statutory construction, universally applied, that a statute will not be construed to be retroactive or retrospective in its operation unless that intention is clearly and unequivocally expressed. Lewis' Sutherland, Vol. 2, Sec. 641, page 1157.

The bonds required to be executed by these new laws would operate as to future acts and conduct only and not as to past acts or conduct. The old bond would take care of acts performed between the time the officer qualified and at least to the time of taking effect of the new acts. The new bonds would operate from that time on. We are not attempting to state the precise time that the old bond would cease to exist and the new bond would be operative, but are only attempting to impress the idea that it was not intended to make the new bonds retroactive.

Unless it could be established, therefore, that these public officers have a vested right in their offices and in the conditions under which they hold such offices for the present term, it is clear to our minds that these acts are not to be held invalid.

That these public officers have no such vested rights as to preclude the Legislature from requiring these bonds with additional conditions in them is perfectly plain to us from a reading and consideration of the authorities in this country. Up to a certain period there was one State, to wit, North Carolina, that held that the rights of a person in connection with a public office were analogous to those growing out of private contract, and for that reason that when a person was elected to a public office for a definite term he thereby acquired a vested right to the office for that term. However, even North Carolina abandoned this doctrine in the year 1903, as will be seen by an opinion of the Supreme Court of that State in the case of *State vs. Ellington*, 65 L. R. A., 697. The Supreme Court in that decision expressly overruled prior cases on the subject and stated in the opinion that it adopted and followed what the court was pleased to call the American doctrine on this subject. The opinion of the court is a well considered one and reviews practically all of the authorities on the subject, and only a casual examination of it is necessary to conclude that the overwhelming weight of authority in this country is in favor of the doctrine that the legislative power in a State may discontinue an office at any time, may change the duties of the office, may increase or decrease the compensation, without violating any constitutional rights of the office holder. This is held to be true, because the rights of the public are paramount to the private rights of the person holding the office; the office is created for the convenience and necessities of the government and the public and not to create private rights in the person who is elected to the office, and, therefore, when the public convenience requires it the private rights of the office holder must give way.

It has been well said that there is no such thing as a vested right or an estate in an office in this country. An office is a privilege as distinguished from an absolute right. 22 R. C. L., 376.

An office is a public trust or agency and is not held by contract or grant and the officer has no vested right therein. Subject to constitutional restrictions the office may be vacated or abolished; the duties thereof changed, and the term and compensation increased or diminished. 23 Am. & Eng. Ency. of Law, p. 328.

An office, not being based upon contract, is not affected by the provisions of the Federal Constitution inhibiting legislation impairing the obligation of contracts, and the Legislature may provide for the termination of an office during the term of the incumbent and may during such term diminish the compensation attached to the office or increase the duties of the office without increasing the compensation. 29 Cyc., 1367.

Our State Constitution does not prescribe the condition of the bonds of the county judge, county commissioners, county clerk or sheriff and for that reason it is within the province of the Legislature to prescribe what bonds these officers shall enter into. The officers took their offices with a knowledge of the power of the Legislature to enact laws affecting these offices, and they cannot complain, so far as the law and the Constitution are concerned, if the Legislature during the term of office adds new duties or new obligations in connection with their offices. It is only one of the burdens connected with public service.

We do not believe it could consistently be said, therefore, that the

acts under consideration are retroactive within the meaning of our Constitution.

If the Legislature has power (in the absence of an express constitutional provision relative to a particular office) to abolish an office, increase the duties, increase or decrease the compensation, etc., it would certainly have the power in its wisdom to require new bonds to be executed calculated to better safeguard the interests of the State or the county, as the case may be, in so far as future acts and conduct are concerned.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2486, Bk. 58, P. 362.

LEGISLATIVE ACTS—WHEN BILLS TAKE EFFECT—APPROVAL AND DIS-  
APPROVAL OF BILLS BY THE GOVERNOR.

1. An act of the Legislature making a general appropriation not otherwise directed therein, becomes effective as a law upon its passage whether approved by the Governor or disapproved by the Governor and finally adopted by both houses over said disapproval or whether allowed to become a law without the signature of the Governor.

2. An act passed by the Legislature not containing an emergency clause otherwise directing, shall become a law ninety full days after the adjournment of the session at which it was enacted whether approved by the Governor or disapproved and finally adopted over his veto or permitted to become a law without the Governor's signature.

3. An act passed by the Legislature with a valid emergency clause otherwise directing, becomes a law at the time mentioned in said act, provided the specified date therein allows full consideration by the Governor authorized by the Constitution.

4. An act of the Legislature with a valid emergency clause presented to the Governor ten full days before the adjournment of the session and specifying that it shall become a law upon its passage, becomes effective when approved by the Governor; or disapproved by the Governor and finally adopted by both houses over said disapproval; or when not returned to the Senate or House within ten days (Sunday excepted) after it has been presented to him.

5. An act of the Legislature with a valid emergency clause presented to the Governor less than ten full days before the adjournment of the session and specifying that it shall become a law upon its passage, becomes effective when approved by the Governor or when twenty full days shall have elapsed from the date of adjournment of the session and no objections filed and proclaimed by the Governor within that time.

6. Where a bill carrying an emergency clause and directing that it become effective on a date certain, passes the House and Senate under suspension of the rule requiring bills to be read on three several days, or passes both houses with three several days consideration, and the final passage in either instance is by recorded two-thirds vote, the bill becomes effective as directed by the Legislature. But if in final passage the House or Senate concurs in an amendment it must be by two-thirds recorded vote.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 26, 1923.

*Honorable S. L. Staples, Secretary of State, Capitol.*

DEAR SIR: The Attorney General's Department is in receipt of your letter of March 9th, in which you suggest that numerous inquiries reach your Department which require an interpretation of the consti-

tutional provisions relative to the exact date upon which various bills, orders and resolutions passed by the Legislature become effective as laws, etc., and you have suggested several questions which you desire to be answered, but in order to more fully exhaust the subject we have decided to include in our answer other kindred questions in order that you may have, for your information in one communication and your convenience in performing the various duties of your office, a ready interpretative discussion of the constitutional provisions.

1. All bills and acts of the Legislature, except general appropriation acts, receiving the approval of the Governor, or permitted to become laws without his approval, or finally passed over the Governor's veto, take effect and go into force, in the absence of an emergency clause specifying another time in which said bills become effective, ninety full days after the adjournment of the Legislature.

Article 3, Section 39, of the Constitution, reads as follows:

"No law passed by the Legislature, except the general appropriation acts, shall take effect or go into force until ninety full 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."

In calculating the exact day upon which a law becomes effective, there must be a lapse of ninety full days, exclusive of the day of adjournment and the ninetieth day thereafter, or, as it has been said: "The date of adjournment of the Legislature and the date upon which the act takes effect must both be excluded, and that beginning on the day after the adjournment, in computing the time, the act takes effect upon the first moment of the ninety-first day."

The general appropriation acts or bills composing a portion of the general appropriations, unless otherwise directed, become effective, however, upon their passage as the meaning of such is hereinafter defined. (Opinions of the Attorney General, 1914-16, page 691.)

2. Acts of the Legislature passed by two-thirds vote by all the members elected to each house in case of an emergency take effect at the time designated by the provision of the bill. (Article 3, Section 39, State Constitution.) The provisions of the bill or act must, therefore, be looked to in order to determine when such act becomes effective as a law.

However, the provisions contained in a bill as to the date when such act shall become effective shall not operate as to deprive the Governor of his constitutional right of consideration of such acts. The Governor must approve, disapprove or permit to become laws without his signature all bills which shall be passed by both houses of the Legislature. In determining what acts of the Legislature must receive consideration by the Governor, we call your attention to Article 4, Section 14, and also Section 15, which reads as follows:

"Sec. 14. Every bill which shall have passed both houses of the Legislature shall be presented to the Governor for his approval. If he approve, he shall sign it; but if he disapprove it, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon its journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members present agree to pass the bill, it shall be sent, with the objections, to the other house, by which it shall be likewise reconsidered; and

if approved by two-thirds of the members of that house, it shall become a law; but in such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the Governor with his objections within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent its return, in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment. If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect. If the Legislature be in session, he shall transmit to the house in which the bill originated, a copy of such statement and the items objected to shall be separately considered. If on reconsideration, one or more of such items be approved by two-thirds of the members present of each house, the same shall be part of the law, notwithstanding the objections of the Governor. If any such bill, containing several items of appropriation, not having been presented to the Governor ten days (Sundays excepted) prior to adjournment, be in the hands of the Governor at the time of adjournment, he shall have twenty days from such adjournment, within which to file objections to any items thereof and make proclamation of the same, such item or items shall not take effect."

In answer to the questions presented in your communication with reference to bills and acts of the Legislature carrying the emergency clause, we will at the outset quote the provisions of Section 14 of Article 4 in part relative thereto:

"If any bill shall not be returned by the Governor with his objections within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Legislature by its adjournment, prevents its return, in which case it shall be a law, unless he shall file the same with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment."

This provision has reference to all bills, resolutions, etc., except bills of appropriation.

The Governor has, therefore, pursuant to the above constitutional clause, ten days (Sundays excepted) within which to consider whether or not he shall approve or disapprove a bill. If a bill remains in the hands of the Governor without action for ten days from the date of its presentment to him, such bill carrying an emergency clause becomes a law at the expiration of the ten days, provided there is expressed stipulation in the bill that it shall become effective upon its passage. Of course, a bill containing an emergency clause and passed by the requisite number of votes may specify another date upon which it shall become operative.

In determining the length of time in which the Governor is allowed to return a bill to either house of the Legislature, Sundays are excepted and are not counted in computing the ten days, and it is well settled that when an act is to be done, such as returning a bill mentioned herein, within a limited number of days from the day on which it is presented, or in which an act is done, that day, or in this case, the day of presentment, is excluded. This is very patent, for if an act was to be required to be done within one day, it must be done on the same day on which it was required (62 Mass., 371; 17 N. W., 319;



19 Am. Rep., —); and since the returning of a bill must be accomplished within ten days, the period of time must be construed as including the last day of that time. (47 S. W., 422, 77 Am. Dec., 192, 47 N. E., 547.)

Now, if a bill carrying an emergency clause providing that it shall become effective immediately upon its passage should come into the hands of the Governor at a time within less than ten days from the expiration of the legislative session, another rule applies. This is made necessary by reason of the fact that the Governor would be unable to return a bill to the Legislature when that body was not in session. In such instance, the Governor has twenty days from the date of adjournment of the Legislature in which to approve or disapprove a bill or act, and should, in the first instance, said act or bill receive his approval carrying an emergency clause as above mentioned, it would come into immediate effect. In the second instance, said bill should be filed with the Secretary of State with his objections and notice given thereof by public proclamation within twenty days. Should the Governor permit a bill to become effective upon its passage, to remain in his office when such bill was presented to him at a time less than ten days before the adjournment of the Legislature, then twenty full days must elapse from the date of adjournment before said bill or act shall become a law. The provisions of the Constitution quoted must be construed so as to permit the Governor to have the full time provided therein for consideration of bills coming into his hands. In brief, ten days is allowed to him in cases where bills have been presented to him within which he may return said bill to the Legislature, but in case he cannot return said bill to the Legislature, then he has twenty days from the date of adjournment in which to file his objections to the bill and prevent its becoming a law.

In computing the twenty days here mentioned, Sundays are to be included, but the day of adjournment must be excluded and the last day mentioned in the period is included. (Ibid., 140 S. W., 401.)

Many bills have been passed with emergency clause suspending the constitutional provision requiring bills to be read on three several days, contained in Section 32, Article 3, of the Constitution, and also suspending the rule that bills shall become effective ninety days after adjournment of the session, contained in Section 39, Article 3, of the Constitution, where some amendment was added either by the Senate or the House, which was required to be concurred in by the other branch of the Legislature. This concurrence in amendment, as the certificates of the clerks of the House and Senate show, was not passed with a two-thirds vote.

You desire to be informed as to whether or not such laws become effective upon their passage or at the time directed in the bill. Section 39, Article 3, reads as follows:

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

In the particular instance mentioned above, this Department in

1897, April 8th, in an opinion by Office Assistant Attorney General T. A. Fuller, held that a two-thirds recorded vote by the Senate is necessary in concurring upon a House amendment. We follow that decision in answering the question presented here and extend it to cover the converse situation where the House concurs in a Senate amendment.

In addition to the reasons advanced in the former opinion and authorities there cited, we desire to call attention to the following:

First. The language of the section giving power to the Legislature in cases of emergency specifies that "The Legislature shall—by a vote of two-thirds of all the members elected to each house—otherwise direct," the votes must be recorded. While a bill for purposes of amendment is the same bill throughout the legislative procedure prior to its delivery to the Governor, yet both houses must direct as to when a bill becomes effective on the identical proposed law. The House may direct a certain bill to become effective within sixty days. The Senate may likewise do so, but upon the same bill changed and altered. In such instance the Senate has directed a different proposed law to become effective on a date certain than the proposed law upon which the House acted in this regard. In respect to the expressed will of the Legislature on the effective date of a bill both branches of the Legislature must act upon identical provisions. This necessarily requires two-thirds recorded vote to concur on amendments after one branch of the Legislature has delivered to the other bill theretofore passed pursuant to constitutional requirements.

Second. The language embraced in this section requires that the Legislature shall otherwise direct—by declaring an existing emergency and a two-thirds recorded vote. The singular is used with the word "vote." No specific stage in the progress of a bill through the legislative procedure is mentioned as the stage when the Legislature shall direct as to when the bill becomes effective. If the rule were otherwise than announced above, it might occur that a two-thirds recorded vote on a given bill on its first reading would result in making the law thereafter amended and altered effective as directed on the first reading. It would therefore deprive members of the House and Senate from exercising their full rights as a member on the question under discussion. True it is, or reasonably so, that the altering or amendment of a bill would be calculated to change the attitude of individual members of the House on the point of effectiveness of the law. To husband the right of each member on the question of the date of the effectiveness of the given law, we follow the rule announced above.

Third. To hold that a two-thirds recorded vote is unnecessary in concurring on such amendment, we must conclude that in some prior stage of the procedure of a bill it was finally passed. Two lines of authorities exist on the definition of final passage. While the wording of our statute is sufficient to support the conclusion above, yet if it be necessary to adhere to or resist one of the two lines of authorities mentioned, we would embrace the holding that voting upon such an amendment as we have before us is voting upon the final passage of the bill. (*Norman vs. Board of Managers*, 20 S. W., 901; *Glenn vs. Wray*, 36 S. E., 161, 18 L. R. A., 556; *contra*, *State vs. Corbett*, 32

S. W., 686; Brake vs. Collision, 122 Fed., 722; Hull vs. Miller, 4 Neb., 503.)

The cases holding that such an amendment is not final passage may be accounted for on the proposition that the courts were undertaking to sustain the validity of an act of the Legislature which under the particular constitutions were required to be finally passed by two-thirds recorded vote. The validity of the law was in question and not the lesser thing—the date of its effectiveness.

Fourth. The intention of the Legislature unexpressed, nor the fact that such inaction occurred by mistake or accident, is unavailing, since neither is sufficient to suspend the constitutional declaration that in the absence of a recorded two-thirds vote a law becomes effective ninety days after adjournment.

Fifth. No inconvenience results in legislative procedure from this construction such as causing repeated readings of a bill. Furthermore, the Constitution has prescribed a specific procedure in such matters which must be rigidly adhered to.

We desire it to be understood that the opinion here passes on the single question that when a bill has passed the House and Senate with a two-thirds recorded vote, containing the emergency clause and directing that it become effective on a date certain, either under the four-fifths suspension rule or having been read the requisite number of times, that thereafter the House or Senate in concurring on an amendment must do so with the recorded two-thirds vote.

In conclusion, we make the following summary:

1. An act of the Legislature making a general appropriation not otherwise directed therein, becomes effective as a law upon its passage whether approved by the Governor or disapproved by the Governor and finally adopted by both houses over said disapproval or whether allowed to become a law without the signature of the Governor. There is no constitutional objection, however, why the Legislature may not direct an appropriation bill to become effective at any time, provided no other constitutional restriction is violated nor shall such appropriation of money be made for a longer term than two years. (Article 8, Section 6, Constitution, 1876.)

2. An act passed by the Legislature not containing an emergency clause otherwise directing, shall become a law ninety full days after the adjournment of the session at which it was enacted whether approved by the Governor or disapproved and finally adopted over his veto or permitted to become a law without the Governor's signature.

3. An act passed by the Legislature with a valid emergency clause otherwise directing becomes a law at the time mentioned in said act, provided the specified date therein allows full consideration by the Governor authorized by the Constitution.

4. An act of the Legislature with a valid emergency clause presented to the Governor ten full days before the adjournment of the session and specifying that it shall become a law upon its passage becomes effective when approved by the Governor; or disapproved by the Governor and finally adopted by both houses over said disapproval; or when not returned to the Senate or House within ten days (Sunday excepted) after it has been presented to him.

5. An act of the Legislature with a valid emergency clause pre-

sent to the Governor less than ten full days before the adjournment of the session and specifying that it shall become a law upon its passage becomes effective when approved by the Governor or when twenty full days shall have elapsed from the date of adjournment of the session and no objections filed and proclaimed by the Governor within that time.

6. Where a bill carrying an emergency clause and directing that it become effective on a date certain passes the House and Senate under suspension of the rule requiring bills to be read on three several days, or passes both houses with three several days consideration, and the final passage in either instance is by recorded two-thirds vote, the bill becomes effective as directed by the Legislature, but if thereafter the House or Senate concurred in an amendment it must be by two-thirds recorded vote.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2506, Bk. 58, P. 137.

CONSTITUTIONAL LAW—AMENDMENTS—PUBLICATION OF AMENDMENTS.

1. The provision of the Constitution requiring proposed amendments to the Constitution to be published once a week for four weeks commencing at least three months before an election, is mandatory; and failure to comply therewith is fatal to the adoption of any proposed constitutional amendments.

2. House Joint Resolution No. 16, submitting to the people the proposed highway amendment to the Constitution to be voted upon the fourth Saturday in July, 1923, was not sent to the newspapers for publication until June 4th, 1923, and no publication began until after that date, and since less than two months will have elapsed, between the first publication and the date of the election, the constitutional provision as to publication cannot have been complied with on the date set for the election, and, therefore, the proposed amendment cannot be adopted at such election and it is not necessary to hold the election.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 9, 1923.

*Honorable C. W. Payne, Acting Secretary of State, Austin, Texas.*

DEAR SIR: Attorney General W. A. Keeling is in receipt of yours of the 5th instant, reading as follows:

"Referring to the matter of publication of the constitutional amendment, same being H. J. R. No. 16, submitted by the Thirty-eighth Legislature at its Regular Session, copy of which is attached hereto, which resolution is to be voted upon at an election to be held the fourth Saturday in July, 1923.

"Section 1 of Article 17 of the Constitution of this State reads as follows:

"How the Constitution is to be amended.—The Legislature, at any biennial session, by a vote of two-thirds of all the members elected to each house, to be entered by yeas and nays on the Journals, may propose amendments to the Constitution, to be voted upon by the qualified electors for members of the Legislature, which proposed amendments shall be duly published once a week for four weeks, commencing at least three months before an election, the time of which shall be specified by the Legislature, in one weekly newspaper of each county in which such newspaper may be published; and it shall be the duty of the several returning officers of said election to open a poll for and make returns to the Secretary of State of the number of legal votes cast at said election for and against said amendment; and if more than one be proposed, then the number of votes cast for and against each of them; and if it shall

appear from said return that a majority of the votes cast have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of this Constitution, and proclamation shall be made by the Governor thereof.'

"The amendment, copy of which is hereto attached, as above referred to, was transmitted in a letter from this Department dated June 4, 1923—one to at least one newspaper in each county—said letter of transmission reading as follows:

"H. J. R. No. 16.

"*To the Publisher of . . . . . County, . . . . . Texas.*

"DEAR SIR: In conformity with the requirements of Section 1, Article 17, of the Constitution of the State of Texas, I herewith hand you for publication in your paper once a week for four consecutive weeks, commencing with your first issue after the . . . . . day of . . . . ., 1923, an amendment to the State Constitution proposed by the Thirty-eighth Legislature by resolution adopted by the two houses, amending Article 8 of the Constitution of Texas, relating to taxation and revenues. You will please publish the same in your weekly paper for four weeks in accordance with the provisions of the Constitution and return to me your bill for such publication in accordance with Chapter 84, Section 7, General Laws, Second Called Session of the Thirty-sixth Legislature, and any amendments thereto, which provides that bills must be accompanied with copy of advertisement and affidavit as to the correctness of same, with dates of publication attached thereto. You will note form of said account to be made out below. The price for this advertisement, four insertions as filed by law, will be \$17.28.'

"Please tear off the acknowledgment slip at the bottom of this sheet and return at once to this office in one of the envelopes herewith enclosed that I may know the advertisement will appear in your paper as specified above.

"Very truly yours,

"S. L. STAPLES,

"Secretary of State.'

"In view of the fact that under the circumstance of it being a fact that it will be, and was a physical impossibility for said amendment to be published for four weeks, commencing at least three months before an election, I beg that you advise with reference to the legality of publication that was, or will be made subsequent to June 4, 1923, as being a compliance with the requirement of the aforesaid constitutional provision, and if said constitutional provision aforesaid is the law in the premises.

"Please advise also as a result of your findings aforesaid as to the legality of any election held in this State on the fourth Saturday in July looking to the adoption or rejection of said constitutional amendment.

"Please advise also what the duty of this Department is in the premises, based upon your findings in answer to the above questions.

"I will state as a matter of information that inquiries have been made of this Department, and the public will be interested in whether or not the amendment has, or is being published as required by law, as also whether or not the election which may be held on the fourth Saturday in July will be a legal adoption or rejection of this said amendment.

"I will state that this matter was called to my attention by an item in the press of date July 4th, and looking into the matter I find the record as above stated, and I have consulted the Secretary of State and, while he is ill at home, he has concurred that I, as Acting Secretary of State, submit the matter to you for an opinion in the premises."

It will thus be seen that the main question upon which you desire an opinion of this Department is whether failure to publish the proposed amendment beginning at least three months prior to the date of the election, is fatal; or whether, on the other hand, publication beginning June 4th, or thereafter (the election to be held July 28th) will be sufficient.

From your communication it appears that printed copies of the resolution were mailed out to newspapers for publication on June 4,

1923, and, therefore, the publication of the proposed amendment could not begin at least three months before the election. As a matter of fact, even if we calculate the beginning of publication from June 4th, the date on which the Secretary of State mailed out the resolution to the newspapers, the earliest publication would be less than two months prior to the date set for the election on the proposed constitutional amendment.

You are respectfully advised that it is the opinion of this Department that the beginning of publication of a proposed constitutional amendment at least three months prior to the date of the election is absolutely essential to the validity of the adoption of the amendment by reason of constitutional mandate; and since no publication began in this instance until on or after June 4, 1923, and the election on the amendment was set by the legislative resolution for the fourth Saturday in July, 1923, there cannot be adequate compliance with the Constitution with respect to publication, and any favorable vote on the amendment would be ineffective, and the proposed amendment would not become a part of the Constitution. The provision of the Constitution requiring publication of amendments to begin at least three months prior to the election is mandatory and compliance therewith is indispensable to the validity of an election having for its purpose the adoption of such an amendment.

We are forced to the above conclusion not only because of the plain and easily understood provision of the Constitution, but from well-established principles of constitutional interpretation as disclosed by text writers, court decisions, and encyclopedias of law.

The Constitution plainly says that the publication of proposed amendments shall begin at least three months prior to the election. The wording is too plain for doubt; but even if there were a doubt and we were forced to find a probable reason for such a requirement, it would not be difficult to do so. The changing of the fundamental law is of so great importance to the people that, evidently, the framers of the Constitution thought that it ought not to be too easy to alter it; that provision should be made for officially notifying the people as to any proposed change in the Constitution, and for this there are undoubtedly two very good reasons, or purposes: first, this notice was evidently required so that actual notice to the people might be assured; second, in order that the people might have ample time to study and understand any proposed change and determine for themselves the probable effect, as well as the desirability of a change. Evidently, to accomplish these purposes, the people themselves, in adopting the Constitution, deemed essential publication in newspapers throughout the State to begin at least three months prior to the election; at any rate, we find such a provision in Article 17 of the Constitution. Having placed it there, everyone, including the people themselves, are bound thereby until the Constitution is altered in this regard. It would be a strange procedure to disregard or disobey an existing provision of the Constitution in order to make more constitutional provisions; if we violate one in making another, what assurance have we that the one we are about to adopt will not also be ignored?

Provisions of this kind will not be considered as merely directory. Statutory provisions are sometimes held to be directory, but this rule as to the construction of statutes does not apply with equal force to

constitutions. A constitution is supposed to be an outline of government, and it is not to be presumed that unimportant and non-essential provisions are inserted therein.

If it had been the intention of the framers of the Constitution to make this provision directory, they could have left to the Legislature or some other agency to determine upon a reasonable means of notifying the people of the approach of an election to amend the Constitution. But they did not do this. Having deemed it absolutely necessary to require a certain amount of notice to be given, and having expressly and particularly prescribed that notice should be given at least three months prior to the election, we cannot reach the conclusion that it was intended to be directory only, without making the Constitution a mere suggestive instrument, recommending what ought to be done *but commanding nothing*.

#### *Constitutional Provision Mandatory.*

Let us look into the authorities and see what the rule is as to provisions of the Constitution being mandatory or directory.

Judge Cooley in his work on Constitutional Limitations, seventh edition, pages 109-119, goes into the question at some length in respect to both statutes and constitutions. After discussing some of the court decisions and stating the rule in respect to directory and mandatory statutes, Judge Cooley says, at page 114 (as to statutes):

“Even as thus laid down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the Legislature.”

Then this eminent jurist shows in strong language that the same rule is not to be applied in construing constitutions. Thus at pages 114-15 we find this language:

“But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish these fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.”

We also quote the following from Judge Cooley's work, page 115:

"There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application."

Then, again, at page 119, this language appears in Judge Cooley's book:

"And we concur fully in what was said by Mr. Justice *Emmot* in speaking of this very provision, that it will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative."

In Vol. 6 of Am. & Eng. Ency. of Law, page 928, we find the general rule as to constitutional provisions being directory and mandatory, stated as follows:

"Constitutional provisions are understood to be mandatory unless by express provision, or by necessary implication, a different intention is manifest."

Particularly as to amending the constitution the rule, given in the same work at page 904, is as follows:

"Provisions of a constitution regulating its own amendment, otherwise than by a convention, are generally to be considered mandatory rather than directory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment. These provisions are as binding on the people as on the Legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the Constitution."

Then, on page 906, this language appears:

"Publication of a proposed amendment is a usual requirement and must be made in the time and manner prescribed. But a constitutional clause requiring amendments proposed by one Legislature to be published for three months next preceding the election of its successor is complied with by publication in the printed edition of the statutes issued eighteen months prior thereto."

The authority cited under this text in support of the latter statement, to the effect that publication in a printed edition of the statutes complied with the constitutional requirement, is the case of *State vs. Grey*, 21 N. W., 378. But in that case the Constitution simply directed that amendments "shall be published for three months next preceding the time of making such choice." The court held that no mode of publication was prescribed by the Constitution and, therefore, the mode was left to the discretion of the Legislature and that publication by means of the official printed laws was a compliance. It is notable that in that case the attorneys called attention to the fact that the constitutional provision with reference to amendments was taken from the Constitution of California, which provided for publication of proposed amendments in a newspaper; and the attorneys argued that the omission of such provision in the Nevada Constitution showed that the mode of publication was left to the Legislature. The court in its decision also mentioned the fact that other constitutions prescribed that the publication should be in newspapers.

We also call attention to the fact that the session laws in Texas were not printed in time to serve as a publication for three months prior to the election on this amendment, and, for that reason no con-



tention could be made in this regard that there has been a compliance with the Constitution in respect to notice.

The rule relative to constitutional provisions as to amending constitutions is stated in 12 C. J., pages 688-9, with citation of authorities as follows:

"Provisions of a constitution regulating its own amendment, otherwise than by a convention, are not merely directory, but are mandatory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment. These provisions are as binding on the people as on the Legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the Constitution. The constitutionality of an amendment to the Constitution is a judicial question."

It will be noted that "the constitutionality" of amendments to the Constitution is a judicial question.

At page 693 of 12 C. J., we also find this language:

"Publication of a proposed amendment is a usual requirement, and must be made within the time and in the manner prescribed."

6 R. C. L., at page 31, states that

"the general rule is that an amendment to a Constitution does not become effective as such, unless it has been duly adopted in accordance with the provision of the existing Constitution. The proceedings and requirements established for the amendment of the fundamental law must be strictly followed, and none of the requisite steps may be omitted."

The doctrine that constitutional provisions are mandatory prevails in this State, as evidenced by our court decisions. In *Hunt vs. State*, 22 Texas App., 396, 3 S. W., 233, a full discussion of the subject and citation of authorities will be found. The Court of Appeals in that case quoted, among other authorities, Judge Cooley, with approval. After calling attention to some authorities tending to hold to the contrary, Judge Wilson, in the case just cited, said:

"But, notwithstanding these decisions are by able courts, the great weight of authority seems to be the other way, holding that the courts nor any other department of the government are at liberty to regard any provision of the Constitution as merely directory, but that each and every of its provisions must be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes."

We quote further from this decision from page 235, as follows:

"In our own State we know of no instance in which a constitutional provision has been held to be directory merely. This court has more than once held that constitutional provisions are always mandatory, and has adopted the doctrine laid down by Judge Cooley, which we have quoted above. *Cox vs. State*, 8 Texas App., 254; *Holley vs. State*, 14 Texas App., 505. We believe this to be the sound and only safe doctrine. It seems to us that the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory and to obey it or not, at their pleasure, is fraught with great danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. We are taught by the Constitution itself that those who administer this government are divided into three co-ordinate departments. Each of these can only act within its own limited sphere, and they, respectively, are the servants of the sovereign power, the people. There is no discretionary power granted in the Constitution for either of these departments, nor for all of them united, to exercise a discretionary expansion and flexible power against its rigid limitations, even though such limitations were imposed by improvident jealousy. If abuse exist by reason of

defects in the Constitution, present or prospective, the true source of authority, the people, have the power, and doubtless the wisdom and patriotism, to correct them; and this, in the American idea, is the safe and only depository.' Potter's Dwar. St., 655."

The court further said in its opinion:

"Upon the weight of authority, and, to our minds, upon the soundest of reasons, we conclude that the provision of the Constitution under consideration, and all other provisions of our Constitution, are mandatory, and can in no case be regarded as directory merely, to be obeyed or not within the discretion of either or all of the departments united of the government."

From the case of *Ex parte Anderson*, 46 Texas Cr., 378, 81 S. W., 973, by the Court of Criminal Appeals, we take the following, which, as will be noted, cites many authorities:

"With reference to the construction of Constitutions, we have always been taught that the words of that instrument are mandatory. *State vs. Connor*, 86 Texas, 133, 23 S. W., 1103; *Higgins vs. Bordages*, 88 Texas, 466, 31 S. W., 52, 803, 53 Am. St. Rep., 770; *Chase vs. Swayne*, 88 Texas, 227, 30 S. W., 1049, 53 Am. St. Rep., 742; *Willi vs. Owen*, 43 Texas, 41; *Storrie vs. Cortes*, 90 Texas, 283, 38 S. W., 154, 35 L. R. A., 666; *Hutcheson vs. Storrie*, 92 Texas, 685, 51 S. W., 848, 45 L. R. A., 289, 71 Am. St. Rep., 884; *Cannon vs. Hemphill*, 7 Texas, 184; *Giddings vs. San Antonio*, 47 Texas App., 548, 26 Am. Rep., 321; *Hunt vs. State*, 7 Texas App., 212; *Cox vs. State*, 8 Texas App., 254; 22 Texas App., 396, 3 S. W., 233, 34 Am. Rep., 746; *Taylor vs. State*, 14 Texas App., 345; *Hawaii vs. Mankichi*, 190 U. S., 197; 23 Sup. Ct., 787, 47 L. Ed., 1016; *United States vs. Dorr*, 23 Sup. Ct., 859, Append., 47 L. Ed., 1187, Append.; *Powell vs. State*, 17 Texas App., 345; *Cline vs. State*, 36 Texas Cr. Rep., 320, 36 S. W., 1099, 37 S. W., 722, 61 Am. St. Rep., 850; *Hatch vs. State*, 10 Texas App., 515; *Ex Parte Ginnichio*, 30 Texas App., 584, 18 S. W., 82; *Davis vs. State*, 15 Texas App., 479; *Whitener vs. Belknap*, 89 Texas, 273, 34 S. W., 594; *Lynn vs. State*, 33 Texas Cr. Rep., 34, 153, 25 S. W., 779; *Titus vs. Latimer*, 5 Texas, 433; *Sun Vapor Electric Light Co. vs. Kenan*, 88 Texas, 197, 30 S. W., 868; *Stockton vs. Montgomery*, Dallam, Dig., 480; *People vs. Albertson*, 55 N. Y., 50; *Rathbone vs. Wirth* (N. Y.), 45 N. E., 15, 34 L. R. A., 408; *Van Horne's Lessee vs. Dorrence*, 1 L. Ed., 391; *Calder vs. Bull*, 1 L. Ed., 648; *Cooley*, Const. Lim., 5, 57, 182, 184, 400; *Sturges vs. Crownshield*, 4 Wheat., 202, 4 L. Ed., 529; *Newell vs. People*, 7 N. Y., 9, 97; *People vs. Purdy*, 2 Hill, 31; *Oakley vs. Aspinwall*, 3 N. Y., 547; 3 Amer. & Eng. Ency. of Law, 379."

From the foregoing we think it appears to be fairly well established in the jurisprudence of this country that provisions of constitutions prescribing modes of amendment to the fundamental law are to be interpreted as mandatory and not merely directory.

We come now to an examination of cases in which the question we have before us is involved, in order to determine how this general rule has been applied in actual practice.

The courts of Texas do not seem to have been called upon to pass upon the exact question under consideration, but such is not the case in other States. We find that the question has been decided in other States under similar constitutional provisions.

#### *The Court Decisions.*

We can get some assistance from decisions of the courts of other States on similar questions. The courts of at least three States have been called upon to pass upon substantially this question and have decided as we have decided here, that failure to publish in the manner and for the time prescribed is fatal to proposed constitutional amendments.

McCreary vs. Speer, 156 Ky., 783, 162 S. W., 99.  
State vs. Tooker, 15 Mont., 8, 37 Pac., 840. 25 L. R. A., 560.  
State vs. Davis, 20 Nev., 220, 19 Pac., 894.

These cases are in point and are entitled to great weight since they are decided under very similar circumstances to those with which we are confronted.

In *McCreary vs. Speer*, just cited, the Supreme Court of Kentucky passed upon a question almost identical with the one now under consideration in this opinion. The Secretary of State had failed to publish for ninety (90) days as required in the Constitution and had published for a period of about sixty days. The Constitution of the State of Kentucky contained this provision:

"Before an amendment shall be submitted to a vote, the Secretary of State shall cause such proposed amendment, and the time that the same is to be voted upon, to be published at least ninety days before the vote is to be taken thereon in such manner as may be prescribed by law. Section 257."

At the Regular Session of 1912, the General Assembly of the State of Kentucky submitted to the people a proposed amendment to the Constitution of that State to be voted on at the regular November election in 1913, and on that date vote was taken upon the amendment and after the result of the election had been certified, action was brought by a taxpayer to restrain the proclaiming of the amendment as having been adopted. There was an agreed statement of facts which showed that the Secretary of State, by an oversight, failed to cause the amendment to be published ninety days before the election in two newspapers of general circulation as directed by Section 257 of the Constitution and Section 1459 of the Kentucky statutes; but the Secretary of State did cause the amendment to be published in two newspapers of general circulation as is directed by the Constitution and statutes for at least sixty (60) days before the vote was taken on the constitutional amendment. It was further agreed that the oversight on the part of the Secretary of State caused said amendment to be advertised more thoroughly than it would otherwise have been advertised. We quote literally from the court's statement of the case the following in order to show more fully the remaining facts, not stated above:

"In February, 1913, the Tax Commission authorized by House Resolution No. 24, which will be found on page 680 of the Acts of 1912, made a report to the Governor of Kentucky, and in this report this Commission set out the constitutional amendment and called attention to the fact that it would be submitted to the people at the regular November election, 1913. Five thousand copies of this report were printed and distributed throughout Kentucky, and the Louisville Courier Journal, a daily paper of general circulation published in the city of Louisville, published this report in full. Said 5,000 copies of said report were distributed and said publication in the Courier Journal was made more than 90 days before the November election, 1913. Long prior to the November election, 1913, a committee composed of citizens living in different parts of the State was organized. Headquarters were opened in the city of Frankfort. H. M. Froman was chairman of said committee. This committee, through correspondence and through advertisement inserted in the daily and weekly papers published in the State of Kentucky, advertised the proposed amendment to the Constitution. As a result of the advertisement caused to be made by the Secretary of State and the other advertisements herein referred to, more than 100,000 people voted for and against this amendment. The vote was certified to the Secretary of State. He in turn certified said vote to the Governor,

There is attached hereto and made part hereof a statement showing the vote for and against the amendment in all the counties not contained in this statement will increase the majority in favor of said amendment.

"The statement of the vote attached shows that 65,978 persons voted for the amendment and that 32,478 voted against it; or that 98,456 persons voted upon the question, exclusive of the four counties not contained in the statement. The circuit court granted the relief sought. The defendant appeals."

In further stating the case, the court said:

"It will be observed that by Section 257 of the Constitution, before an amendment shall be submitted to a vote, the Secretary of State shall cause such proposed amendment, and the time that the same is to be voted upon, to be published at least 90 days before the vote is to be taken thereon in such manner as may be prescribed by law; the Constitution thus fixing the length of time for which the publication must be made and leaving to the Legislature to determine only the manner of the publication. The Legislature provided that the Secretary of State shall cause such proposed amendment to be published at least four times in two papers of general circulation published in the State and shall also cause to be published at the same time and in the same manner the fact that the constitutional amendment will be submitted to the voters for their acceptance or rejection at the next general election at which the members of the General Assembly are to be voted for; the publication to be so made that the last publication shall be at least 90 days preceding the election. It will also be observed that the Secretary of State did not make the publication for 90 days but only for 60 days before the vote was taken on the constitutional amendment. The question to be determined is: Did this mistake of the Secretary of State invalidate the proceeding, or is the provision of the Constitution requiring the publication to be made for 90 days mandatory or merely only directory?"

It will thus be seen that the court conceded the question to be whether the provision in the Constitution requiring ninety days' publication was mandatory, or merely directory. In discussing this point, the court said:

"In *Varney vs. Justice*, 86 Ky., 600, 6 S. W., 459, 9 Ky. Law Rep., 744, we said: 'By the term "directory," it is meant that the statute gives directions which ought to be followed, but the power given is not so limited by the directions that it cannot be exercised without following the directions given. In other words, if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely. Should this rule of construction be applied to the Constitution of the State? We think not. The Constitution of the State was adopted by the people of the State as the fundamental law of the State. This fundamental law was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it. It was intended by the people that all departments of the State government should shape their conduct by this fundamental law. Its every section was doubtless regarded by the people adopting it as of vital importance and worthy to become a part and parcel of the constitutional form of government by which the governors as well as the governed were to be governed. Its every mandate was intended to be paramount authority to all persons holding official trusts in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be ingrafted in it; but each section and each article was solemnly weighed and considered and found to be essential to the form of constitutional government adopted. Whenever the language used is prohibitory, it was intended to be a positive and unequivocal negation. Whenever the language gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed and in no other manner. It is an instrument of words, granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit except the spirit to be found in them. To say that these words are directory merely is to license a violation of the

instrument every day and every hour. To preserve the instrument inviolate, we must regard its words, except when expressly permissive, as mandatory, as breaching the spirit of command."

The court then quoted from a former Kentucky case, as follows:

"The instrument provides for amendment and change. \* \* \* If it provides how it is to be done, then, unless the manner be followed, the judiciary, as the interpreter of that Constitution, will declare the amendment invalid."

After citing and quoting from other authorities to the effect that constitutional provisions relative to amendments are to be considered as mandatory, the court says that the provisions of the Constitution must be considered as mandatory even though no express provision is contained in that instrument to that effect, using this language:

"It is true our Constitution contains no provision to the effect that all its provisions are mandatory; but we deem this immaterial for the reason that this court had held before the adoption of the present Constitution that all the provisions of a Constitution are mandatory; and the Constitution must be presumed to have been adopted with this understanding of its meaning. Since the adoption of the Constitution the court has steadily maintained the same rule. There could be no reason for inserting in the Constitution the length of time for which the publication of the proposed amendment must be made unless it was intended to be mandatory, for otherwise there was no reason for not leaving the whole matter to the Legislature."

Discussing the question of substantial compliance with the Constitution requiring ninety days' publication, the court uses this language after mentioning some authorities holding that there was a substantial compliance under the facts of those cases:

"But we do not see that a publication for 60 days can be said to be a substantial compliance with the requirement that the publication shall be made for 90 days. The Constitution requires the publication to be made by the Secretary of State, an officer created by the Constitution. Publications made by private persons cannot take the place of the publication required by the Constitution, and we cannot assent to the conclusion that the notices in the newspapers calling attention to the failure of the Secretary of State to make the publication required by the Constitution can take the place of the publication by him, for, while this may have drawn public attention sharply to the matter, many persons, when they learned that the required publication had not been made, may have thought that the constitutional amendment could not legally be voted on at the election. The fact that about 100,000 people out of a vote of over 400,000 voted on the amendment is not assuring that the voters of the State properly understood the matter. But for the provisions of the Constitution on the subject it could only be amended by a convention called for this purpose. The framers of the Constitution evidently intended to restrict amendments. The Constitution may be set aside by revolution, but it can only be amended in the way it provides."

The court further held that a publication in the printed Session Acts was not to be considered as a compliance with the Constitution in respect to ninety days' publication, saying:

"The publication of the proposed amendment in the Session Acts is not such a publication as Section 257 of the Constitution contemplates, for it makes it the duty of the Secretary of State to cause the proposed amendment and the time that the same is to be voted upon to be published at least 90 days before the vote is to be taken thereon, in such manner as may be prescribed by law; and Section 1459, Ky. St., which was intended to carry into effect the constitutional provision, prescribes how this publication shall be made. The framers of the Constitution intended to leave to the Legislature to determine the form of the publication and the manner of it (that is, whether it should be by hand bills or in the daily press or in the county papers, etc.); and, when the Legisla-

ture prescribed the manner of the publication, to ignore its requirement is to ignore the constitutional provision itself. It is true we have held that where by law an election is to be held at a given time, and the statute also requires notice to be given of the election, the statute will be held directory, and a failure to give the notice will not invalidate an election fairly held. *Berry vs. McCullough*, 94 Ky., 247, 22 S. W., 78, 15 Ky. Law Rep., 117; *McCreary vs. Williams*, 153 Ky., 49, 154 S. W., 417, and cases cited. But to apply this rule to a constitutional provision would be to hold the constitutional provision directory and not mandatory."

Answering the argument that such a construction places it in the power of one man to defeat the will of the people and prevent an amendment to the Constitution, the court said:

"It is argued that this conclusion puts it in the power of an officer of the State to defeat the will of the people and prevent an amendment of the Constitution; but the Secretary of State is an officer created by the Constitution. The duty to publish the proposed amendment is a duty imposed by the Constitution, and, when the Constitution has provided that it may only be amended when certain things have been done by the agencies it selects for that purpose, to amend the Constitution in any other way is to ignore its provisions."

The court concluded its opinion by stating in substance that the fact that a majority voted for the amendment was not sufficient where the Constitution had not been complied with in respect to notice; and furthermore that it was a judicial question to determine whether a proposed amendment has been legally adopted, or not. In closing its opinion, the court said:

"The fact that a majority voted for the amendment, unless the vote was taken as provided by the Constitution, is not sufficient to make a change in that instrument. Whether a proposed amendment has been legally adopted is a judicial question, for the courts must uphold and enforce the Constitution as it is written until it is amended in the way which it provides for. *Wood vs. Tooker*, 15 Mont., 8, 37 Pac., 840, 25 L. R. A., 560; *McConaughy vs. State*, 106 Minn., 409, 119 N. W., 408; *Oakland Paving Company vs. Hilton*, 69 Cal., 499, 11 Pac., 3; *Utter vs. Moseley*, 16 Idaho, 274, 100 Pac., 1058, 133 Am. St. Rep., 94, 18 Ann. Cas., 723.

"Judgment affirmed. Whole court sitting, except Nunn, J., who is absent."

#### *Montana Case.*

A case no less emphatic in its holding is the Montana case, *State vs. Tooker*, above cited. The question in that case was whether a constitutional amendment proposed by the Legislative Assembly by Act of February 23, 1891, and voted upon by the electors at the general election in November, 1892, became and was at the time suit was filed (1894) a part of the Constitution. The facts in relation to the alleged adoption of the proposed amendment were as follows:

"The State Constitution, adopted October 1, 1889, contains the following: 'In each county there shall be elected three county commissioners, whose term of office shall be four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs.' Article 16, Sec. 4. The act of the Legislative Assembly referred to, approved February 23, 1891, provides as follows: 'Section 1. There shall be submitted to the qualified electors of the State, at the next general election, the following amendment to the State Constitution: Section 4, Art. 16, shall be amended so as to read as follows: Sec. 4. In each county there shall be elected three county commissioners, whose term of office shall be four years; provided, that the term of office of those elected to succeed those elected October 1, 1889, shall expire on the first Monday in January, 1895; and, provided further, that at the general election to be held in November, 1894, one

commissioner shall be elected for a term of two years, and two commissioners for a term of four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs.' The Constitution provides, as to amendments of that instrument, as follows: 'Amendments to this Constitution may be proposed in either house of the Legislative Assembly; and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendment, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the Secretary of State shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be), for *three months previous to the next general election* for members to the Legislative Assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the State for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of the Constitution. Should more amendments than one be submitted at the same election, they shall be so prepared, and distinguished by numbers, or otherwise, that each can be voted upon separately; provided, however, that not more than three amendments to this Constitution shall be submitted at the same election.' Article 19, Sec. 9. The fact as to the publication of the amendment proposed by the Act of February 23, 1891, is that it was published by the Secretary of State in the newspapers as required, but for two weeks before the election of 1892 only, and for no longer period. The question now presented is whether the publication of the proposed amendment for only two weeks caused the attempt to adopt the amendment to be wholly a failure."

The court held in the first place that constitutional provisions are to be construed as mandatory, citing and quoting from Judge Cooley's Work on Constitutional Limitations. The court also quoted from Texas cases to the same effect. The court quoted further from the Constitution itself to show that its provisions were mandatory and prohibitory unless by express words they are declared to be otherwise.

The court then proceeded to pass upon the effect of failure to comply with the Constitution relative to publication of amendments. The court said:

"It being settled that the provision under consideration is mandatory, the inquiry remaining seems to be, what is the consequence of disobedience to the mandate of the Constitution? Is the proposed adoption of the amendment nullified, or is the disobedience of the Constitution to be treated as simply an omission by the Secretary of State? A constitution differs from a statute in that a statute must provide the details of the subject of which it treats, whereas, a constitution states general principles, and builds the substantial foundation and general framework of the law and government. It is true that it is a subject of general remark that the modern tendency of constitution makers is to somewhat depart from this practice; but the distinction between a statute and a constitution, as above suggested, certainly remains, and it is still true that constitutions do not generally descend into details. But when we find this practice departed from, and we observe a constitution going into details, such action is significant. Again referring to the eminent constitutional authority above quoted, we repeat: 'It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we

impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end.' Pages 94, 95. Thus Judge Cooley holds that if we find in a constitution that which some may undertake to argue should be held to be unessential, it was not intended to be unessential by the people in enacting the provision. See, also, *Paving Co. vs. Hilton*, 69 Cal., 510, 11 Pac., 3, citing *Koehler vs. Hill*, 60 Iowa, 554, 14 N. W., 738, and 15 N. W., 609, citing Cooley as above."

Several cases are then discussed by the court dealing with the subject of amending constitutions and provisions outlining procedure of amendment. The court concluded its opinion as follows:

"In considering the provisions of our own Constitution and in the light of the decisions, we are clearly of the opinion that the requirement to publish notices of a proposed amendment for three months is not only mandatory, but that it is an essential provision, and that it must be obeyed. We may add further that it seems to us to be a prudent and expedient provision. This requirement of the Constitution provides a method for amending that instrument. It is also provided that the Constitution may be amended, or a new one compiled, by a convention. Const., Art. 19, Sec. 8. This method, or course, is not now under consideration. But it may be said with us as it was said in Pennsylvania: There are only three methods by which a constitution may be changed: First, the method by amendment, as provided in Article 19, Sec. 9; second, by convention, as provided by Article 19, Sec. 8; and, third, by revolution. *Wells vs. Bain*, 75 Pa. St., 39. The first method was attempted. But that method was not followed as prescribed. Instead, another method was followed; that is, a method identical with that provided in Article 19, Sec. 9, except that the advertisement was for two weeks only, and not for three months. As remarked in California, the constitution framers ordain and declare that no other form or mode of machinery is permissible to secure certainty in doing the act permitted. It is also held in the Alabama case, above cited, that an amendment cannot be made by a method other than that provided. We therefore have this situation: The method for amendment is provided by the solemnity of the constitutional enactment, and another method of amendment has been attempted to be invoked. We can see no other result but that such attempt is nugatory, and of absolutely no avail. The California Supreme Court, in construing the provision that all of the Constitution of that State should be mandatory and prohibitory, said: 'We will add here that under our Constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the Constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. Article 1, Sec. 22. This section, in our judgment, not only commands that its provisions shall be obeyed, but that the disobedience of them is prohibited.' *Paving Co. vs. Hilton*, 69 Cal., 512, 11 Pac. 3. The Alabama case is also the same effect—that, if a method other than that provided is adopted, the attempt is nugatory. We also find it said in *End. Interp. St.*, Sec. 433, as follows: 'It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted.' If it is held that the command to the Secretary of State to publish a proposed amendment for a certain period is nonessential, and may be disregarded, why may not the legislative department of the government follow the same practice, and disregard the requirement that the proposed amendment shall be voted for by two-thirds of the members elected to each house, shall be entered in full on their respective journals? If one requirement is nonessential, why is not another? And who is to say what is essential and what is not? And by what rules are such distinctions to be made? The Constitution does not itself make them. The framers of that instrument made no distinction in the requirements. They made them all mandatory; and, if a court commences to nullify their commands by construction, we do not know where the court would commence, or where it would end, or where it would draw the line which the Constitution says shall not be drawn.

"We have felt wholly satisfied that the omission to publish the proposed



amendment, as required by the Constitution, is fatal to its adoption; but we have considered the question at perhaps some length, and have quoted from the authorities with much liberality, because this is the first time that such a question of construction has been before us. We cannot but be of opinion, with Judge Cooley, that we would be treading upon extremely dangerous ground were we to hold that a solemn constitutional provision was simply directory and nonessential when we face the express mandatory language of the provision, and also the additional and separate command of the Constitution that the provision is mandatory. The command of the Constitution is in no uncertain voice. We cannot misunderstand it. We cannot do other than render to it the obedience which our duty demands. It provides that an amendment may be adopted by certain methods. Those methods were not employed. Another method was resorted to. That method accomplished nothing. The amendment was not adopted. There being no amendment to the Constitution, there are no offices of county commissioners in Lewis and Clarke County to be filled at the election to be held in November, 1894, and there is therefore no duty enjoined by law upon the county clerk and recorder of that county to file any alleged certificates of nomination for such offices. The writ of mandamus is therefore dismissed."

*Nevada Case.*

The decision of the Supreme Court of Nevada in *State vs. Davis*, above cited, was along the same line. Article 16, Section 1, of the Nevada Constitution, provided that the Legislature shall submit proposed amendments to the people "in such manner and at such time as the Legislature may prescribe." The statute of Nevada provided for the publication of proposed amendments in one daily newspaper of general circulation for ninety days next preceding the general election at which the amendments are to be voted on, and that as many copies of such paper shall be sent without extra compensation to the clerk of each county as there are registered voters therein, and by the clerk mailed to the voters. It was held in the case that this act of the Legislature was a reasonable requirement, sanctioned by the Constitution, and that amendments voted on without compliance with such requirements are inoperative.

It appears that in the general election of November, 1888, the people ratified a proposed amendment to the Constitution of this State abolishing the office of Lieutenant Governor. At the same election, other proposed amendments were ratified and among them one changing the time for the meeting of the Legislature. In stating the case, the court said in part:

"The question, then, is whether this proposed amendment to the Constitution has been legally adopted. The objection urged against the adoption of the amendment is equally applicable to the proposed amendment changing the time for the meeting of the Legislature, and the conclusion to be reached must be common to each of the proposed amendments. Section 1, Art. 16, of the Constitution, prescribes how amendments may be made without calling a convention. It reads as follows: 'Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and, if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the Legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice; and if, in the Legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people, in such manner, and at such time, as the Legislature shall prescribe; and, if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the Legislature

voting thereon, such amendment or amendments shall become a part of the Constitution."

The court, among other things, stated that "the publication here required (that is, by the statute passed under the constitutional provision) was not made of either of the proposed amendments, nor of any proposed amendment voted on by the people at the last general election." Relative to the statutory requirements as to publication of amendments, the court said:

"The wisdom of the requirement is apparent, but whatever may be said of the policy of this law, the conditions imposed are within the proper province of the Legislature, and being imposed, were indispensable to a valid adoption of the proposed amendments."

Answering the contention that the publication was not required by the Constitution, the court said:

"The Constitution does require that an amendment proposed and agreed to at a session of the Legislature shall be published for 90 days next preceding the succeeding election of members of the Legislature, so that the people may, if they desire, elect members specially to consider it. But the Constitution having unconditionally referred to the Legislature the subject matter of the manner of submitting proposed amendments, by declaring that they shall be submitted 'in such manner and at such time as the Legislature shall prescribe,' such reasonable requirements may be imposed by the Legislature as its discretion may suggest. A publication two years prior was made in obedience to the Constitution, but if, in submitting the proposed amendments to the people, the Legislature required another and further publication, the power to impose the requirement is expressly conferred by the language of the Constitution heretofore quoted, and is as follows: 'It shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the Legislature shall prescribe.'"

Concluding its opinion, the court said:

"It results from the views stated that the proposed amendment to the Constitution abolishing the office of Lieutenant Governor, and the one changing the time for the meeting of the Legislature, were not legally submitted to the electors of the State, and have therefore failed. It is ordered that judgment be entered in favor of defendant, with costs."

We call attention to the cases cited in note 95, at page 693, of 12 Corpus Juris. It is not necessary to discuss and quote from all of them since the questions decided in some of them do not bear directly on our problem but we have read all of these cases and take occasion to here note some of them cited in said note, as well as some other cases:

The case of *In Re House Resolution No. 10*, 50 Colo., 71, 114 Pac., 293, illustrates the point that the constitutional provisions prescribing the mode of amendment are mandatory and must be strictly followed. The Constitution of the State of Colorado provided that amendments to the Constitution "shall be published in full in not more than one newspaper of general circulation in each county." The court held that this constitutional provision meant that a proposed amendment must be published in one newspaper published in each county in the State which is published and has a general circulation in each county; that the words "general circulation" were descriptive of the character of newspaper and excluded a newspaper of limited circulation and restricted to some particular trade or calling.

*Hammond vs. Clark*, 136 Ga., 313, 71 S. E., 479, 38 L. R. A. (N. S.), 77. In this case the court held that a proclamation of the Governor declaring that an amendment was adopted was not conclusive, and that the courts could inquire into the question; that in the absence of some other exclusive method of determination the weight of authority is to the effect that whether an amendment has been properly adopted according to the requirements of the Constitution is a judicial question. In discussing decisions tending to hold that liberality should be indulged in construing constitutional requirements as to methods and procedure of an amendment, the court said:

"This liberal interpretation applies rather to the manner of compliance with constitutional requirements in regard to amendments, than to a total omission or disregard of such a requirement. It has not generally been held that an essential requirement could be entirely omitted, nor does the present case require us to take that position."

The court held that under a constitutional provision requiring that amendments shall be "published in one or more newspapers in each congressional district for two months previous to the time of holding the next general election" was complied with by publishing the amendment on August 5th, since that date was two months prior to October 5th. Also, that publication weekly, as distinguished from daily publication, complied with the Constitution.

*Russell vs. Croy*, 164 Mo., 69, 63 S. W., 849. The Supreme Court of Missouri held that publication once in each of the four consecutive weeks next preceding the week in which the election occurred complied with the Constitution declaring that proposed amendments shall be published weekly in some newspaper, if such there be within each county in the State "for four consecutive weeks next preceding the general election then next ensuing," though the first publication was less than twenty-eight days before the date of election. We quote from the court's opinion language, indicating a strict compliance with the Constitution is necessary:

"The four weeks here called for are not any four weeks the Secretary of State may select prior to the election, but they must be the four weeks next preceding the election. If the Secretary of State has chosen to begin the publications on the first day of September, and run them into the first week in October, so as to secure, with the varying days of publication among the newspapers, a full period of twenty-eight days, that would not have answered the requirement of the Constitution, because the four weeks so covered would not have been those next preceding the election."

*State vs. Gray*, 21 Nev., 378, 32 Pac., 190, 19 L. R. A., 134. The Constitution of the State of Nevada simply provided that proposed amendments should be "published for three months next preceding the time of making such choice," without prescribing the method of publication. The court held that the publication of proposed amendments with the statutes of the year after they had been concurred in by both houses of the legislature sufficiently complied with the constitutional provisions. It also held that a publication of eighteen months in this manner complied with the provision requiring publication for three months, the court holding that the "greater included the lesser." Also, that the Constitution, as stated, left the manner of publication to the Legislature, except as to publication commencing at least three months

before the holding of the election. The court thereby intimated that as to the three months' period of publication the Legislature had no discretion.

*Hildreth vs. Taylor*, 117 Ark., 465, 175 S. W., 40. This case holds that a statute concerning notice of constitutional amendments is directory. The court held, however, that the question as to sufficient notice is a judicial one. In holding that the provision was merely directory, the court based its decision upon the proposition that the direction as to notice was a statute as distinguished from a constitutional provision, and in discussing the cases cited to the contrary, said:

"Those were cases, however, where the Constitution itself by way of condition upon which amendments may be made required that notice must be first given; and the courts following the rule of presumption that all language in the Constitution itself is in the absence of something showing a contrary condition, intended to be directory, held that the provision for notice must be treated as mandatory. The reasons in those cases do not apply here, inasmuch as our Constitution as amended on that subject does not itself prescribe a condition concerning notice."

*State vs. Alderson*, 49 Mont., 387, 142 Pac., 210, and *Ann. Cases*, 1916b, 39. This case holds that a constitutional provision providing that proposed amendments shall be published in full in at least one newspaper in each county, if such there be, for three months prior to the next general election for members of the Legislature, etc., is satisfied by publication weekly in a weekly newspaper, or once a week in a daily or semi-weekly publication.

*State vs. Winnett*, 78 Neb., 379, 110 N. W., 1113, 10 L. R. A. (N. S.), 149, 15 *Ann. Cases*, 781. This case holds that although an amendment is required to be published in every county, failure to publish it in one county is not fatal to its adoption where it appears that the vote of the county could not have affected the result.

In Logan County the publication in the newspaper began four days later than the limit required by the Constitution. The court in distinguishing the case of *State vs. Tooker* (Mont.), before discussed, said:

"In that case there was no substantial compliance with the Constitution. The proposed amendment was published but for two weeks before the election."

In *Gottstein vs. Lister*, 88 Wash., 462, 153 Pac., 595, the Supreme Court of Washington decided that there was no way by which the questions of fact involved as to the sufficiency of publication of a constitutional amendment could be brought before the court, and that the court would not take judicial notice of the facts as to the sufficiency of the notice. The court upon that ground declined to hold the amendment void. In that case, however, the amendment had already been adopted and the court pointed out that there was a difference in such a situation and one where the question was up in a proceeding having authority to look into the facts. Of course in the case under consideration in this opinion, the facts are undisputed and, moreover, the election is yet to be held, and proceedings can be brought, and we have no doubt would be brought, in which the questions of fact can be raised. In fact, there could be no reasonable controversy as to the facts.

*Fahey vs. Hackman (Mo.)*, 237 S. W., 752. The Supreme Court of Missouri held in this case that an amendment was adopted even though in one county in the State the proposed amendment was published for only three weeks instead of four consecutive weeks as required by the Constitution. The court said in effect that there was a substantial compliance and that another reason for so holding was that there would be a large margin in favor of the amendment even if the entire vote of that county should be eliminated or counted against the amendment. In that case, the Secretary of State furnished to all the newspapers, one in each county, in ample time, the proposed amendment, but in one county the newspaper published the amendment for only three weeks instead of four.

*Cartledge vs. Wortham (Texas)*, 153 S. W., 297. In this case our Supreme Court held that an amendment was duly adopted as against the objection that the Legislature in its resolution had not fixed a day for the election on the amendment. The resolution of the Legislature was so worded that there was doubt as to whether the date for the election had been definitely fixed as required by the Constitution. Our Supreme Court, through Chief Justice Phillips, held that the fixing of the date was sufficiently definite. The court held that a definite fixing of the date was essential, thus, as it seems to us, giving sanction to the wholesome rule that constitutional provisions prescribing modes of amendment are to be construed as mandatory and must be strictly followed. The following is taken from the opinion of the court:

"We cannot believe the Constitution contemplated not enjoining upon the Legislature by positive command the duty of specifying the date of the election upon constitutional amendments proposed by it for adoption by the people, that it might designate only a possible time therefor and thereby reduce the election to a mere contingent event."

*Johnson vs. Craft (Ala.)*, 87 So., 374. In holding that the Legislature could not delegate to the Governor the fixing of the date for the election on a constitutional amendment, the court said:

"The provisions of the Constitution providing for its amendment are mandatory, not directory—binding on the people themselves and concluding every department, body, officer, and agency under its authority. Authorities *supra*; 12 C. J., pp. 688, 689. The power granted the Legislature to propose amendments to the Constitution is a particular, special power, not possessed by the Legislature otherwise than through grant by the instrument itself. It can only be exercised in the mode prescribed, and the mode defined is the measure of the power. *Collier vs. Frierson, supra*; *Oakland, etc., Co. vs. Hilton*, 69 Cal., 479, 514, 11 Pac., 3; *Jones vs. McDade, supra*. It results from the system and the provision of the Constitution that in proposing amendments to that instrument, to be voted upon by the electorate, the Legislature is not exercising its other power to make laws. *Jones vs. McDade, supra*; *Livermore vs. Waite*, 102 Cal., 113, 36 Pac., 424, 25 L. R. A., 313, 315, 316; 12 C. J., p. 693; 6 R. C. L., Sec. 19, pp. 28, 29. Recognition of this last-stated principle—resultant, as it is, from those previously reiterated—is an essential prerequisite to any sound, logical conclusion upon the objection now being considered. To ignore it or to deny it appropriate effect is to invite error in judgment and to court the affirmation of inexcusable fallacy."

We have thus gone into this question at length because of the importance and seriousness of the question under consideration.

We are not unaware of the fact that the people have a right to

change their fundamental law and that unimportant and unessential matters should not stand in the way of their doing so, unless they in their organic law have so declared. But we cannot but conclude that to hold to the contrary would be to disregard and disobey the Constitution. It is not so much, under the facts of this situation, whether the people can be thwarted by acts of agents in their effort to amend the Constitution, but rather whether the agents can dispense with requirements prescribed by the people themselves. The people, by changing the fundamental law, are the ones having a right to dispense with the requirements, and to hold as we do, instead of defeating the will of the people upholds it.

It will be conceded that we are reluctant to hold that the agents of government by acts of omission can defeat the purpose of the Legislature and those favoring a particular amendment to have the amendment submitted to a popular vote; but we have no hesitancy in doing so when confronted with the alternative of so doing or violating the Constitution. If it be said that it is too great a power vested in one man, the answer is that the people themselves have so ordered and we must obey the mandate until altered in the usual and regular way. While it is true in a sense that one man may cause a failure of adoption of an amendment, still the fact that it was a mistake cannot supply and substitute itself for the three months' notice required. The Constitution does not say "three months unless someone forgets to publish"; it says unequivocally *at least three months*.

While it may be true that it is unfortunate and will cause temporary inconvenience to adhere strictly to the Constitution in this instance, yet a good wholesome respect and obedience to the provisions of the Constitution we already have is far more important than the temporary advantage to be gained by ignoring it.

The Constitution cannot be interpreted to suit temporary convenience, even of the majority; it ought to be strictly followed by not only the servants of the people, but the people themselves until altered.

We conceive it to be our duty, therefore, to advise you that in our opinion the failure to publish beginning three months prior to the election is fatal.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2513, Bk. 59, P. 256.

CONSTITUTIONAL LAW—AUTOMOBILE REGISTRATION FEE—TAXATION—  
OCCUPATION TAXES.

The automobile registration fee is not an occupation tax.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 11, 1923.

*Hon. C. V. Terrell, State Treasurer, Capitol.*

DEAR SIR: Attorney General W. A. Keeling is in receipt of your inquiry of the 8th inst., reading as follows:

"The question having arisen as to whether or not the county collectors of the

State should pay to this department for the benefit of the Available School Fund one-fourth of the taxes collected on motor vehicles, the same having been heretofore paid to the Highway Department. I, therefore, would like to know whether or not under the law one-fourth of said tax should be paid to this department for the benefit of the Available School Fund. I also enclose letter received from ex-Governor Colquitt bearing on the same."

Your letter is accompanied by copy of a letter of Hon. O. B. Colquitt, formerly Governor of this State, of date the 4th inst., addressed to Attorney General Keeling. From Governor Colquitt's letter we gather that it is the automobile registration fee that is thought to be an occupation tax and that, being such, one-fourth thereof should be set apart annually for the benefit of the public free schools in accordance with Section 3 of Article 7 of the State Constitution, which declares as follows:

"One-fourth of the revenue derived from the State occupation taxes and a poll tax of one dollar on every male inhabitant of this State between the ages of twenty-one and sixty years shall be set apart annually for the benefit of the public free schools."

In reply thereto you are respectfully advised that the automobile registration fee exacted by the State is not an occupation tax. It is in the nature of a charge imposed under the police power of the State rather than a tax collected by the State under its taxing power for revenue purposes. A fee imposed under the police power is to be distinguished from an excise imposed under the taxing power for revenue purposes. It is not in every case easy to determine whether the exaction is the one or the other, but where the revenue derived from it is incident to a reasonable exercise of the power of regulation as distinguished from a charge imposed primarily for the purpose of raising revenue, and is not unreasonably out of proportion to the expense of such regulation, it will not be regarded as taxation and is not subject to the constitutional restrictions in respect thereto.

The imposition of the automobile registration fee is a part of a general scheme of regulation of the operation of motor vehicles and the use and operation of the public highways in this State under the police power, and it is not believed that it is any kind of taxation as that term is ordinarily understood, much less an occupation tax. It is in the nature of a fee imposed for the use of the public highways to pay the expense of regulating the use of motor-vehicles and the highways.

As above indicated, in order for a statute which imposes a pecuniary burden to be sustained under the police power, the amount of revenue must bear a reasonable proportion to the expense of the regulation exercised. It may be argued by some that the amount of money raised by our automobile-highway statute is far in excess of the expense of enforcing registration and the rules and regulations as to driving automobiles, and that, therefore, the act will fall as being a revenue measure under the guise of a police regulation. But this contention overlooks the proposition that the building, maintenance and operation of public highways by the State is also an *exercise of the police power*. So that unless the amount of revenue is out of proportion to the constructing, maintaining and operation of highways as well as the actual control of the use of vehicles thereon, the basis of the contention falls. No one would seriously contend that the amount of money raised is too

much for such purpose under present conditions. We have far to go in the direction of good roads. That the power of constructing, maintaining and operating public highways by the State rests upon the general police power, is asserted upon high authority.

The Supreme Court of the United States, in *Hendrick vs. Maryland*, 235 U. S., 610, speaking of a State law similar to the Texas statute, said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the State put into effect the above described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engines—a practical measure of size, speed, and difficult of control."

Then follows this language:

"This is but the exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens."

The Supreme Court of the United States has said in another case that the establishment, maintenance and control of the public highways is within the police power. The following sentence is from the case of *Jones vs. Brim*, 165 U. S., 80:

"Embraced within the police powers of the State is the establishment, maintenance and control of public highways."

If these statutes had exacted this registration fee and had set aside a small amount of it to pay the expense of regulation and had placed the remainder in the general revenue, then a different situation would probably be presented. But they do not attempt to do that. The statutes apply all the registration money to the subjects regulated, to wit, regulation of motor vehicles and highways. Since the latter is essential to the use of the former, the regulation of both forms the basis of one general scheme of laws.

We do not believe that anyone will have serious doubt as to the correctness of our conclusion after reading and considering the following authorities:

R. C. L., subject "Taxation."

*Atkins vs. State Highway Department*, 201 S. W., 226 (in which writ of error was denied by Supreme Court).

*Re Kessler*, L. R. A., 1915D, page 322.

*Re Hoffert*, 52 L. R. A. (N. S.).

*Ex parte Schuler*, 139 Pac., 685.

*Bozeman vs. State*, 61 So., 604.



Cleary vs. Johnston, 74 Atl., 538.  
 Kane vs. Titus, 80 Atl., 530.  
 Newport vs. Mekell Bros., 161 S. W., 549.  
 Storage Co. vs. Chicago, 14 Am. & Eng. Ann. Cas., 536.  
 Dalton vs. Brown, 42 L. R. A. (N. S.), 506.  
 Tomlinson vs. Indianapolis, 235 U. S., 610.  
 Brown vs. City of Galveston, 97 Texas, 1.  
 Ex parte Gregory, 20 Texas App., 211.  
 Booth vs. City of Dallas, 179 S. W., 301.  
 Auto Transit Co. vs. City of Fort Worth, 182 S. W., 685.  
 Ex parte Sullivan, 178 S. W., 537.

In discussing a license fee on vehicles levied by cities, the Court of Criminal Appeals in *Ex parte Gregory*, supra, said:

“Evidently it was not intended by this ordinance to levy an occupation, but a license tax under the police and not the taxing power.”

And in *Ex parte Sullivan*, supra, the same court in reference to a “motor bus ordinance” of the city of Fort Worth, used this language:

“We think the \$10 license fee fixed and applicable to applicant, as established by the agreed facts herein and the law, is unquestionably *not an occupation tax*, but a mere license fee, and is not unreasonable.”

The case of *Atkins vs. State Highway Department*, 201 S. W., 226, upheld the constitutionality of our State motor-vehicle statute. Writ of error was denied by the Supreme Court. The statute was upheld in that case on the theory that it was not “a revenue measure in the sense and with the effect contended for by appellant.” (201 S. W., 229.) The appellant had contended that “the trial court erred in holding that the tribute sought to be collected from the appellant by appellees for the State is a registration fee and not a tax.” (201 S. W., 228.)

The court evidently meant it was not a revenue measure as that term was ordinarily understood. Conceding that the funds raised were for road purposes, the court said:

“There is no inhibition in the Constitution against the Legislature making such provision, and therefore it had the power to provide for such use of the funds, leaving the expense of policing, regulating, and administering the law in regard to the use and operation of the vehicles upon the highways, to be paid out of other funds by the State, or by the counties, as in other cases.” (201 S. W., 229.)

The court held that the registration fee was a “license fee for the privilege of operating motor vehicles over improved public highways, commensurate with the injury done to such roads and the benefits received from them.” (201 S. W., 229.)

In addition to these authorities, we direct attention to the written argument and brief of appellees in No. 5942 in the Court of Civil Appeals, Third District, *Atkins vs. State Highway Department*, and which brief is also to be found at page 1 in Vol. 5 of Briefs of the Attorney General of Texas, where a full discussion and citation of authorities will be found as to the nature of this automobile registration fee.

Even if the automobile registration fee should be held to be a tax, it is difficult for us to see how it could be deemed an occupation tax. We have no doubt that the term “occupation” as used in the Constitution in connection with occupation taxes means business, trade, call-

ing, vocation, profession or employment. If an automobile is operated upon the public highways the registration fee must be paid regardless of the occupation of the person driving it. Take for illustration a person engaged in the taxable occupation of producing oil. He rides to his place of business in his automobile. Certainly the operation of his car is not his occupation, but still, he cannot operate it on the public highways without the registration fee having been paid. As an oil producer he pays an occupation tax, but this does not excuse him from paying the registration fee on his automobile also. A man may own an automobile and his friend or a member of his family may lawfully operate it upon the public highways if the registration fee has been paid. These several persons may be engaged in various occupations or they may be engaged in no occupation at all. The registration fee of the car does not cover the occupation of these people, but is rather in the nature of a fee entitling that particular car to be operated upon the public highways, regardless of who may be the operator and regardless of the occupation of the operator. The person operating it may be using the car entirely unconnected with any occupation at all as that term is ordinarily understood.

The Constitution of Texas expressly mentions four subjects for taxation, to wit: property, poll, income, occupations. No one would contend that the automobile registration fee is an income tax, a property tax, or a poll tax. It has been intimated that since it is not any one of these that it must necessarily be the fourth—an occupation tax. But we do not think that necessarily follows.

These four subjects of taxation are not exclusive. The framers of the Constitution were evidently apprehensive that some one would contend that they were exclusive. In order to assure and preserve to the Legislature the full taxing power of the government, they included in the Constitution the following:

“The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution.” (Sec. 17, Art. 8.)

So that, even if we should call the statute a revenue measure enacted under the taxing power, we need not conclude from the constitutional enumeration of the four kinds of taxes that this registration charge is an occupation tax. If it is a tax at all, it is “another subject or object to be taxed,” within the meaning of Section 17, Article 8. On the proposition that other subjects may be taxed, see *M., K. & T. Ry. vs. Shannon*, 100 Texas, 389, 100 S. W., 141.

Even if it should be held to be a tax, does the privilege for which the fee is paid come within the term “occupation?” The occupation tax contemplated by the Constitution carries the idea of “*doing business*.” The Constitution says:

“It (the Legislature) may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, *doing any business in this State*.” (Art. 8, Sec. 1.)

The term “occupation” within the meaning of occupation tax laws means a “profitable pursuit, or a pursuit undertaken and prosecuted for a profit.” *Tarde vs. Benseman*, 31 Texas, 277, 282.

“Occupation” as used in a statute imposing a tax on any person

pursuing the occupation of selling liquor, "and as understood commonly, would signify vocation, calling, trade, or business which one principally engages in to procure a living or obtain wealth."

Standford vs. State, 16 Texas App., 331, 332.

Williams vs. State, 5 S. W., 136, 137, 23 Texas App., 499.

State vs. Austin Club, 33 S. W., 113, 115, 89 Texas, 20; L. R. A., 500.

See also Love vs. State, 20 S. W., 978, 31 Texas Cr. App., 469.

"An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family." 6 Words and Phrases, p. 4908, Appeal of Banger, 109 Pa., 79, 95.

The privilege of operating an automobile on the public highway, or rather the operating itself, does not come within the definition of "occupation." A car may be operated for mere pleasure, and yet the registration fee must have been paid. "Joy riding" falls short of being an occupation, still it is lawful so far as registration fee is concerned.

As before stated, the Constitution speaks of taxing occupations "doing any business." This is the occupation tax, one-fourth of which goes to the schools. The Supreme Court of Louisiana in State vs. Boston Club, 45 La. Ann., 585, 12 So., 895, very aptly said that within the meaning of a statute relating to license taxes the word business "is that which occupies the time, attention, and labor of men for purposes of livelihood, or for profit; a calling for the purpose of livelihood."

In conclusion, you are advised that we are of the opinion that the automobile registration fee is a charge incident to governmental regulation under the police power, and, being such, is not an occupation tax within the meaning of the aforementioned constitutional provisions.

And even if it be granted that it is in the nature of a tax, still it is not an occupation tax.

In either event, the Constitution framers and the Legislature have not seen fit to provide that the public schools shall participate in these funds.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2476, Bk. 58, P. 210.

#### CONSTITUTIONAL LAW—CONSTITUTIONAL CONVENTIONS—POWER OF LEGISLATURE TO CALL.

The Legislature cannot without an affirmative vote of the people call a convention to revise or alter the State Constitution.

The calling of such a convention is not within the grant of legislative power to the Legislature, but the question of whether a new Constitution is desired is one reserved by the people in themselves.

The people having the inalienable right (subject to the United States Constitution) to alter, reform or abolish their government in such manner as they may think expedient, and no other method having been expressly provided in the State Constitution, the Legislature has power to submit to the people the question whether a constitutional convention shall be called.

This power is not derived from the grant of legislative power, but from necessity and general custom amounting to common law.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 20, 1923.

*Messrs. Patman of Cass County, McFarlane of Young County, and Hendricks of Ellis County, Members of the House of Representatives, Capitol.*

GENTLEMEN: Attorney General Keeling received your communication reading as follows:

"The undersigned, a committee representing a caucus composed of fifty-two members of the House of Representatives, respectfully request your opinion on the following question:

"(1) Can the Legislature itself call a constitutional convention for the purpose of revising or altering the Constitution of the State, that is, does the Legislature possess this power without an affirmative vote of the people?"

"Your early opinion is desired and will be greatly appreciated."

It is at once apparent that a question dealing with the power of the legislative department of our government to initiate proceedings to alter and revise the fundamental law under and by virtue of which the Legislature itself exists, is one of the gravest importance. The matter becomes none the less difficult when we find at the outset a direct conflict in two leading text writers on this question:

"\* \* \* it would seem that the Legislature cannot call a convention, and hence that a convention in order to be valid must be the act of the people." (Hoar (1917), p. 75.)

"The assertion, that where express authority to call a convention has not been given by the Constitution, a Legislature has no power to do it, I deem to be unfounded. \* \* \*" (Jameson (1866), p. 365.)

It may be safely asserted as well settled that the Legislature is the proper body to initiate proceedings looking to the calling of a constitutional convention for the framing of a new Constitution, and the decided weight of authority supports the doctrine that the action of the Legislature in this regard is not the exercise of power under the grant of legislative power, but that since the people have reserved to themselves the right and authority to adopt a new Constitution and has conferred upon the Legislature express authority only to submit specific amendments to the people, that from the necessities of the case and from usage the Legislature is the appropriate agency to start the machinery whereby the people may express their wishes as to a new Constitution or a general revision. This will appear from the authorities hereinafter reviewed and quoted from.

The weight of opinion supports this view, even though the Constitution is silent on this question, or where, as is usually the case, the State Constitution contains only a clause outlining a mode of amendment—usually empowering the Legislature to propose specific amendments for adoption or rejection to the people.

The provisions in our Constitution pertinent to our inquiry are the following:

Section 2 of Article 1:

"All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

And Section 1 of Article 17:

"The Legislature, at any biennial session, by a vote of two-thirds of all the members elected to each house, to be entered by yeas and nays on the journals, may propose amendments to the Constitution, to be voted upon by the qualified electors for members of the Legislature, which proposed amendments shall be duly published once a week for four weeks, commencing at least three months before an election, the time of which shall be specified by the Legislature, in one weekly newspaper of each county in which such newspaper may be published; and it shall be the duty of the several returning officers of said election to open a poll for and make returns to the Secretary of State of the number of legal votes cast at said election for and against said amendment; and if more than one be proposed, then the number of votes cast for and against each of them; and if it shall appear from said return that a majority of the votes cast have been cast in favor of any amendment the said amendment so receiving a majority of the votes cast shall become a part of this Constitution, and proclamation shall be made by the Governor thereof."

We do not have to depend alone upon an express provision in the Constitution to conclude that the people have reserved the right to change their government, but it is made plain, as appears above, that the people of Texas have made unto themselves such a reservation of power. Also, that the only express grant to the Legislature in connection with changing the Constitution is the usual provision as to submitting amendments to the people.

While, as above indicated, there is some conflict between text writers as to the power of legislatures to call constitutional conventions, there is no conflict in the court decisions upon this point, as we shall show in a review of the authorities. In fact, there is only one court decision directly upon the question, and that is the Indiana case, which will be discussed later. It holds under a constitution similar to ours that the Legislature is without such power.

Although there are no other decisions of the courts passing on this question, there are many decisions dealing with the general subject of constitutional conventions, and which are valuable in ascertaining general principles, which we think are conclusive.

Therefore we deem it proper to examine at some length the authorities upon this subject.

#### THE RHODE ISLAND CASE.

*In Re Constitutional Convention*, 14 R. I., 649 (1883). The Rhode Island case is in a class by itself and takes the extreme view that there is no authority whatever for the Legislature to initiate any kind of a movement to submit to the people the question of calling a constitutional convention, in view of a specific provision in the State Constitution providing for the submission by the Legislature of specific amendments.

The Senate of the State of Rhode Island propounded two questions to the Supreme Court of that State: (1) Whether the general assembly had authority to call upon the electors to elect members to a constitutional convention to frame a new constitution and to provide that a new constitution should be submitted for adoption either to the qualified electors or to persons entitled to vote under the new constitution, and if a majority should vote in favor thereof whether the new constitution would then become a legally adopted constitution. (2) Whether they could submit the question to the qualified voters

as to whether a constitutional convention should be called to frame a new constitution to be submitted to a vote of the people.

The Supreme Court held that the Legislature was without authority to do either, because of a specific provision in the Constitution providing a method of amending the organic law, holding that since the constitution prescribed a method of amendment that method was exclusive. We quote the following from the court's opinion:

"Finally it has been contended that there is a greater unwritten common law of the States, which existed before the Constitution, and which the Constitution was powerless to modify or abolish under which the people have the right whenever invited by the general assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is in our opinion rather a law, if law it can be called, of revolutionary than of constitutional change. Our Constitution is, as already stated, 'the supreme law of the State.' We know of no law except the Constitution and laws of the United States which is paramount to it." 14 R. I., 654.

*Opinion of Justices* (1850), 6 *Cush. (Mass.)*, 573. The House of Representatives of the State of Massachusetts asked the following questions of the Supreme Judicial Court of that State:

(1) Whether if the Legislature should submit to the people the question of calling a convention for the purpose of revising or altering the Constitution of the Commonwealth in any specified parts of the same and a majority of the people should decide in favor thereof, whether such convention could propose to the people amendments in other parts of the Constitution not so specified.

(2) Whether any specific and particular amendment or amendments to the Constitution could be made in any other manner than that specified in the Constitution.

The Supreme Court answered the second question in the negative and the first it answered as follows:

"Upon the first question considering that the Constitution has vested no authority in the Legislature in its ordinary action to provide by law for submitting to the people the expediency of calling the convention of delegates for the purpose of revising or altering the Constitution of the Commonwealth it is difficult to give an opinion upon the question what would be the power of such a convention, if called. If, however, the people should by the terms of their vote decide to call a convention of delegates to consider the expediency of altering the Constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and upon the general principles governing the delegation of power and authority they would have no right under such vote to act upon and propose amendments in other parts of the Constitution not so specified." (6 *Cush.*, 574-5.)

*Wells vs. Bain* (*Pa.*, 1874), 75 *Pa. St.*, 39; *Woods' Appeal* (*Pa.*, 1874), 75 *Pa. St.*, 59. In these cases the question of the authority of the Legislature to call a constitutional convention without the consent of the people was not involved; on the other hand, the Legislature had submitted the question to the people in 1871 whether a constitutional convention should be called to amend the State Constitution and there had been an affirmative popular vote upon this proposition. The question at issue was as to the authority of the convention when called; that is, whether the convention had authority to promulgate a new constitution without submitting that instrument to a vote of the people and to adopt ordinances having the effect of changing exist-

ing law without such ordinances being submitted to a vote of the people.

The Supreme Court of Pennsylvania decided against this authority in both instances, going upon the theory that a convention is a body deriving its authority from the people and is the agent or servant of the people and limited in its authority by the terms of the instrument giving it existence and authority. Among other things the court said:

“When a law becomes the instrumental process of amendment, it is not because the Legislature possesses any inherent power to change the existing Constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire State, can be lawfully obtained in a state of peace.” (75 Pa. St., 47.)

Speaking of the mode of revising or amending the Constitution then under consideration, the court used this language:

“The process was an application or petition to the Legislature to call a convention, the passage of a law to gather the sense of the people on the question whether a convention should be called; an election authorized by this law to take the sense of the whole people on this question, and, finally, the passage of a law to call the convention and define its powers and duties.” (75 Pa. St., 49.)

And again:

“The terms of delegation, which the people themselves declare, when acting under and by virtue of the law which they have called to their aid, as the instrumental process of conferring their authorities and reaching their purpose of amendment, become of necessity the terms of their own will.” (75 Pa. St., 49.)

That same idea—that is, that the power of the convention is derived from the people—was reiterated by the court as follows:

“This law, being unrepealed, and being acted upon by the people, became their own delegation of authority—the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. Without this legislation the convention had not existed; and to exist on terms not found in or contrary to the law, is to seek for a grant of powers to be found nowhere else, except in a state of revolution, and, therefore, do not exist in this peaceful process of amendment.” (75 Pa. St., 52.)

In concluding its opinion in the *Wells vs. Bain* case now being discussed, the court said:

“The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an open court and to redress at our hands.” (75 Pa. St., 57.)

In the second case above mentioned—*Woods’ appeal*—in rejecting the doctrine of supreme power in a constitutional convention, the court said:

“The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government, and a well matured bill of rights, the bulwark and security of their liberties, that they will pause before they allow the claim and inquire how they delegated this fearful power

and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the danger, and prompted by self-interest, they will at once distinguish between their own rights and the powers they commit to others. These rights it is, the judiciary is called in to maintain. The very rights of the people and freedom itself demand, therefore, that no such absolute power shall be imputed to the mere delegates of the people to perform the special service of amendment, unless it is clearly expressed, or as clearly implied, in the manner chosen by the people to communicate their authority." (75 Pa. St., 69.)

And further:

"The right of the people is absolute in the language of the bill of rights, 'to alter, reform or abolish their government in such manner as they may think proper.' This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only when they exercise this right, and not before they determine by the mode they choose to adopt, the extent of the powers they intend to delegate." (75 Pa. St., 70.)

As to the doctrine of full authority of the convention the court drew a distinction between the exercise of such power during revolutionary and peaceful times:

"Such a doctrine, however suited to revolutionary times, when new governments must be formed, as best the people can, is wholly unfitted when applied to a state of peace and to an existing government, instituted by the people themselves and guarded by a well matured bill of rights." (75 Pa. St., 70.)

"No people can be safe in the presence of a divine right to rule or of self-imputed sovereignty in their servants to bind them without ratification." (75 Pa. St., 74.)

"In conclusion, we find nothing in the Bill of Rights, in the vote under the Act of 1871, or the authority conferred in the Act of 1872, nothing in the nature of delegated power, or in the constitution of the convention itself, which can justify an assumption that a convention so called, constituted, organized and limited, can take from the people their sovereign right to ratify or reject a constitution or ordinance framed by it, or can infuse present life and vigor into its work before its adoption by the people." (75 Pa. St., 74.)

*State vs. American Sugar Refining Co.* (1915), 137 La., 407, 68 So., 742. It seems that the Legislature of the State of Louisiana in 1913 passed a resolution submitting to the people the question of calling a constitutional convention, and the people voted in the affirmative. The resolution was passed at a special session of the Legislature and the Governor had submitted a specific subject for consideration of the Legislature at that session and the calling of a constitutional convention to accomplish that particular purpose if necessary. There was some question as to the power of the Legislature to submit to the people the question of a general revision of the Constitution at this special session under such a call and submission of the question to the Legislature by the Governor. With these questions we are not particularly interested. The court's opinion contains dictum which appears to approve the doctrine that the Legislature itself has authority to call a convention. The court said, at page 744 of 68 Southern:

"The customary manner of calling constitutional conventions in the United States is by resolution of the Legislature followed by a submission of the question to the electorate. In the absence of any provision in the Constitution on the subject, it seems that the Legislature alone can give validity to a convention. 6 R. C. L., 17, p. 27."

As above stated, the question was not before the court as to the authority of the Legislature itself to call a convention, for the people



had voted in favor of such a call, and it may be that the court meant by this expression that the Legislature alone may give validity to the convention after securing the approval of the people for calling the convention. The court said:

"When the people, acting under a proper resolution of the Legislature, vote in favor of calling a convention, they are presumed to ratify the terms of the call, which thereby become the basis of the authority delegated to the convention." (68 So., 745.)

"Act No. 1 of the Extra Session of 1913 calling for a convention, with full power and authority to frame and adopt, without submission to the people, a new Constitution of the State, subject, however, to a number of restrictions enumerated in said act, having been adopted by the people, constituted a mandate to the convention of 1913." (68 So., 745.)

*State vs. Dahl* (1896), 6 N. D., 81, 68 N. W., 418, 34 L. R. A., 97. Here is another case that, while not necessary in the decision of the case, contains language favorable to the proposition that the Legislature might itself call a convention. The Legislature of North Dakota had not attempted to call a convention but simply passed a resolution submitting the question to the people as to whether a convention ought to be called. The question in the case was whether the submission of the question could be accomplished by resolution instead of by an act of the Legislature. The court decided in favor of the proposition that the matter could be submitted by resolution. Upon the question of initiating the proceedings looking to a revision of the Constitution, the court said:

"True it is that the power to take the initiative with respect to a calling of a constitutional convention resides in the Legislature. In the absence of any provision in the Constitution on the subject, that body alone can give legality to such a convention." (68 N. W., 419.)

In holding that such a resolution need not be approved by the Governor, the court disclosed its opinion that the passage of such a resolution is not ordinary legislation:

"Under many constitutions containing provisions with regard to the enactment of statutes similar to those found in the organic law of this State it has been and is customary to express by joint resolution the will of the Legislature on matters not falling within the category of ordinary legislation." (68 N. W., 419.)

*Ex Parte Birmingham & A. R. Co.*, 145 Ala., 514, 42 So., 118. In this case the Supreme Court of Alabama held that a constitutional convention could not enact legislation by ordinances and give it validity unless ratified by a vote of the people. It does not appear that the Legislature submitted the question to the people as to whether a convention should be called, but the court did use this language:

"But the Legislature in passing the act for calling together the convention were not acting in their legislative capacity. The act has no relation to general powers of legislation. They were the agent of the people for this particular purpose. \* \* \*" (42 So., 122.)

*Frantz vs. Autry*, 18 Okla., 561, 91 Pa., 193. In this case the Supreme Court of Oklahoma held that under an enabling act passed by Congress "to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States," etc., the constitutional convention called had authority to pass an ordinance

creating and defining counties in the State. The court recognized that the power of the convention came from the people: "but in the formation of a constitution and State government the power emanates from the people." (91 Pa., 202.)

*Opinion of Justices (N. H., 1889)*, 76 N. H., 612, 85 Atl., 781. The Supreme Court of New Hampshire held that the Legislature had no authority to fix the time for the taking effect of constitutional amendments submitted to the people by a constitutional convention. As to the nature of the convention, the court said:

"They are not endowed with the entire sovereignty of the State. Their agency, like every branch of the public service, is marked on all sides by fixed bounds." (85 Atl., 782.)

"For ordinary and general purposes they are not a legislative body. They are a committee to whom the Constitution makes no expressed grant of law-making power." (85 Atl., 782.)

*Foley vs. Democratic Parish Committee*, 138 La., 220, 70 So., 104. This case holds that where the question of the calling of a constitutional convention under the terms and restrictions of the measure passed by the Legislature was submitted to the people and the people voted affirmatively, the constitutional convention called pursuant thereto had no authority to enact an ordinance contrary to the restrictions in the act calling it.

*Livermore vs. Waite (Cal., 1894)*, 102 Cal., 113, 117, 36 Pa., 424, 25 L. R. A., 312. The question of calling a constitutional convention was not in this case, but the court discussed to some extent the power of the Legislature to initiate proceedings to amend the Constitution. It said:

"The Legislature is not authorized to assume the form of the constitutional convention and propose for adoption by the people a revision of the entire Constitution under the form of an amendment, nor can it submit to their votes a proposition which, if adopted, would be by the very terms in which it is framed, inoperative." (36 Pa., 426.)

"The power of the Legislature to initiate any change in the existing organic law is, however, of greatly less extent (than the power of a convention), and being a delegated power is to be strictly construed under the limitations by which it has been conferred." (36 Pa., 426.)

*Berry vs. Bellows (Ark., 1875)*, 30 Ark., 198. The question was the authority of a constitutional convention to declare null and void *ab initio* provisions of a former Constitution. The court held against such power, saying:

"Conventions are not omnipotent. The Constitution of the United States is above them, and limits their powers. They must provide for governments, republican in form. They cannot impair the obligation of contracts, or make *ex post facto* laws.

"Moreover, the delegates to a convention are the representatives, the agents of the people. The source from which they derive their authority, and the purposes for which they assemble, imply, in the American theory of governments, limitations upon their powers. They assemble to frame a form of government for the protection of their constituents in the enjoyment of life, liberty, property, and the pursuit of happiness, and they have no power to subvert these great rights, and defeat the very purposes for which they assemble." (30 Ark., 203.)

*State vs. Keith (N. C., 1869)*, 63 N. C., 140. The Supreme Court of North Carolina in this case held that a constitutional convention by

ordinances could not pass an ex post facto law repealing the amnesty act, which had the effect of pardoning criminals. The court seemed to recognize the power of such conventions to form new constitutions and to legislate generally, but this convention was assembled under the Reconstruction Act of Congress just after the war between the States.

*Pennsylvania vs. Tillison* (Ark., 1871), 26 Ark., 545. In holding that the secession convention of 1861 in the State of Arkansas had no authority to nullify the Constitution of 1836, although assembled pursuant to a vote of the people "to take into consideration the condition of political affairs," and "to determine what course the State of Arkansas should take in the then political crises," the Supreme Court of Arkansas quoted approvingly from *Story on the Constitution*, Volume 1, page 243, as follows:

"The people and the people only in their original sovereign capacity have a right to change their form of government."

The court also quoted approvingly the following from Judge O'Neill (2 Hill, 223):

"A convention assembling under the Constitution is only the people for the purposes for which it assembles, and if they exceed those purposes their act is void unless it is submitted to the people and affirmed by them."

*Sproul vs. Fredericks* (Miss., 1872), 69 Miss., 898. This case belongs to that category of decisions holding to the theory of omnipotent power of constitutional conventions. Says the Supreme Court of Mississippi in this case:

"We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the power of sovereignty, specially delegated to it for the purpose and the occasion by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is, that no change in the form of government shall be done or attempted. \* \* \*

"The theorizing of the political essayist and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers. This theorizing will reduce that great body, which, in our own State at least, since the beginning of its existence, except for a single brief interval in an exceptional period, by custom and the universal consent of the people, has been regarded as the repository and executor of the powers of sovereignty, to a mere commission, stripped of all power, and authorized only to make a recommendation." (69 Miss., 904.)

It does not appear expressly in the decision whether the people authorized the calling of the convention, but we may infer that the Legislature itself called the convention. It will be noted that the court said that the convention has been regarded as the repository and executor of the powers of sovereignty by "custom and the universal consent of the people," thereby evidently assuming that the will of the people is after all supreme.

*Goodrich vs. Moore* (Minn., 1858), 2 Minn., 261. This case simply holds that the Legislature had no authority to provide by law for a printer for a constitutional convention, it being beyond the power of the Legislature to control the convention in that respect, even though the Legislature did provide for the assembling of the convention. In discussing the constitutional convention, the court said:

"It is the highest legislative assembly recognized in law vested with the right of enacting or framing the supreme law of the State. The fact that the convention assembled by authority of the Legislature renders it in no respect inferior thereto, as it may well be questioned whether, had the Legislature refused to make provision for calling a convention, the people in their sovereign capacity would not have had the right to have taken such measures for framing and adopting a constitution as to them seemed meet." (2 Minn., 266.)

*State of Missouri vs. Neal* (Mo., 1868), 42 Mo., 119. The Supreme Court of Missouri in this case said that the constitutional convention of 1865 was clothed with the power, if it had so desired, of putting the Constitution into effect without a vote of the people, and certainly, therefore, had the authority to place in effect an ordinance as to perjury in connection with the holding of elections.

"As the representatives of the people clothed with an authority as ample as that, certainly its power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument cannot be seriously questioned." (42 Mo., 123.)

*Taylor vs. Commonwealth* (Va., 1903), 101 Va., 829, 44 S. E., 754. This case holds that the Constitution promulgated by the constitutional convention which assembled at Richmond, Virginia, during the years 1901-2 was the Constitution of the State irrespective of the power of the convention to place it in effect without a vote of the people, since the people had acted under it and accepted it by acquiescence.

*Kemper vs. Hawkins*, 1 Va. Cases, 20, 74. Speaking of the revolutionary constitutional convention, the General Court of Virginia said:

"The convention of Virginia had not the shadow of a legal or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, and annul the Constitution itself—namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity." (1 Va. Cases, 74.)

*Miller vs. Johnson* (Ky., 1892), 92 Ky., 589, 18 S. W., 522, 13 Ky. L., 933, 15 L. R. A., 524. This decision holds, in substance, as follows:

"If a constitution has been recognized as valid in its entirety by both the executive and legislative branches of the government after being formed and promulgated according to the forms of law, the judicial department will not declare it or any part of it invalid although after it was submitted to and voted upon by the people the convention elected to draft it, made several changes in it, and promulgated it as changed." (15 L. R. A., 524.)

Note.—The Constitution of Kentucky provided for the calling of conventions by the Legislature, seemingly with power to adopt a constitution without submitting it to the people.

*In the Matter of Oliver Lee & Co.'s Bank* (N. Y., 1860), 21 N. Y., 9. In this case the Court of Appeals of New York said, speaking of a constitutional convention:

"The Convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to

ratification by the people, and to the Constitution of the Federal Government, with all private and social rights, and with all the existing laws and institutions of the State." (21 N. Y., 9.)

*Loomis vs. Jackson*, 6 W. Va., 613, 708. The Supreme Court of Appeals of West Virginia in this case said:

"That a constitutional convention lawfully convened does not derive its powers from the Legislature but from the people.

"That the powers of a constitutional convention are in the nature of sovereign powers.

"That the Legislature cannot either limit nor restrict them in the exercise of these powers.

"That the legality of the election for officers held on the 22nd day of August, 1872, after the ratification of the new Constitution and schedule, is not to be called in question by any court created or continued by the provisions of that Constitution. When it is proposed that this court shall determine that the sovereign power of this State cannot lawfully commission a judge of its own creation, it is invited to commit judicial suicide. Courts sit to expound the laws made by their government and not to declare that government itself a usurpation." (6 W. Va., 708.)

There do not seem to be any Texas cases deciding whether or not the Legislature may call a constitutional convention; in fact, there are very few court decisions in this State with reference to constitutional conventions.

In the case of *McMullen vs. Hodge* (1849), 5 Texas, 34, we find this expression:

"So in case of a peaceful change of government by the people assembled in convention for the purpose of framing a constitution as the fundamental law for the protection of the three great objects of all governments based on the rights of man—life, liberty and property. It would be in the power of such a convention to take away or destroy individual rights, but such an intention would never be presumed; and to give effect to a design so unjust and unreasonable would require the support of the most direct explicit affirmative declaration of such intent." (5 Texas, 37.)

The court assumed, of course, that the convention had full sovereign power, but does not discuss by what means this vast power could be vested in the convention.

*Cox vs. Robison*, 105 Texas, 426, 431, 150 S. W., 1149. In this case our Texas Supreme Court held that:

"The convention that framed the Constitution of 1866 was called upon the proclamation of President Johnson which did not require any part of its work to be submitted to the people for their ratification; and the ordinances that it adopted were therefore valid without a vote of the people."

*Quinland vs. Houston & L. C. Ry. Co.* (1896), 89 Texas, 356, 34 S. W., 378. In this case the Supreme Court held that since the convention of 1867 was called pursuant to an act of Congress which authorized the calling of a convention for the purpose of framing a constitution for the State with a view to its restoration to the Union, the constitution to be framed by the convention and submitted to the people for ratification, the convention was without authority to legislate by passing ordinances:

"The Act of Congress did not invest the convention with the power of independent legislation. It is true the question of propriety of incorporating any specific provision into the fundamental law was for the sole determination of the convention. But we are of opinion that when a convention is called to frame

a constitution which is to be submitted to a popular vote for adoption it cannot pass ordinances and give them validity without submitting them to the people for ratification as a part of the Constitution. The delegates to such a convention are but agents of the people and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election and assemblage." (34 S. W., 744.)

We will now show briefly what the encyclopedia and textbooks have to say based substantially upon the authorities discussed in this opinion.

At page 895 of *Am. & Eng. Ency. of Law*, second edition, we find this language:

"A constitutional convention has been defined as a body of delegates chosen by the electors of a State to perform certain legislative duties connected with the enactment of the fundamental law. It has been called a sovereign body, but is not an independent branch of the government."

And at page 896 of the same volume:

"It requires no provision in the existing Constitution to authorize the calling of a convention for the purpose of revising the fundamental law. The legislative department of the government is alone empowered to take the initiative in calling a constitutional convention unless a different mode of procedure is laid down in the Constitution. And such action may be taken in form of a joint resolution; a formal statute is not required in order to provide for a lawful convention."

It will be noted that the language quoted is that the legislative department only is empowered "to take the initiative in calling a constitutional convention." This text does not attempt to state what "taking the initiative" is, whether it is calling the convention or merely enacting a measure giving the people an opportunity of authorizing the calling of a convention. At page 27 of 6 *Ruling Case Law* the following language appears:

"The customary manner of calling a constitutional convention in the United States is by resolution in the Legislature followed by a submission of the question to the electorate. At one time in the early history of the country the view was entertained that the people could legally assemble in convention and revise their Constitution without the sanction of the legislature, but this doctrine is no longer recognized. In the absence of any provision in the Constitution on the subject it seems that the legislature alone can give validity to a convention. Where a change in the Constitution is made under proceedings initiated by the legislature it is not because the legislature possesses any inherent power to change the existing Constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire State, can be lawfully obtained."

Here again we find that the language used is not susceptible of the construction that the Legislature has power itself to call the convention. The language is that the Legislature alone "can give legality to a convention." This might very well mean that the only method of initiating the movement so as to give it legality is through the Legislature. The case cited in support of the text is *State vs. Dahl*, 6 N. D., 81, 68 N. W., 418, 34 L. R. A., 97, and also *Wells vs. Bain*, 75 Pa. St., 39, 15 Am. Rep., 563, both of which cases we have discussed and in neither of which was the question involved as to the power of the Legislature to call a convention.

The paragraph in 12 *Corpus Juris*, pages 683-4, on this subject is as follows:

"Some of the State Constitutions provide for periodically submitting to the

voters the question whether a convention shall be called to revise and amend the Constitution. Regardless of whether or not provision is made for periodical resubmission of the question of calling a convention, the constitutions usually provide that the legislature may, of its own volition, submit to a vote of the people the question whether a convention shall be called, and subject to any existing constitutional limitations, may prescribe the time and manner of electing delegates to such convention. This power may be exercised by joint resolution. A provision for periodical submission, without more, does not deprive the legislature of the power to submit the question of a convention at other times. Where no method of amendment is provided by the Constitution itself, it is universally admitted that the legislature may submit to the people the question of calling a convention for the purpose of framing amendments; and it is for the people themselves, not the legislature, to say whether or not the convention shall be held. Where the Constitution provides for amendment by the framing of separate amendments by the Legislature and their submission to the people, and contains no other provision for amendment, some authorities have held that the method expressly provided is exclusive and that the legislature is without power to call a convention. Other authorities, however, have held that a provision in the Constitution for the framing of amendments by the legislature is not exclusive; and, acting on this principle of construction, conventions have been called, the legality of their existence and proceedings has been justified, and the constitutions framed by them have been adopted by the people. Where the Governor convenes the general assembly in extraordinary session, for the purpose of calling a constitutional convention, he is without power to limit the call for the convention to a particular subject."

We have discussed practically all the authorities cited under the text just quoted.

In *Cooley's Constitutional Limitations*, seventh edition, page 61, we find this language:

"In accordance with universal practice, and from the very necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval. But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definite action upon amendments or revisions; they must submit the result of their deliberations to the people—who alone are competent to exercise the powers of sovereignty in framing the fundamental law—for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the State must be enacted by the people themselves."

From *Dodd on the Revision and Amendment of State Constitutions* (page 44):

"When in States having no provision for conventions need was felt for a constitutional provision, the question necessarily arose as to whether conventions might be called in spite of the absence of constitutional authorization to do so. It has now become the established rule that where the Constitution contains no provision for the calling of conventions, but has no provision expressly confining amendments to a particular method, the legislature may provide by law for the calling of a convention—that is, enactment of such a law is within the power of the legislature unless forbidden and is considered a regular exercise of legislative power."

The following excerpts are also taken from Mr. Dodd's work at the pages shown:

"The calling of conventions by legislative action alone, without requiring the

submission of the question to a vote of the people, has been the method adopted by a few States, and is the one still permitted by the Constitutions of Maine and Georgia. Then, too, when no provision is contained in a State Constitution regarding the calling of a convention, it would seem to be within the discretion of the legislature as to whether the question should be submitted to the people. Yet even in these cases the feeling has existed that the people should be consulted upon a matter of so much importance." (Dodd, pp. 46-7.)

"The plan of permitting the Legislature at its discretion to submit to the people the question of calling a constitutional convention has for many years been the most popular one, and is now adopted into the Constitutions of twenty-six States." (Dodd, p. 49.)

"The practice of obtaining the popular approval for the calling of a convention may be said to have become also the settled rule. Thirty-two State Constitutions require such a popular expression of approval, and even where it has not been expressly required such a popular vote has been taken in a majority of cases in recent years." (Dodd, p. 51.)

*Mr. Jameson*, who argued for supreme power in the Legislature in this respect, in his work on the *Constitutional Conventions*, took the position that the Legislature has authority to call a convention. At page 210 of his book he said:

"For our present purposes it may be regarded as settled that the Legislature of a State has authority to provide for calling a convention whenever there is no constitution provision at all relating to amendments of the fundamental law, or the provisions are confined to the enactment of specific amendments, and a general revision is deemed necessary."

On the other hand, *Mr. Hoar* in his recent work on *Constitutional Conventions* (1917) appears to take the opposite view. At page 75 of *Mr. Hoar's* book we find this language:

"Legislatures have no inherent rights. The powers are derived from the Constitution and hence in States whose constitutions do not provide for the holding of a constitutional convention, it would seem that the Legislature cannot call a convention, and hence that a convention in order to be valid, must be the act of the people."

*Mr. Hoar* discusses this question in Chapter 5 of his book, beginning at page 58. Among other things *Mr. Hoar* says:

"It is undoubted that conventions have in the past been called by legislatures without advanced permission from the voters, but the growing tendency has been to first take a popular vote." (Hoar, p. 66.)

He quotes from 6 R. C. L., page 27, the following:

"The customary manner of calling constitutional conventions in the United States is by resolution of the Legislature followed by a submission of the question to the electorate." (Hoar, p. 68.)

"Thus convention calling is not a regular function of the Legislature and there is a growing tendency toward the view that the Legislature has no power to call a convention without first obtaining permission from the people." (Hoar, p. 68.)

"The theory with the greatest weight of authority behind it is based on the fact that there would be no convention unless the people voted affirmatively, that an affirmative vote would result in holding exactly the sort of convention in every detail provided in the act, and that the people are presumed to know the terms of the act under which they vote. The conclusion drawn from this is that the convention's act in its every detail is enacted by the people voting under it."

We now get down to the Indiana cases, one of which deals with the exact question under consideration and the other contains language very much in point, so far as the principles involved are concerned.



*Ellingham vs. Dye* (Ind., 1912), 178 Ind., 336, 99 N. E., 1; *Ann. Cas.*, 1915c, p. 200. In this case the Supreme Court of Indiana held invalid an act of the Legislature passed in 1911 incorporating therein what was termed a "proposed new Constitution" which was a copy of the existing Constitution with twenty-three amendments or changes of its provisions. The act provided that it should, if adopted, take effect on the first day of January, 1913. There was no pretense of complying with or proceeding under the provisions of the existing Constitution prescribing the mode of amendment. The bill was enacted and approved by the Governor. An injunction suit was instituted to enjoin public officers from carrying out this act, it being alleged that the act was beyond the power of the Legislature. The Supreme Court of Indiana held the act invalid and in its written opinion described freely the nature of constitutional conventions, and we quote the following excerpts from the opinion:

"That the power to initiate, frame, and submit to the people fundamental law is not legislative power in the sense in which the General Assembly is vested with legislative power by that provision." (9 N. E., 3.)

Calling attention to the provision in the Constitution authorizing the Legislature to initiate specific amendments the court said that:

"This by necessary implication withholds the right of the broader and more comprehensive exercise of the power to so participate in fundamental legislation involved initiating, preparing, and submitting a new Constitution." (99 N. E., 3.)

"But this general grant of authority to exercise the legislative element of sovereignty power has never been considered to include authority over fundamental legislation." (99 N. E., 3.)

"The grant to the General Assembly of 'the legislative authority of the State' did not transfer from the people to the General Assembly all the legislative power inhering in the former. (99 N. E., 4.)

"A 'Constitution' is legislation direct from the people acting in their sovereign capacity, while a 'statute' is legislation from their representatives, subject to limitations prescribed by the superior authority." (99 N. E., 4.)

The court stated that there were two methods of changing or amending written Constitutions:

"First, by the agency of conventions called by the General Assembly in obedience to a vote of the people and usually pursued when a general revision is desired; and, second, through the agency of the specific power granted to the General Assembly by constitutional provision to frame and submit proposed amendments, which is considered preferable when no extensive change in the organic law is proposed. And, it is scarcely necessary to add, the proposed fundamental law must be regularly ratified by the people." (99 N. E., 8.)

As to the power of the Legislature in general, the court said:

"A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the Federal or State Constitution." (99 N. E., 18.)

The court concluded its holding upon the main question in the case in the following language:

"Sound legal and political principles, the history of our political life as a State, and the authority of judicial and commentatorial opinion, all unite in forcing the conclusion that the Act of 1911 is invalid for want of power in that body to draft an entire Constitution and forthwith submit it to the people under its general legislative authority, if the instrument be conceded to be a new Constitution and not merely amendments; and that, if it be considered as

merely a series of amendments, it is a palpable evasion and disregard of the requirements and checks of Article 16, and is for that reason void." (99 N. E., 19.)

*Bennett vs. Jackson (Indiana, 1917)*, 116 N. E., 921. This is the one case in which the question under investigation has been decided by a court, so far as we are able to ascertain. It appears that Indiana had at the time a Constitution similar to ours so far as amendments and constitutional conventions are concerned; that is, a specific mode for the Legislature to submit specific amendments to the people was contained in the Constitution, but the Constitution was silent as to general revisions or constitutional conventions.

The Indiana Legislature in 1917 had passed an act calling a constitutional convention "to revise the Constitution of the State." The power of the Legislature to enact such a law was squarely raised and adversely decided by the Supreme Court of Indiana.

The case was decided upon the theory that a general revision of the Constitution (as opposed to specific amendments) was within the power of the people, not delegated to the Legislature in the general grant of the legislative power; that while the Legislature was the proper body to initiate a movement looking to a general constitutional revision, still that body was limited to that which is appropriate and necessary to afford the people an opportunity to express themselves on the question as to whether they desire a new Constitution to be framed and submitted by a convention—that is, that the Legislature must consult the people before calling such a convention.

As to the nature of the power of the Legislature the court said:

"If the passage of such a bill is within the purview of the Constitution governing ordinary legislation, there would be no question but that the General Assembly might, without any suggestions, proceed to the enactment of such legislation, for the reason that within the field of legislation as fixed by Section 1, Article 4, of the present Constitution, the Legislature is supreme and its actions are circumscribed only by the terms of the State or Federal Constitution. *Ellingham vs. Dye*, 178 Ind., 336, 343, 99 N. E., 1, Ann. Cas. 1915c. 200. The almost universal holdings of the courts are to the effect that the duties which may be performed by the General Assembly in relation to the change or making of a Constitution are not governed by the general rule of authority as set out in Section 1, Article 4, supra. *Ellingham vs. Dye*, supra, 178 Ind., at page 344, 99 N. E., 1, Ann. Cas. 1915C, 200." (116 N. E., 922.)

The court further used this language:

"The Legislature has no inherent rights. Its powers are derived from the Constitution, and hence, where some action of the legislative body, which action is outside of the particular field fixed by the Constitution and is not strictly legislative within the meaning of Section 1, Article 4, supra, is sought to be justified, a warrant for the same must be found somewhere; if not in the Constitution, then directly from the people, who, by the terms of Section 1, Article 1, of the Bill of Rights, have retained the right to amend or change their form of government. The right of the people in this regard is supreme, subject, however, to the condition that no new form of a Constitution can be established on the ruins of the old without some action on the part of the representatives of the old, indicating their acquiescence therein; and, the General Assembly being the closest representative of the old, its approval must be obtained by some affirmative act. This is the only orderly way that could be conceived. The question then arises: How may these, the people and the Legislature, get together on this proposition? If no positive rule is provided by the fundamental law of the State, then, if a custom has prevailed for a sufficient length of years so that it is said to be fully established, that rule or custom must prevail." (116 N. E., 922-3.)

As to the custom prevailing among the States the court said:

"It seems to be an almost universal custom in all of the States of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, to ascertain first the will of the people and procure from them a commission to call such a convention, before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention. 6 R. C. L., Sec. 17, p. 27; Hoar, Constitution Conventions, p. 68 (1917)." (116 N. E., 923.)

It appears that the people of the State of Indiana had recently voted adversely on the calling of a constitutional convention:

"If ever an emphatic protest has been registered against any proposition, it was in this instance. The court further found that this election was the last expression of the people of the State on the question of calling a constitutional convention. It cannot consistently be claimed that the Legislature of 1917 had any commission from the people to call a constitutional convention as provided for in Chapter 2, p. 5, of the Acts of 1917." (116 N. E., 923.)

"We are of the opinion that the will of the people as expressed in the election of 1914 is as binding on the General Assembly as a positive provision of the Constitution could be, and hence the action of the Legislature in calling a constitutional convention as provided for in Chapter 2, p. 5, of the Acts of 1917, is null and void, being in conflict with Section 1 of the Bill of Rights and taking from the people the right to say when they desire a change in their fundamental law." (116 N. E., 923.)

Justice Lairy of the Indiana court dissented upon the ground that there being no express or implied inhibition in the Indiana Constitution, the Legislature had the authority to call a convention and presented quite a strong argument from his viewpoint.

As stated in some of the authorities, supra, no valuable precedent can be found in the practice of calling conventions during unsettled or revolutionary times. The conventions which dealt with Texas Constitutions in 1836, 1845, 1861, 1866 and 1867, being the provisional government convention, the one "recommended" by the President of the Republic in 1845, the secession convention of 1861, the convention of 1866 called by President Johnson, and the reconstruction convention of 1867 called pursuant to an act of Congress, respectively, fall within such class of conventions.

The convention which framed and submitted to the people the Constitution of 1876, our present organic law, was called after an affirmative vote of the people. The Texas Legislature passed a joint resolution approved on March 13, 1876, submitting to the people the question whether a constitutional convention should be called "for the purpose of framing a new Constitution." (8 Gammel's Laws, p. 573.)

After considering carefully the authorities, as shown in the foregoing, we have arrived at the conclusion that your inquiry should be answered in the negative; that is, we are of the opinion that the Legislature is without power to call such a convention without a favorable vote of the people on that proposition.

We have seen that the power to adopt a new Constitution has been reserved in the people; that the grant of legislative power does not include any authority to take any step towards changing the organic law; that any power the Legislature may exercise upon this subject must be found elsewhere than in that grant of power; that even the power of submitting specific amendments is derived from an express grant, not in the grant of legislative power; but that in order that

there may be a means whereby the people may exercise their ultimate power as to the Constitution—may in their wisdom decide on changing it—by usage and the necessities of the case, the Legislature is the proper agency, and has the authority to initiate a movement which will afford the people an opportunity to express their will upon the question.

But beyond what is reasonably necessary to accomplish that purpose we take it the Legislature cannot go. There must be some limit to the authority of the Legislature to deal with the subject. The Legislature, like other departments of the government, owes its existence to the Constitution. In a sense the Constitution is the creator of the Legislature, and “as a stream cannot rise above its source,” the creature cannot destroy the creator, or even determine that it needs destroying, so the Legislature cannot logically be deemed to have power to decide on the necessity of a new Constitution and breathe into existence instrumentalities and provide for the expense thereof, without consent of those who alone are capable of making such decision ultimately.

Ordinarily the Legislature can do whatever is not inhibited by the Federal or State Constitution. But whatever it does must be in the nature of legislative power unless there is some express grant in the Constitution conferring additional power. The authorities are overwhelming to the effect that submitting amendments and initiating proceedings looking to revising the Constitution is not legislative power as that term is ordinarily understood. As stated above, it is only from necessity and custom that the Legislature may even submit to the people the question of calling a constitutional convention; and this only because necessary in order to allow the exercise of a sovereign power reserved to the people. The power of the Legislature ought not to go beyond this necessity until the people have seen fit to make an express grant increasing the Legislature’s power in this regard.

The Legislature having any authority in this respect only by necessity and custom, the general custom ought to have weight in determining the matter, and we have seen from the authorities that except in the case of revolutionary conventions, or those held under condition to submit to the people the question of calling a convention amounting to practically the same, the general custom is for the convention.

Believing that the reservation in the people of the power of framing a new Constitution or initiating changes in it in any other manner than by specific amendment as provided in Article 17, upon principle precludes the calling of a constitutional convention by the Legislature, and that necessity and custom does not sanction it in a time of peace and tranquility under a stable government, and believing our opinion is in harmony with the weight of authority, and particularly in view of the decision of the Supreme Court of Indiana under conditions and a Constitution similar to ours, we are of the opinion that the Legislature is without authority to call a convention without an affirmative popular vote for the purpose mentioned in your inquiry.

The doctrine that the Legislature has power to pass any measure not inhibited in the State or Federal Constitutions cannot be accepted unqualifiedly. If it has power to call a convention to form a new

Constitution, and vest it with incidental power to accomplish that end, where is the limit of the authority the Legislature may delegate to the convention? Might it not authorize the convention to promulgate a new Constitution? The point is, there must be a limit beyond which the Legislature cannot go, and we think it is marked by what is necessary to make practicable the exercise of the theoretical power of the people to adopt a new Constitution. Power to submit the question to the people to decide that a convention shall or shall not be convened accomplishes that purpose. The act then, if an affirmative vote is registered, becomes the act of the people; the power of the convention is then derived from the people, not the Legislature.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2475, Bk. 58, P. 246.

CONSTITUTIONAL LAW—HOUSE OF REPRESENTATIVES—THE METHOD  
OF VOTING.

There is no constitutional inhibition against using the electric voting machine now installed in the House of Representatives to take and record the vote of the members of the House except in elections by the Senate and House of Representatives, jointly or separately (other than election of their officers), which must be by viva voce.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 12, 1923.

*Honorable R. E. Seagler, Speaker of the House of Representatives,  
Capitol.*

DEAR SIR: We have your inquiry of the 10th instant, reading as follows:

"The question has arisen as to whether or not the Legislature can legally transact business by the use of the electric voting machine which has been recently installed.

"We will thank you very much if you will render an opinion on that question for the information and guidance of the House in its deliberations, and will furnish the same to us at your earliest convenience."

According to our information the method of voting by the electric voting machine mentioned by you may be described briefly as follows:

Each member by pressing a button on his desk may make a record of his vote, either "yes," "no," or "present and not voting." When the member presses the button it records his vote on a large board in front of all the members showing the names of all the members of the House and showing instantly how each member voted. Then by a photographic process a record is made on a sheet of paper, being a reproduction of the face of the board and showing how each member voted on the proposition before the House. It is our understanding also that it will show the total vote, pro and con, etc. Then the yeas and nays are entered upon the journal in the usual way.

There can be no doubt that either branch of the Legislature may choose its own method of voting and expressing its will unless there is some constitutional restriction or direction as to the mode of cast-

ing the votes of its members. As to the enactment of laws, we find the rule stated in 25 R. C. L., page 881, as follows:

"Independently of constitutional requirements, the rule is that a law may be enacted by the voting of a majority of the legislative body taken in such manner as may be adopted; but in many, if not most jurisdictions, the method is governed by constitutional provisions."

The only directions or restrictions we find in our Constitution as to the method of voting in the two branches of the Legislature are the following:

Section 12 of Article 3 provides as follows:

"Each house shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either house on any question shall, at the desire of any three members present, be entered on the journal."

Section 32 of Article 3 is in the following language:

"No bill shall have the force of a law until it has been read on three several days in each house and free discussion allowed thereon; but in case of imperative public necessity (which necessity shall be stated in a preamble, or in the body of the bill), four-fifths of the house, in which the bill may be pending, may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journals."

Section 39 of Article 3 is as follows:

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

Section 41 of Article 3 provides a specific method of voting as follows:

"In all elections by the Senate and House of Representatives, jointly or separately, the vote shall be given viva voce, except in the election of their officers."

Another provision is to be found in Section 8 of Article 15 in reference to the removal of judges of the Supreme Courts, Courts of Appeal and district courts. This section provides in part that:

"And in all such cases the vote shall be taken by yeas and nays and entered on the journals of each house, respectively."

It will thus be seen that the only direction the Constitution contains as to the method of taking the vote of the members of the House is that (1) in certain instances there must be a yea and nay vote, to be entered upon the journal; (2) that in all elections by the Senate and House of Representatives, jointly or separately, the vote shall be given viva voce, except in the election of their officers.

You are respectfully advised that in our opinion the Constitution would not be complied with by voting with this machine where the Constitution requires a viva voce vote. A vote viva voce has been defined as follows:

"The term 'viva voce' when applied to elections, is used in opposition or contradiction to the ballot, and simply means that the voter shall declare himself by voice instead of by ballot." (Words and Phrases, Second Series, Vol. 4, page 1190.)

It is clear that the machine method of casting the vote of the House would not be in compliance with the Constitution in elections by the Senate and House of Representatives, jointly or separately, except in the election of their officers. In such cases the member must cast his vote by speaking it with the "living voice."

In all other instances we find no constitutional inhibitions against the use of this voting machine. The use of this machine for the taking of the yeas and nays is just as effective as verbally calling the name of each member and allowing him to answer "yes" or "no"; and, of course, under this method the vote is entered upon the journal in compliance with the Constitution.

This view we think is consistent with the intent and purpose of the framers of the Constitution in requiring a yea and nay vote to be entered upon the journals. In speaking of such a provision, Mr. Cooley in his work on Constitutional Limitations at page 201, Seventh Edition, says:

"Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation; and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not."

The method of voting now under consideration discloses to all how each member voted and certainly makes and preserves an authentic record of the number of votes pro and con upon the given proposition. Then when the yea and nay vote is entered on the journals the Constitution is complied with in directing that a yea and nay vote shall be taken in certain instances and entered on the journals.

In making the above statement we are assuming, of course, that the machine will effectively accomplish the purpose for which it is designed.

In addition to what we have said there is another circumstance in favor of our view, and that is that the fact that in a particular instance a viva voce vote is required furnishes a strong intimation that in all other instances such a method is not necessary.

You are therefore respectfully advised that in the opinion of this Department there is no constitutional inhibition against using the electric voting machine now installed in the House of Representatives to take and record the vote of the members of the House except in elections by the Senate and House of Representatives, jointly or separately (other than election of their officers), which must be by viva voce vote.

We have made a careful search and assume we have found all the provisions of our Constitution on this subject; if not, of course the rules announced can be applied to all similar provisions that we may have overlooked.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2482, Bk. 58, P. 203.

CONSTITUTIONAL LAW—DEBTS—DEFICIENCY WARRANTS.

The fact that deficiency warrants may have been authorized by the Governor and issued in excess of \$200,000.00 does not render such deficiency warrants

illegal, and no debt is created in violation of the Constitution, Section 49 of Article 3, by reason of such deficiency warrants exceeding the amount of \$200,000.00.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 21, 1923.

*Honorable J. E. Quaid, Chairman of the Appropriation Committee,  
House of Representatives, Capitol.*

DEAR SIR: Attorney General Keeling is in receipt of yours of even date, reading as follows:

"House Bill 133 is under consideration in the House of Representatives at this time. Question has been raised in regard to the legality of deficiencies of \$200,000.00 or more and the right of the Governor to authorize such deficiencies.

"A prompt opinion on these matters will be appreciated by us."

It is the understanding of the writer that the exact question you desire answered is whether Section 49 of Article 3 of the State Constitution inhibits the issuance of deficiency warrants in excess of the amount of \$200,000.

Section 49 of Article 3 reads as follows:

"No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed, in the aggregate at any time, \$200,000.00."

This Department in an opinion dated October 8, 1913, to be found at page 736 of the printed Report and Opinions of the Attorney General for 1912-14, held that the limitation in the above quoted constitutional provision as to the amount of debt that may be created to supply the casual deficiencies in the revenue has no application to the issuance of deficiency warrants. In that opinion the following language appears:

"A deficiency warrant is not even a debt against the State, and there is no obligation whatsoever upon the Legislature to make an appropriation to pay deficiency warrants, for, in the first place, there was no authority for the creation of the debt. Warrants issued in pursuance of an appropriation are not debts against the State although there may be no money in the Treasury at the time such warrants are drawn, but where the revenue is in process of collection such transactions are considered to be upon cash basis and the revenue to be collected during the current year is theoretically in the Treasury.

"In re State Warrants, 55 Am. St. Rep., 852.

"In re Appropriations, 13 Col., 313.

"While Article 4342 of the Revised Statutes authorizes the issuance of deficiency warrants, yet, at the same time, a pursuance of such article does not create a debt against the State. A debt against the State, in the true significance of that term, can only be created under the provisions of Section 49 of Article 3 of the Constitution, which reads as follows:

"No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed, in the aggregate at any one time, \$200,000.00."

"The only one of the heads set out in this section under which a deficiency could be deemed a debt of the State would be that exception allowed in said section 'to supply casual deficiencies of revenue,' and it is sometimes thought that deficiency warrants issued under the provision of Article 4342 come within the meaning of casual deficiencies of revenue. But this is erroneous. Casual deficiencies in revenue arise when the revenues derived from taxation and other sources are insufficient during any one year to meet the appropriations made by the Legislature for the expense of the government during that year, and when such a contingency arises then the Legislature is authorized to borrow



money and lend the credit of the State for the purpose of securing sufficient funds to meet the appropriations for that year.

- "In re Loan of School Fund, 18 Col., 195.
- "In re Contracting State Debt, 21 Col., 399.
- "State vs. McGraw, 12 Washington, 541.
- "In re Appropriations, 13 Col., 316.
- "In re Casual Deficiencies, 21 Col., 403.
- "In re Incurring of State Debt, 19 R. I., 610."

It will be seen that the opinion asserts two propositions, to wit: (a) that deficiency warrants are not debts, and (b) that they are not to supply casual deficiencies in the revenue.

If these two propositions are correct, and we think they are, then the debt clause of our Constitution above quoted does not inhibit the issuance of deficiency warrants in excess of \$200,000.

We do not believe that it could be seriously contended after an examination of the authorities that deficiency warrants in themselves create debts. It is equally clear to us that the issuance of deficiency warrants does not provide for casual deficiencies in the revenue. In fact, the issuance of deficiency warrants does not raise any revenue and does not in the least add to the amount of revenues in the Treasury.

The mere fact, therefore, that deficiency warrants were issued pursuant to statute in excess of the sum of \$200,000 would not inhibit the Legislature from making the necessary appropriation to take care of such deficiency warrants.

Even a casual examination of the authorities in this and other States will disclose that it is not every obligation that a State or municipality may enter into that constitutes a debt within the meaning of the debt provisions of the Constitution. Every time the State through its necessary officers and agents makes a purchase of a piece of merchandise and does not pay for the same in cash at the time it creates in the strict sense of the word a debt, but it does not necessarily create a debt within the meaning of the Constitution inhibiting the creation of debts, etc. If such a strict construction were placed upon the language used in the Constitution it would be wholly impracticable to operate the State government, because it is not practicable to turn over the cash at the very instant that each and every purchase or obligation is made.

We have a provision in the Constitution (Section 7, Article 11) declaring that no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same and levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund. A very similar provision is to be found in Section 5 of Article 11. However, in construing these provisions the courts of our State, including the Supreme Court, have held that the word "debt" as here used is not to be construed in its strict sense, but these constitutional inhibitions had for their purpose to prevent obligations being entered into that would tie up future revenues without making the necessary provisions for interest and sinking fund.

In the case of *City of Corpus Christi vs. John Woessner*, 58 Texas, 462, our Supreme Court said:

"We are of the opinion that the issuance of warrants on current expenses of a city, which do not exceed the current revenue derived from taxation, permitted by law to be levied to meet current expenses, and such other revenue as a city may have from other sources than taxation, cannot be said to be the

creation of a debt prohibited by law unless a special tax be levied to meet the interest and create a sinking fund."

Our Supreme Court laid down the rule in *McNeal vs. City of Waco*, 89 Texas, 83, 33 S. W., 322, and this rule has been adhered to consistently by the courts of this State. The rule as stated by the Supreme Court is as follows:

"We conclude that the word 'debt,' as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation."

Under this construction of the Constitution it has been held many times in this State that counties and municipalities may make purchases without paying for same at the time so long as it is reasonably contemplated that such purchases and obligations may be taken care of out of the current revenues for the year. It has also been held that the current revenues of the year may be relied upon even though they have not been actually collected; in other words, if it is reasonably apparent that sufficient revenues have been provided for, that either have been actually collected or that will be or ought to be collected for the year, then obligations may be incurred based thereon even though it may eventually transpire that some of the revenues will not be collected. In this connection, we respectfully direct attention to the compilation of authorities in our opinion No. 2389, dated September 29, 1921, addressed to Hon. E. R. Campbell, attorney for Harris County, which is available in printed pamphlet form. It is unnecessary for us to repeat the authorities and the quotations therefrom contained in that opinion.

We think it is clear that the question whether a debt has been created contrary to the Constitution does not depend upon the amount of deficiency warrants that may have been allowed and issued, and therefore we respectfully advise that in the opinion of this Department the Legislature is not inhibited from making the contemplated appropriation simply by reason of the fact that the amount of deficiency warrants granted and issued may exceed the amount of \$200,000 in the aggregate.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2521, Bk. 59, P. 115.

CONSTITUTIONAL LAW—STATUTES CONSTRUED—STATE BOARD OF  
EDUCATION.

1. Article 7, Section 3 of State Constitution construed. Section 4, Chapter 29, Acts Regular Session, Thirty-sixth Legislature, construed.

2. Duty of State Board of Education in respect to setting apart funds to provide free textbooks is imposed in and defined by Section 8, Article 7, State Constitution.

3. Section 4, Chapter 29, Acts Regular Session, Thirty-sixth Legislature, is merely directory in respect to duty of Board of Education and cannot be given a construction that would conflict with duty of Board as defined in the Constitution.

4. Legislature has no power to require the State Board of Education to set apart only the amount estimated by the Superintendent of Public Instruction to be sufficient to provide free textbooks the coming year, if the Board should believe such amount too much or too little.

5. State Board of Education must obey its constitutional duty and set apart an amount actually sufficient to provide for textbooks.

6. If there is not sufficient amount in funds described in Section 3, Article 7, of Constitution to provide free textbooks, then duty rests on Legislature to appropriate needed amount out of general fund of State.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 19, 1923.

*The State Board of Education, Capitol Station, Austin, Texas.*

GENTLEMEN: You have asked to be advised as to whether you should at this time attempt to rescind a resolution passed at a former meeting of the Board setting apart from the Available School Fund of the State a certain sum of money to be used in the purchase of textbooks for children attending the public schools of Texas during the coming scholastic year and to pass another resolution, at this time, setting aside a smaller amount for such purpose and, at the same time, apportion the balance then remaining in the Available School Fund to the various public schools of the State.

The duty of the Board in respect to setting aside funds to purchase textbooks for children attending the public free schools of Texas is imposed by and defined in the following provision of Section 3, Article 7, of the State Constitution:

"It shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free textbooks for the use of children attending the public free schools of this State."

This language is mandatory. The Board cannot refuse to set aside money or funds to provide free textbooks for children attending the public free schools of the State. The sum they must set aside is "a sufficient amount" to provide free textbooks for the use of children attending the public free schools of the State. That they must set aside an amount that is actually sufficient for such purpose is shown not only by the provision quoted above, but also by the provision that immediately follows:

"Provided, however, that should the limit of taxation herein named be insufficient, the deficit may be met by appropriation from the general funds of the State."

While no legislation was needed to make the duty imposed by the Constitution upon the Board effective or complete, still the Thirty-sixth Legislature, at its Regular Session, passed an act which has a bearing upon this subject and must receive consideration in answering the questions propounded. This act is Chapter 29, General Laws, Thirty-sixth Legislature. The pertinent portion of said act is contained in the following provisions of Section 4 thereof:

"The State Board of Education shall require from the State Superintendent on July 1st of each year, a report as to the funds necessary for the purchase and distribution and other necessary expenses of school books for the regular school session of the following year, and said Board of Education shall have the power to set apart from the available school fund the estimated amount with twenty-five per cent additional, this additional sum to be used only to meet

emergencies or necessities caused by unusual increase in scholastic attendance or by unusual and unforeseen expenses and school conditions."

It is certain that these provisions can be given no meaning that will conflict with the mandatory duty imposed upon the Board by the Constitution. The Constitution having imposed upon the Board the duty to set apart a fund to provide free textbooks, the Legislature cannot empower anyone else to perform that function. The Constitution having imposed upon the Board the duty of determining what is "a sufficient amount" for that purpose, neither the Legislature, the State Superintendent, nor anyone else, can be empowered to make that determination. If the Legislature should say to the Board: "You shall each year set aside not less than one million dollars to provide free textbooks," and the Board should think that seven hundred thousand dollars would be sufficient for that purpose the coming year, the Board would have to obey the Constitution, and not the Legislature, and set aside the latter amount.

No matter what the Legislature may have said in statute to the Board, the Board must still obey the Constitution, if it cannot consistently obey both. The Constitution having measured the duty of the Board, the Legislature cannot govern the conscience and judgment of the Board in the performance of that duty by saying: "This and nothing else shall constitute the amount to be set aside each year for free textbooks." Nor can it substitute for the conscience and judgment of the Board the conscience and judgment of the State Superintendent of Education, by saying: "You shall take the estimate made by the State Superintendent of Public Instruction, add twenty-five per cent thereto and set aside that and no other amount each year." The Legislature can neither take anything from nor add anything to the duty imposed upon the Board by the Constitution.

Therefore, assuming, as we should, that the Legislature did not intend said statute to be in conflict with the Constitution, the proper construction to be placed upon the quoted provisions is, that they constitute merely a legislative construction of the meaning of the term, "a sufficient amount \* \* \* to provide free textbooks for the use of children attending the public free schools of this State," as the same is used in the Constitution. That, and no more. They mean, that it is the sense of the Legislature that the Board, in the performance of its constitutional duty of setting aside "a sufficient amount to provide free textbooks," shall set aside a sum sufficient not merely to purchase textbooks for children attending the public free schools of the State, but a sum sufficient for the purchase of such books and, in addition thereto, sufficient to bear the expenses of distribution and all "other necessary expenses of school books for the regular school session of the following year," and also twenty-five per cent thereof additional "to meet emergencies or necessities caused by unusual increase in scholastic attendance or by unusual and unforeseen expenses and school conditions," and that this amount may be best arrived at by adding twenty-five per cent to an estimate that shall be furnished by the State Superintendent of Public Instruction.

These provisions, except the one in respect to report to be made by the State Superintendent, can be regarded only as directory. So regarding them, and giving to the provisions a construction harmonious

with the Constitution, their chief value is, that they clearly indicate what the Legislature considered important to be taken into consideration by the State Superintendent, and the Board of Education in arriving at "a sufficient amount" to be set aside for free textbooks, within the meaning of that term as used in the Constitution. Said provisions clearly show that the Legislature intended that the State Superintendent, first, and then the Board, in arriving at "a sufficient amount," must take into consideration all known and probable factors that might affect the requirements of the schools for free textbooks for the coming year, and, in addition thereto, must make allowance for emergencies and for unusual and unforeseen expenses.

The writer is informed that the State Superintendent made to the Board two reports or estimates to meet the requirements of Section 4 of said act—first, a report that a certain amount would be necessary, in event the contracts awarded by the Textbook Commission at its last meeting were finally determined by a court of competent jurisdiction to be valid, and, second, an estimated amount in event such contracts were held to be invalid. The writer is also informed that the Board took the estimate based on the validity of the contracts, added twenty-five per cent thereto, as the statute directs, and passed a resolution setting apart from the available school fund the sum thus arrived at.

The question of the validity or invalidity of these contracts is a matter which neither the Superintendent nor the Board could overlook in arriving at an estimate of the probable amount that might be needed to provide free textbooks the coming year, and it certainly cannot be said that either the Superintendent or the Board exceeded constitutional and statutory authority in so doing. After due deliberation on the subject, we are of the opinion that the duty in that respect was properly discharged.

But the Board is now requested to rescind this resolution and pass another for a smaller amount, based on the invalidity of the contracts and, at the same time, to apportion the balance then remaining of the Available School Fund to the various public free schools of the State entitled to receive the same. It is pointed out that the increased apportionment thus obtained would be beneficial to the schools in that the trustees could then approve teachers' contracts for a longer term.

Of course, if the suggested action were taken and a court of final and competent jurisdiction should thereafter hold the contracts invalid, no harm would result. But, in event such increased or additional apportionment was made and teachers' contracts based thereon were so approved, and, thereafter, a court of final and competent jurisdiction should determine that the textbook contracts were valid, even greater confusion would exist. For, unquestionably, after school trustees had approved contracts based on such increased apportionment, the action of the Board in granting the same could not be rescinded, and no money remaining to care for textbook contracts, the Legislature would have to meet a large deficiency for the purchase of books under such contracts by appropriation out of the general fund of the State.

This Board could find no justification for putting itself into a posi-

tion where it could not perform its constitutional duties in event these contracts were held to be valid. That would be its position if the above request were acceded to and the contracts were determined to be valid.

By leaving your former resolution as it was passed, if these contracts are hereafter held invalid, the Board can at that time rescind its resolution setting aside the larger amount and pass a resolution setting aside an amount sufficient under the conditions that will then obtain and can also, at the same time, apportion the balance then remaining in the Available School Fund to the various public schools of the State. Such a course involves no risk and no loss of benefit to the schools. This course we advise at this time.

Yours truly,

JNO. C. WALL,  
First Assistant Attorney General.

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Op. No. 2484, Bk. 58, P. 448.

CONSTITUTIONALITY OF EXEMPTING OF PROPERTY OF THE AMERICAN  
LEGIQN OF THE DEPARTMENT OF TEXAS FROM TAXES.

An act of the Legislature undertaking to exempt from taxation property owned, held and used by the American Legion of the Department of Texas and the various posts thereof in the State of Texas is unconstitutional, since it is not within the power of the Legislature to extend such exemption to any property not used exclusively for purely public charities.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 7, 1923.

*Hon. A. C. Dunn, Member of the House of Representatives, Capitol.*

DEAR SIR: Replying to your letter of the 6th inst., enclosing a bill, the caption of which reads as follows:

"A bill to be entitled An Act amending Article 7507, of Title 126 of Chapter 11 of the Revised Civil Statutes of the State of Texas, by adding thereto subsection 12 thereof, exempting all property held and owned by the American Legion, and American Legion Posts in the State of Texas from taxation"—

in which you asked the opinion of this Department as to whether this act would be constitutional, I have to advise that in a recent decision by the Supreme Court of Texas, viz., *City of Houston vs. Scottish Rite Benevolent Association*, 230 S. W., 978, it was held that the *Scottish Rite Benevolent Association*, as its purposes and practices were disclosed by the facts, is an institution of purely public charity, within the meaning of Section 2 of Article 8 of the Constitution. The court proceeds at page 981 as follows:

"But the question remains whether the property was owned and used exclusively by an institution of purely public charity. It does not satisfy the constitutional requirement that the use by others was permitted by the owner to obtain revenues to be devoted entirely to the owner's work of purely public charity. *Morris vs. Masons*, 68 Texas, 703, 5 S. W., 519. Nor is the requirement satisfied by the fact that those sharing the use pay no rent. *Red vs. Johnson*, 53 Texas, 288. The actual, direct use must be exclusive on the part of such institution as is favored by the constitutional provision.

"By the very manner and terms of this property's acquisition, it was required to be used, as it was in fact used, by the two Masonic orders, 'to enable them

to pursue their work as Masonic lodges,' such work being, as agreed, only partly charitable.

"To the extent that the property was used by Masonic organizations, whose activities included other fields than charity, it was not, and could not be, used exclusively by an institution of purely public charity. Not being used exclusively by an institution of purely public charity, the claim to exemption under the constitutional provision fails, and our answer to the certified question is that the property was subject to taxation."

The purpose of the incorporation referred to in the bill, as the same is disclosed by its charter on file with the Secretary of State, is as follows:

"ARTICLE III.

"PURPOSE.

"Its purpose is to foster and perpetuate a one hundred per cent Americanism; to preserve the memories and incidents of our association in the Great War; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness; to maintain law and order, a representative form of government and white supremacy, and to uphold and defend the Constitutions of the United States and the State of Texas. The organization is absolutely non-partisan, and shall never be used for the dissemination of partisan propaganda, or for the promotion or destruction of any person's candidacy for public office or employment."

From an examination of this it is plain that its character does not bring it within the exemptions authorized by the Constitution, and hence it is not within the power of the Legislature to exempt the property used by it in furtherance of its expressed purposes from taxes which are required to be levied. Touching the question of the power of the Legislature to create an exemption by reason of the members of this organization having been veterans of the World War, the decision of the Court of Criminal Appeals in *Ex parte Jones*, 43 S. W., 513, is in point. The court had under consideration the validity of an act of the Legislature imposing an occupation tax upon peddlers and provided for the exemption

"from the payment thereof of blind, deaf, and dumb persons, wounded persons who have lost a hand or foot, all *ex-Confederate and ex-Federal soldiers*, who, from old age or other cause, are incapacitated to do and perform manual labor, who are actual residents of the State of Texas and are not inmates of any soldiers' home, or drawing any pension from the United States or any State government. \* \* \*"

The court said, at page 513:

"We understand the applicant to insist that the exemptions contained in said subdivision are obnoxious to Section 1 of Article 8 of the Constitution, which, so far as is necessary to be here considered, is as follows: 'Taxation shall be equal and uniform'; and Section 2 of said Article 8, which reads as follows: 'All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. But the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools) and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be void.'"

Referring to the above quoted exemptions, the court said:

"Without discussing the first three of said objections, it occurs to us that the exemptions enumerated in applicant's fourth subdivision make said occupation tax law (being Subdivision 21) clearly obnoxious to the provisions of the Constitution above set out. Some of the exemptions enumerated would appear to have strong claims, and entitled to consideration at the hands of the lawmaking power, if the Constitution did not intervene and inhibit such action. In some cases exemptions have been upheld where the persons exempted might be entitled to a pension or a bounty at the hands of the government; but we believe that other constitutional provisions stand in the way of such allowance by the lawmaking power. Under the provisions of our Constitution, no pension can be granted to any person, except as provided in Article 16, Section 55, of the Constitution, in favor of survivors, etc., of the Mexican War. Section 3 of our Bill of Rights would appear to inhibit any class legislation, and is as follows: 'Sec. 3. All free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.' A proper construction of these constitutional provisions, together with an application of same to the occupation tax provision before quoted, would appear to settle this question in favor of the applicant; for unquestionably the act exonerates and exempts from taxation, and constitutes certain classes therein named, privileged classes, who are authorized to pursue the occupation of peddling without the payment of any tax or the procurement of any license. This is obviously taxation which is not equal or uniform."

Thereupon the court after discussing the case of Pullman Palace Car Co. vs. State, 64 Texas, 274, quotes therefrom as follows:

"The Legislature may classify subjects of taxation, and these classifications may, as they will be, more or less arbitrary; but, when the classification is made, all must be subjected to the payment of the tax imposed who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision."

It concludes its own opinion with this language:

"We hold that said Subdivision 21 of the occupation tax act of the Twenty-fifth Legislature is null and void, as being violative of our constitutional provisions on the subject."

Accordingly we have to advise that the proposed law is unconstitutional.

Yours very truly,

EUGENE A. WILSON,  
Assistant Attorney General.

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Op. No. 2522, Bk. 59, P. 100.

#### CORPORATIONS—BLUE SKY LAW.

1. Electric interurban railroad corporations organized or to be organized under subdivision 60 of Article 1121, Revised Civil Statutes, 1911, are not exempt from the provisions of the Blue Sky Law of 1923. The term "railroad corporation" as used in Section 20 of said Blue Sky Law does not include interurban electric railroad corporations.

2. The Blue Sky Law is not applicable where the promoters themselves in good faith, without an intention to evade the provisions of the Blue Sky Law, organize a corporation and subscribe to all of the capital stock of the corporation without soliciting subscriptions from others.

3. But where the incorporators or organizers or a portion of them decide upon the organization of a corporation and go out and actively solicit subscriptions, the Blue Sky Law does apply and must be complied with.



4. The Blue Sky Law must be complied with in all cases where there is an increase of capital stock of a corporation.

The statute construed: Chapter 52, page 114, General Laws, Second Called Session Thirty-eighth Legislature, being the Blue Sky Law.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 20, 1923.

*Hon. S. L. Staples, Secretary of State, Capitol.*

DEAR SIR: This is in reply to your two communications of date the 12th and 14th instants, respectively. The first requested an opinion as to whether electric interurban railroad corporations are exempt from the provisions of the Blue Sky Law, and the second desired an opinion with respect to the applicability of this law where in the organization or in the increase of the capital stock of a corporation all of the capital stock is subscribed. The questions submitted will be more fully stated in connection with our reply to each communication.

### I.

Your inquiry of the 12th instant reads as follows:

"Referring to the Blue Sky Law, and more especially to Section 20, wherein the act says that the same shall not apply to certain corporations or concerns, including in the exemption 'railroads,' I beg to ask if, by virtue of the exemptions in Section 20, or in any other section of said act, a person desiring to form an organization, to be known as a corporation under the laws of the State of Texas, for the purpose of constructing, owning and operating an electric interurban railway or railroad should comply with the terms of said act in the matter of soliciting, selling and receiving subscriptions to a proposed capital stock for the purposes aforesaid.

"In explanation will state that General Jake Wolters and associates of Houston have formulated plans to organize a corporation for the purpose of building an electric interurban line and incorporate same under the general incorporating laws of the State, the purpose to be derived from subdivision 60 of Article 1121."

The Blue Sky Law enacted by the Thirty-eighth Legislature at its Second Called Session, page 114, Chapter 52, seems to have for its purpose, as disclosed by the caption, "to regulate and supervise and prevent fraud in the sale, purchase, and disposition in the State of Texas of stocks, stock certificates, bonds, debentures, or other securities, and the transaction of business in this State of persons, joint stock companies, brokers, agents, co-partnerships, or other companies, individuals, or other organizations, offering for sale or selling in this State such securities, including companies hereinafter incorporated under the laws of the State of Texas," and placing the administration of the act in the hands of the Secretary of State.

The word "stock" as used in the act is defined by the act itself to include "the certificates of stock of every corporation, as well as the certificates or any other written instrument evidencing ownership or membership in any joint stock association, common law trust, or any other organization, association, or concern of whatsoever nature, which is organized, formed, or created, or intended to be organized, formed, or created, which may, or which is designed to own property of any character."

The terms "person," "company," or "concern" are declared by the act to refer to and include "any such concern, or individual, or person

who may issue such stock, and whose such stock or certificate shall represent or evidence ownership or membership therein, which ownership or membership may be designed to be transferred, assigned or negotiated by the transfer, assignment or negotiation of such instrument."

The emergency clause recites the evil which the act seeks to remedy, which is in substance that "Texas has in recent years been flooded with worthless securities, issued and sold by irresponsible parties to the people of this State, resulting in great loss to investors, especially wage-earners, a class least able to stand such losses, and the fact that many companies have organized and made their domicile or home office in this State, and sold worthless securities through the mail and otherwise, to people in other States by reason of inadequate laws in this State."

Section 2 provides in part as follows:

"Every concern which shall hereafter be formed or created, or which shall hereafter attempt to increase its capital stock, or commence the transaction of business in this State, shall, before offering for sale, directly or indirectly, through itself, its agents or employees, or through any character of person, or association, whether herein defined or not, holding company, sales company, or otherwise any stock as defined in Section 1 of this act, and before transacting any business in this State, except the preparation of instruments hereinafter mentioned and other instruments relative to the organization and transaction of business thereof, file in the office of the Secretary of State, together with a fee equal in amount to the filing fee of a private corporation having capital and surplus of like amount, the following: \* \* \* This requirement as to fees shall not apply to corporations, by reason of the existing requirement in respect to the payment of filing fees upon obtaining charters and permits from the Secretary of State."

It is not necessary to recite more fully the provisions of the act, but it may be stated in a general way that in order to issue and sell stock a permit must be secured from the Secretary of State after full and complete information has been furnished that officer. The Secretary of State is given a good deal of discretion in the issuance of these permits. He is to grant the permit if he shall decide that values warrant and that the sale of stock or other securities and the business of the issuer will be conducted honestly and fairly and in compliance with the act and the general laws of the State. (See Section 5.)

In short, the object of the act seems to be substantially the same as that sought after by the Legislatures of the various other States of the Union that have enacted blue sky laws; that is, to place the flotation and sale to the general public of stocks and securities under the supervision of the State government for the protection of the investor against fraud and misrepresentation. Experience has demonstrated that all promoters of stock-selling schemes are not to be trusted to deal fairly with purchasers and prospective purchasers of stock and other securities. There are many of these promoters who will resort to fraud and misrepresentation, their main purpose being to make sales and rake down commissions and secure the other fellow's money without any good faith intention of perfecting a going concern which will be profitable to the investor. In order to eliminate as nearly as may be the fraudulent features of these schemes these blue sky laws are enacted. They require the promoters to submit their propositions to a representative of the State government to be passed upon by him

and a permit granted or refused as the merits of each proposition may warrant; and whenever such a permit has been granted, the investor has a right to assume that the State government has placed its stamp of approval upon the project, in so far as the claimed values and fairness and honesty are concerned. The law cannot hope to remove all element of risk in investments in stocks and securities, and such a result is not claimed for any of the blue sky laws that have been enacted; but, on the other hand, it has been demonstrated that the public ought to be protected from stock-selling schemes wherein the prospective purchasers are misled by fraudulent claims and misrepresentations. If, after the affairs of these concerns have been submitted to a representative of the State government, it is found that there is no unfairness or dishonesty connected with them and a permit is issued, the government has done all it can reasonably be expected to do and the investor takes the ordinary risks incident to investments generally.

We make the preceding general statement to indicate the theory and purpose of laws of this kind, for we must interpret the law so as to carry out its general purpose and intent if possible. If there is doubt in the interpretation of the words of the act, that doubt ought to be resolved in favor of the carrying out of this general purpose and intent. If exemptions have been made or doubtful language used and there are two interpretations to be placed upon the exempting words or the doubtful language, that interpretation ought to be adopted which will better effectuate this general purpose and intent.

Section 20 of the act declares that the act shall not apply, among others, to "railroad \* \* \* corporations." This section reads as follows:

"This act shall not apply to banking corporation, or concern named in Senate Bill No. 52 passed at the Regular Session of the Thirty-eighth Legislature, known as the Private Banking Bill, railroad, and building and loan corporations, nor to the stock thereof, nor to be construed to in any manner, affect the existing laws of this State, relating to the regulation of any corporation or concern, whatsoever, but in all respects, shall be cumulative thereof."

Does the expression "railroad corporation" include electric inter-urban railroad corporations? The courts in numerous instances have been called upon to decide whether the terms "railroad," "railroad company," "railroad corporation," or the like, include street railroads within the meaning of various statutes. It cannot be said that the expression "railroad" includes or excludes street railroads in all cases. It depends upon the purpose and intent of the act being construed. The Supreme Court of the United States in *Omaha Street Railway vs. Interstate Commerce Commission*, 230 U. S., 335, said:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

In an opinion rendered by the Attorney General of Texas in 1914, prepared by Hon. Luther Nickels (page 586, Opinions for 1912-14), it was held that within the meaning of a regulatory statute requiring *railroads*, machine shops, and other concerns manufacturing or re-

pairing cars within this State to provide derailing devices upon all tracks upon which cars are manufactured, interurban railroads *were railroads*, but that street railroads were not. In that opinion we find this language, which we think is undoubtedly correct:

"It cannot be said that in all instances the term 'railroad' either includes or excludes the term 'street railway' or 'street railroad.' The context of the act, the reason for its enactment, the evil which it was designed to meet, and the remedy proposed, must always be looked to to determine whether or not the one term includes the other."

The opinion just referred to does not seem to apply this same rule to interurbans. But the holding of the opinion with respect to interurbans is not inconsistent with this rule, and we need not consider the opinion authority any further than to the extent necessary in deciding the matter then before the Department. Considering the evident purpose *and intention* of the regulatory statute under consideration in that opinion, the Department may have been justified in holding that the expression "railroad" included interurban railroads, but in our opinion an act may use the expression "railroad corporation" in a statute in a sense so as to exclude interurban railroad corporations. We think the act under consideration does this.

The Legislature evidently had in mind that there was a statute giving the Railroad Commission jurisdiction in respect to the issuance of stocks and bonds of railroad corporations, while such was not the case in respect to interurban railroad corporations. The Railroad Commission of Texas does not claim any such jurisdiction in respect to stocks and bonds of interurbans. It is not to be presumed, in the absence of unmistakable language to that effect, that it was intended to leave unregulated interurban railroad corporations in so far as their stocks and bonds are concerned.

Railroad corporations, as that term is ordinarily understood, are dealt with in a separate chapter of the statute from the one dealing with interurbans. The statutes thus make a distinction between the two, and we think the expression "railroad corporation" was used in the Blue Sky Law in the same sense in which it is ordinarily understood in these statutes. The Blue Sky Law is broad in its scope, governing all corporations, associations, and common law trust concerns, and it is inconceivable that they intended to leave out interurban corporations when there is no other statute governing and regulating them in respect to the things included in the Blue Sky Law. There is a presumption against the Legislature having intended to leave them unaffected by the supervision imposed in respect to other corporations. The fact that railroad corporations are already supervised in the issuance of stock and bonds evidently accounts for the fact that they are exempted from the provisions of the Blue Sky Law. The same reasoning does not apply in the case of interurban railroad corporations.

The statutes of the State and the practical, or contemporaneous, construction of them indicates that the expression "railroad" or "railroad corporation" does not include interurbans. Thus the jurisdiction of the Railroad Commission extends to "railroads," but no jurisdiction has ever been asserted by that Commission over interurbans except where interurbans are expressly mentioned in the statutes. (See

Chapter 15, Title 115.) The Railroad Stock and Bond Law applies to "railroad corporations," but it has never been supposed that it applies to interurbans. (See Chapter 16, Title 115.) The power of eminent domain had long since been conferred upon "railroad corporations," but the Legislature in 1907 considered it necessary to expressly confer this power upon interurban railroad corporations. (See Article 6733, Revised Civil Statutes.) Article 6736 provides that interurban railway companies shall have "all rights and powers of eminent domain and condemnation of property in this title hereinafter set out and conferred upon steam railway companies of this State." The statutes had simply conferred the power on "railroads" without expressly limiting it to steam railroads, but, nevertheless, the Legislature thought this insufficient to include interurban railroad corporations, and therefore enacted a particular statute as to them.

So that it is evident that the statutes in using the expression "railroad" or "railroad corporation" may not in every case intend to include electric interurban railroad corporations.

As disclosing, without any claim of particular application, that the courts have held the expression "railroad" or "railroad corporation," or the like, to include or exclude interurban railroads, depending upon the purpose and intent of the act being construed, we call attention to the cases cited in Words and Phrases, both the Regular and New Series, under the head of "Railroad—Railway."

You are advised that the provision in the Blue Sky Law exempting from its provisions "railroad corporations" does not exempt interurban railroad corporations.

## II.

Your communication of the 14th instant is as follows:

"As you will observe from the letters hereto attached, one from M. W. Townsend of Dallas, Texas, and the other from Mr. Lindsey of Tyler, Texas, that the questions arise in the cases inquired about by them, and will necessarily arise from time to time in the application and enforcement of the Blue Sky Law of this State as to whether or not: (1) the subscriptions for the stock of a proposed corporation, or for the increase of its capital stock where all of such stock is subscribed for by the incorporators themselves, and none of said stock is offered or to be offered for sale to the public, is a sale of such stock within the meaning of the term 'sale' as used in the law. (2) Is the subscription for stock in a proposed corporation made and carried on in any one of the ordinary ways for procuring such subscription, that is, by opening a stock book for general subscriptions for said stock, or other method of subscriptions therefor, a sale of such stock within the meaning of said act.

"Does the said Blue Sky Law, and especially Section 2 thereof, require that before subscriptions may be taken for the capital stock of a proposed corporation yet to be organized, and the cash payment of 50 per cent thereof be received by the person, persons or concerns procuring such subscriptions and cash payments, a permit shall be procured from the department of the Secretary of State, as provided in said law, for the sale of such stock."

An answer to your inquiry seems to involve a reply to each of the following questions:

1. Does the act apply where there is a subscription of all the stock by the incorporators without any solicitation of membership or subscriptions from others?

2. Does the act apply where the incorporators make a general solicitation for membership or subscription to the capital stock?

3. Does the act apply in the case of increases in the capital stock of corporations?

According to Section 2 of the act the following classes of concerns must comply with the act:

Every concern which shall

- (1) Hereafter be formed or created, or
- (2) Which shall hereafter attempt to increase its capital stock, or
- (3) Commence the transaction of business in this State.

This enumeration, however, is not all that is included in Section 2. It is limited by further language. This section declares that these classes shall comply with the act "before offering for sale directly or indirectly \* \* \* and before transacting any business in this State except the preparation of instruments," etc.

We do not believe that this language means that all these concerns shall comply with the act before transacting any business in this State, but rather that it means that any concern which contemplates offering for sale any such stock or securities shall comply with the act before offering for sale such stock or securities and before transacting any business in this State. They shall comply with the act before offering for sale and before transacting any business, if they contemplate selling such stock or securities. Unless this construction be correct, then it would be incumbent upon the Secretary of State to pass judgment upon all concerns whatsoever, including individuals (except those concerns exempted by the act), who desire to do business in the State regardless of whether they contemplate placing any stock or securities on sale or not. Such a broad purpose is not believed to be within the contemplation of this law. On the other hand, the sale and offering for sale of stocks and securities is the activity from which the evils had emanated and in respect to which the supervision was evidently intended to operate.

The caption of the act bears out this idea. In substance, the caption declares it to be an act to regulate and supervise and prevent fraud in the sale, purchase, and disposition in this State of stocks and securities and the transaction of business in this State of companies, persons, and concerns *offering for sale or selling in this State such securities*. In other words, the supervision and regulation in respect to doing business in this State seems clearly to be limited in the caption to those *offering for sale or selling such securities*. The caption of the act is not necessarily controlling as between it and the provisions of the body of the act, but it is helpful in arriving at the probable intention of the Legislature.

As intimated above, unless our interpretation is adopted, then we would have the rather unusual situation of every individual, or concern, whether selling or offering for sale any stock or not, being compelled to get a permit from the Secretary of State in order to transact any kind of business in this State. A reasonable construction, one which harmonizes with the general scope of the act from the caption to the emergency clause, compels us to the view that the sale or offering for sale of stocks and securities is a necessary prerequisite to the application of the act to a particular concern.

Now in the case of the organization of a corporation, where all the capital stock is subscribed for and an application is made and filed

with the Secretary of State, is there a sale or offer for sale of the stock within the meaning of this act? Probably not, in the absence of a solicitation of sales or subscriptions by the incorporators or organizers. But we are not prepared to say that under no circumstances is there a sale or offering for sale of stocks or membership or ownership where all the capital stock of a corporation is subscribed prior to incorporation. Suppose five persons agree among themselves, without any general soliciting of persons to take subscriptions, to form a corporation, and these five persons subscribe for all of the stock and pay up as much as fifty per cent (50%) thereof of the proposed corporation. In such an event, it is our opinion that it would not be necessary to comply with the Blue Sky Law. But suppose, on the other hand, these five organizers or incorporators agree among themselves that a corporation shall be formed, but do not take all the capital stock and go out and solicit others to subscribe for the capital stock. Might not there be room for fraud and misrepresentation in procuring the money of these subscribers? And might not the interest which the subscriber receives for his money be in substance "ownership" or "membership" and therefore stock within the meaning of this act? In such a case we are of the opinion the Blue Sky Law would have to be complied with.

There might not in this latter mentioned instance be a technical sale of the stock of the corporation itself, but would not the organizers or incorporators have an organization or "concern" within the meaning of the act? And are not the transactions in the soliciting and procuring of subscriptions potentially within the evils designed to be corrected by the Act? We fear that if it should be held that the act in no instance applies in the case of organizing corporations a field would be opened up for evasion of this law. The line cannot be accurately drawn in an opinion, but we think you will have no difficulty in applying the reasoning of our opinion in the particular cases confronting you from time to time.

Does the act apply in respect to increases in the capital stock of private corporations?

There is of course a distinction, for some purposes at least, between subscription to the capital stock of the corporation and the purchase of the capital stock thereof. A discussion of this subject will be found beginning at page 507 of 14 C. J. We do not deem it necessary to enter into a discussion of this matter, contenting ourselves with quoting from the case of *Bole vs. Fulton*, 233 Pa., 609, 610, 82 Atl., 947, as follows:

"There is a well recognized distinction between original subscriptions for stock in a corporation to be formed, and subscriptions for shares in an existing corporation. In the one case the engagement between the subscribers is created directly by the act of subscription, which, when once the corporation has been created by letters patent, issued on the strength of the subscription, becomes absolute, not subject to recall and dischargeable only by actual payment. By the act of incorporation, without more, the original subscribers become members of the corporation, entitled to all the rights and privileges of membership, including the right to vote, the right to share in the profits, and the right to compel specific performance of the contract of membership. *Garrett vs. Dillsburg, etc., R. Co.*, 78 Pa., 463; *Curry vs. Scott*, 54 Pa., 270. In the other case the contract is not between the subscribers, except as it is shown that the subscriptions were mutual considerations for each other, but between each individual subscriber and the corporation as it exists, and is simply a contract of

purchase and sale. *Weiss vs. Mauch Chunk Iron Co.*, 58 Pa., 295; *Pittsburgh, etc., R. Co. vs. Byers*, 32 Pa., 22. 72 Am. D., 770."

The above quoted language is included in a note to paragraph 754, page 508, of 14 C. J., in support of a stated proposition to the effect that a purchase of stock "is where an individual, after the organization of the corporation is completed, makes an independent agreement with the corporation itself to purchase shares of stock from it at a stipulated price."

After the incorporation is completed, as would of course be the case in every instance of an increase in the capital stock, the stock is sold or offered for sale within the usual meaning of those terms, and in our opinion within the meaning of this act. There is an owner making the sale, to wit, the corporation, and of course there is a distinct purchaser. Those taking the stock are purchasers.

Therefore, in every increase of the capital stock of a corporation, whether the stock is taken by those already holding stock or others, the stock is placed on sale and sold within the meaning of the act, and a permit must be had.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2542, Bk. 59, P. 75.

#### BLUE SKY LAW—BONDS ISSUED IN BORROWING MONEY.

1. A private corporation proposing to issue its mortgage bonds for the purpose of borrowing money to finance its business is not required to submit such bonds to the Secretary of State and procure a permit or exemption certificate for the issuance thereof.

2. The term "securities" as used in the Blue Sky Law (Chapter 52 of the Acts of the Second Called Session of the Thirty-eighth Legislature) refers to securities defined in Section 1 of the act, except where the context of the circumstances indicate a different meaning.

3. In cases where the issuer of stock, as defined in Section 1 of the act, offers with such stock as a part of the scheme for selling the same, the bonds, debentures or other securities of such concern, he is required to supply copies thereof with his application for permit.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 7, 1924.

*Hon. S. L. Staples, Secretary of State, Capitol.*

*Attention. Mr. F. E. Johnson.*

DEAR MR. SECRETARY: Your recent request for the advice of this Department upon the following situation is before me. In it you state that a domestic corporation whose charter was filed on January 9, 1906, and whose capital stock is now \$4,500,000, and which has been a solvent going concern for a period of more than two years, now desires to issue certain bonds to take up and pay off outstanding bonds and for the general purpose of financing said corporation in the conduct of its business; which bonds are to be secured by a general mortgage upon its assets, including real estate; and which bonds are to be issued from time to time in different amounts and to be sold when



the market is most favorable, in accordance with the conditions and provisions of the mortgage.

Upon this you inquire whether such bonds come within the meaning of the term "other securities," as said term is used in the act known as the Blue Sky Law, and, accordingly, whether such corporation is required to secure from your Department a permit or exemption as set out in said law in order to issue and sell these bonds. We have read with much interest your valued observations upon the subject.

The law under consideration is found in Chapter 52 of the Acts of the Second Called Session of the Thirty-eighth Legislature. The caption of the act recites that it is to regulate, supervise and prevent fraud in the sale, purchase and disposition of stocks, stock certificates, bonds, debentures or other securities, and the transaction of business in this State of persons, joint stock companies, brokers, agents, co-partnerships and other companies, individuals or organizations, offering for sale or selling in this State such securities, etc.

Section 1 of the act reads as follows:

"The term 'stock' as used in this act shall include the certificates of stock of every corporation, as well as the certificates or any other written instruments evidenced ownership or membership in any joint stock association, common law trust, or any other organization, association or concern of whatsoever nature, which is organized, formed or created, or intended to be organized, formed or created, which may or which is designed to own property of any character."

"The terms 'person,' 'company' or 'concern' shall refer to and include any such concern, individual or person who may issue such stock and whose such stock or certificate shall represent or evidence ownership or membership therein, which ownership or membership may be designed to be transferred or negotiated by the transfer, assignment or negotiation of such instrument."

Section 2 of the act, in making provision for an application to the Secretary of State for permit to sell "stock as defined in Section 1 of this act," prescribes in paragraph (a) that "an application for a permit to sell any of the securities mentioned herein, or any other securities offered or to be offered for sale," shall contain certain matters defined. Paragraph (b) prescribes that the capital stock, its par value and price, together with the amount thereof issued or to be issued for promotion, compensation or other purposes shall be shown. Paragraph (c) of said section reads: "Copies of stock certificates, bonds, debentures, or other securities offered or to be offered for sale or other disposition \* \* \*" it must be shown, etc.

Section 5 of the act prescribes the duty of the Secretary of State in case he "shall decide that values warrant and that the sale of stock or other securities and the business of the issuer will be conducted honestly," etc. This section also makes other reference to "stock."

Section 6a reads:

"In order to avoid undue restrictions upon the handling of stock, as the term stock is defined in Section 1 hereof, of solvent concerns, it is provided that any concern which has been a solvent going concern for a period of two years next preceding the date of any application named in this section, may submit to the Secretary of State satisfactory evidence \* \* \* (upon finding of the solvency thereof), \* \* \* whereupon the proposed issue and sale of such stock, debenture or other securities as in this act defined of such concern shall be exempted from the general requirements of this act."

Section 9 prescribes that "any person, broker, agent, joint stock

company, co-partnership or other company, individual or organization, domestic or foreign, sending advertising matter, \* \* \* offering for sale or selling *any of the securities enumerated in Section 1 hereof*, without first having been issued a permit shall be deemed guilty of having violated the provisions of this act. \* \* \*”

Section 11 refers to the absorption of property of any company, etc., “*coming under the provisions of Section 1 hereof.*”

Other provisions of the act refer to “stock” and securities.

Other provisions of the act are in harmony with the purpose indicated in the caption, of bringing about the supervision of the sale of fraudulent securities.

The act does not appear to define the terms “securities,” “bonds” or “debentures.” The only attempt made by the act to define “securities” is found in Section 1, which is copied above. Penalties are denounced against the sale of securities defined in Section 1, except as prescribed by the act, and the statute seems plainly to be penal in its nature.

The act does not appear to embrace the regulating of the finances of the persons, companies and concerns referred to in Section 1 of the act, and of the legitimate borrowing of money by them for the purpose of its business. Such regulation does not appear to be fairly within the purview of the caption nor to be included in the body of the act.

What meaning is to be attached to the word “bonds” as used in this statute, the word not having been defined therein? The word “bonds,” like the word “securities,” has a very wide application. The use of either of these words alone without sufficient expressed definition or sufficient indication by the context to indicate the use meant may make their meaning insignificant in a penal statute. Thus, the word “bond” applies to indemnity bonds, guaranty contracts, bail bonds, and numerous other undertakings of a private or official nature.

Also, there is a class of instruments known as bonds for title whereby an equitable interest in land may be evidenced.

The term is also very commonly applied to negotiable instruments having the general characteristics of promissory notes issued in series and secured by a mortgage or mortgages of some character.

Classes of bonds which might seem to come within the meaning of the term “bonds” as found in the act are bonds for title and bonds of the last above named class. Ownership in the so-called common law trusts is ownership of a beneficial, or equitable interest in the property. A bond for title to convey such would doubtless be an illustration of a “bond” within the meaning of that term as there used.

Carrying in mind that the statute does not attempt to regulate the financing of the various individuals or concerns therein named nor the borrowing of money by them, it is obvious that any such person or concern, without the formality of submitting to the Secretary of State an application for permit or exemption, may borrow money and execute his or its promissory note or promissory notes secured by mortgage, in evidence of such indebtedness. We do not think it could be said that, instead of calling such negotiable obligation a promissory note, it be called a “bond,” the issuer would thereby incur the penalties of this act.

In Black, Const. and Int. of the Laws, at page 78, it is said:

"Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand, and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of. If it is the evident and plain purpose of the act to affect only a particular class of persons, the generality of the language employed will not have the effect of including a single individual not belonging to that class, though the mere words might include him." (Citing Estate of Ticknor, 13 Mich. 44, and United States vs. Saunders, 22 Wall., 492.)

At page 80 the author says:

"When a statute makes specific provisions in regard to several enumerated cases or objects but omits to make any provision for a case or object which is analogous to those enumerated, or which stands upon the same reason, and is therefore within the general scope of the statute, and it appears that such case or object was omitted by inadvertence or because it was overlooked or unforeseen, it is called a 'casus omissus.' Such omissions or defects cannot be supplied by the courts."

At page 83 the author says:

"The rule which forbids the supplying of a casus omissus by construction has a more peculiarly stringent effect in the case of enactments creating penal or criminal offenses. Indeed, it is not difficult to discover, in the later cases, a strong disposition of the courts to confine this rule to statutes which require a strict interpretation on account of their penal character, and to reject it in the case of remedial laws."

Under the title "Penal and Criminal Statutes," at pages 454-455, the author says:

"In the next place, in the construction of statutes of this character, it is not permissible for the courts to supply or correct any omissions of the Legislature, whether resulting from oversight or inadvertence or any other cause, no matter how plainly the act or persons omitted may appear to come within the spirit and purpose of the law. 'In construing such laws, we should be careful to distinguish between what may have been desirable in the enactment in order that it should effectually accomplish its purpose, and what has been really prohibited or commanded by it. Before conduct hitherto innocent can be adjudged to have been criminal, the Legislature must have defined the crime, and the act in question must clearly appear to be within the prohibitions or requirements of the statute, that being reasonably construed for the purpose of arriving at the legislative intention as it has been declared. It is not enough that the case may be within the apparent reason and policy of the legislation upon the subject, if the Legislature omitted to include it within the terms of its enactments. What the Legislature has from inadvertence or otherwise omitted to include within the express provisions of a penal law, reasonably construed, the courts cannot supply.'"

Reverting to Section 2 of the act, it is recalled that those proposing to issue and sell "stock as defined in Section 1 of this act" shall make the application referred to. These are the only persons and concerns of whom this requirement is made. Those proposing to merely borrow money on bonds have not this duty and cannot be compelled to perform it or punished for not performing it.

The word "securities" used in the same section and elsewhere in the act would, as has above been suggested, ordinarily be construed to mean securities of the nature defined in Section 1, in the absence of language or context indicating a different use of such term.

An exception to this interpretation may arise, of course, in any instance where the issuer of stock, as defined in Section 1, may, as part

of his selling plan, offer, with such stock, the bonds, debentures or other securities of the concern. This would bring into application the requirement of paragraph (c) of Section 2 as to the supplying of copies of stock certificates, bonds, debentures or other securities.

We have, therefore, the honor to advise that in the opinion of this Department the bonds under consideration are not required to be submitted to your Department before negotiation by the concern offering them.

Yours very respectfully,

EUGENE A. WILSON,  
Assistant Attorney General.

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Op. No. 2526, Bk. 59, P. 113.

CORPORATIONS—TRUST COMPANIES—INCORPORATION UNDER SECTION 37, ARTICLE 1121, R. C. S.

Section 37 of Article 1121, Revised Civil Statutes, is not superseded by similar provisions in the general banking act, and trust companies of the kind therein designated may operate under said section by complying with the general corporation laws.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 9, 1923.

*Mr. W. L. Peterson, Deputy Commissioner of Banking, Capitol.*

DEAR SIR: Your recent inquiry is before me in which you state that application has been made for a charter as a trust company for the purpose of the creation of a corporation which is designed to administer, as trustee, the affairs of two estates; upon which you inquire whether your department should consider the matter of approving this charter under the provisions of the general banking act, or whether the company is one which may be chartered under the provisions of Section 37 of Article 1121, Revised Civil Statutes, that being the general corporation law of the State.

Section 37, above referred to, contains a number of provisions relating to the powers which may be enjoyed by corporations of the kind proposed. Subsequent to the enactment thereof, the Legislature placed in the general banking act certain provisions authorizing banking corporations to exercise the same character of powers. The question arises upon this situation whether or not it was the purpose of the Legislature by its later enactments to supersede the provisions contained in Section 37; or, in other words, whether it impliedly repealed that section. As a matter of legislative construction of such later enactments, it is to be observed that when the Legislature afterwards adopted the Revised Statutes of 1911 such revision contained both the provisions contained in the general banking act and the provisions contained in Section 37, thereby indicating the legislative intent that these two provisions should stand side by side.

Again, we find that subsequent to all this legislation, viz: at its Third Called Session held in 1920, the Thirty-sixth Legislature, in Chapter 45 of the acts of that session, amended Article 1129 of the Statutes of 1911 so as to make it read as follows: "Corporations created under subdivisions 21, 29, 37, 53, 54 and 60 of Article 1121,

as well as corporations formed for the construction, \* \* \* etc. This provision clearly shows that the Legislature considered Section 37 as continuing in force, notwithstanding other enactments.

Accordingly, we have the honor to advise that corporations may be organized under Section 37, above mentioned, without the necessity of submitting their application to the State Banking Board.

Very respectfully,

EUGENE A. WILSON,  
Assistant Attorney General.

Op. No. 2468, Bk. 58, P. 81.

CO-OPERATIVE SAVINGS AND CONTRACT LOAN COMPANIES—THREE PER  
CENT LOAN COMPANIES—BUILDING AND LOAN ASSOCIATION  
PLAN DISTINGUISHED—LOTTERIES—FAIRNESS OF CONTRACTS  
—RESERVE FUND—FINES—USURY—FORFEITURE OF  
PAYMENTS.

1. A savings and loan scheme operated primarily for the profit of its promoters, whose investment features are negligible; whose chief attraction is the awarding of a loan at a rate of interest which is but a fraction of the market rate for such loans, which loan is awarded upon the happening of various contingencies, and which loan receives a credit, either greater or less than the liability of the concern to the subscriber, according to the time when the loan is awarded, and which loan is drawn from a fund out of which it receives a certain preference over other obligations of the concern, so combines the elements of prize and chance with consideration as to constitute a lottery.

2. Such a contract is unfair to the subscribers as a whole.

3. A building and loan company, organized primarily for the accumulation of building funds, whose subscribers are stockholders sharing mutually in the profit and receiving loans at normal rates, without undue preference or credits, is not a lottery, though it award its loans by chance, the element of prize being absent, and such distribution lawful when the general plan is not of a lottery nature.

4. A scheme such as outlined in paragraph 1 is not in pursuance of the building and loan powers of co-operative savings and contract loan corporations.

5. Article 1313<sup>1</sup>/<sub>c</sub>, Complete Texas Statutes (being Section 5 of Act of 1915), providing that such savings and loan corporations may provide for the maturing of their contracts in order of their issue, or in series, or in some other arbitrarily determined manner; "or providing for the payment of moneys \* \* \* greater in value \* \* \* than the amount paid in upon such contracts, together with the actual net earning accrued \* \* \*," does not authorize the substitution of the word "and" for the disjunctive "or" so as to combine the elements of prize and chance. The clause in quotations is to be read in connection with Section 13 of act.

6. Sections 11, 12 and 13 of act do not authorize such a concern to forfeit to the company the money which a subscriber has paid in, upon the defaults mentioned, but merely authorizes the cancellation of the subscriber's rights to have the contract carried out by the company in other respects.

7. The reserve fund described in these contracts is not the legal reserve prescribed by statute, hence such use of the term "reserve" is misleading and should not be made.

8. Such concerns are not authorized to impose "fines" or other penalties for delays in payment of installments, exceeding a rate of 10 per cent per year upon such delinquent amounts.

9. Contracts of such concerns, which impose a greater responsibility upon the contract holder, or a less responsibility, or liability, upon the company than is prescribed by statute, imposed such different responsibilities, or liabilities, illegally, and contracts which thus conflict with the statutes should be disapproved by the Insurance and Banking Department.

10. This opinion applies only to the four contracts which were submitted to this Department, and to others bearing the characteristics herein discussed.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 2, 1922.

*Honorable J. L. Chapman, Commissioner of Insurance, Capitol.*

DEAR SIR: Responding to the request of your Department that I examine certain forms of contracts issued by the so-called three per cent loan companies, which contracts, you inform me, are typical of those in use in all such companies, and advise you concerning these contracts upon the following matters; that is, as to their solvency, as to whether the scheme involves a lottery feature, as to whether they are usurious, and as to whether they contain any other features making them legally "unfair," I have to advise as follows: (Since this investigation began, I am informed by you that some changes have been made in the contracts, fortifying their actuarial solvency and in a number of instances the concerns issuing them have changed from a three per cent rate on the building loans offered by them to a four per cent rate. These changes do not make necessary a change in the conclusion herein reached.)

I.

As to their solvency, I am informed by your actuary that the table of cash surrender values, etc., attached to these several contracts is correctly computed on the basis of three per cent interest upon that portion of the subscribers' monthly installments which are placed by the company into what the law terms the "reserve," and that upon the monthly payments being made as prescribed by the contract the values thus promised will have been earned. Accordingly, the contract does not appear to lack solvency.

II.

The question whether the scheme of investment represented by these contracts has the characteristics of a lottery is more difficult and will require a somewhat extended discussion.

These contracts, though differing in some details, have these general features in common, to wit:

(a) They provide for a stipulated contract fee of one per cent, in addition to one hundred monthly installments of like amount.

(b) A table of values is annexed showing the various amounts to which the subscriber is entitled and his other rights upon the making of his payments. The following is taken from this table for illustration. (Where figures are not shown, none are in table.) The table is on the basis of a \$1000 contract.

No. of months contract in force.	Monthly payments	Credit value on contract when loan is made.	Paid-up certificate value.	Cash surrender value.	Temporary loan value.
1	\$ 10 00				
6	60 00		\$ 31 00	\$ 26 35	
12	120 00		81 87	72 90	\$ 60 00
15	150 00	\$ 150 00	107 55	95 40	75 00
50	500 00	500 00	482 31	482 31	250 00
95	950 00	950 00	1014 14	1014 14	475 00
100	1000 00	1000 00	1076 95	1076 95	500 00

(It must be borne in mind that the monthly payments referred to are in addition to the 1 per cent initial fee, so that the amount actually paid is \$10 more than that shown in column 2.)

(c) Some of these contracts provide that priority of position or numbers shall be governed by priority of date, to be determined by the day, hour and minute when received at the home office. Others provide for determining such priority by the day, hour and minute when application is signed.

(d) With practical uniformity these contracts provide for an "expense fund" consisting of

(1) Contract fee of 1 per cent of face of contract . . . . .	\$10.00
(2) 2.4 per cent of the face value of the contract, from the first three monthly installments . . . . .	24.00
(3) 16 $\frac{3}{4}$ per cent of all monthly installments after the third, up to and including the fifteenth, being twelve installments, totaling \$120, of which 16 $\frac{3}{4}$ per cent is . . . . .	20.00
	\$54.00

It will be observed that the three monthly installments from which the \$24 is deducted total \$30, leaving a balance of \$6.00.

(e) A "loan or trust fund" is created by

- (1) 60 per cent of all third monthly installments.
- (2) 83 $\frac{3}{4}$  per cent of all monthly installments after the third up to the fifteenth, inclusive.
- (3) 100 per cent of all monthly installments after the fifteenth.

These payments aggregate \$956.

(f) A "reserve fund" is created by

- (1) All interest earnings, simple and compound, not necessary to meet contract obligations of the loan or trust fund.
- (2) All transfer fees received.
- (3) All profits from contracts that have lapsed.
- (4) Any profits that accrue from cash settlements made on contracts before they have matured for loans in their regular numerical order.

"The reserve fund shall be used in making loans to contract holders, but any sums loaned therefrom must be returned to the reserve fund, with its pro rata share of interest, out of the first monthly repayments by contract holder.

"After all obligations have been fully met in 'Class A' contracts, there being no further obligations to arise therefrom," then any balance remaining "shall belong to the corporation."

It thus appears that the so-called "reserve fund" is not shared by subscribers in any way. It is merely loaned to them, to the profit and advantage of the company.

(g) The holder is entitled to a loan for the face value of the contract.

(1) "When a sum of money equal to the face value of this contract has accumulated in the loan or trust fund, provided all contracts of this class have been satisfied and discharged." \* \* \*

(2) After the maturity of the contract and after 15 per cent of the face of the contract shall have been paid the holder becomes entitled to a loan at 3 per cent per annum. In some of these contracts the rate of interest is 4 per cent.

The subscriber is credited on this loan with "all moneys previously paid in for monthly installments," less any sum of money owed the corporation.

It will be observed that this does not provide for the crediting of

interest also, but the entire principal so paid. Section 13 of the act relating to these corporations, it being Article 1313½L of Complete Texas Statutes, provides that the liability of the corporation "shall at all times be the amount paid into the loan and reserve fund, together with interest at the rate of three per cent per annum thereon," less the maximum expense deduction allowed.

Accordingly, this credit allows the subscriber more than his legally defined reserve and interest on all loans made earlier than approximately sixty months, and allows him less than this on all contracts maturing later than that date. Thus, where a contract is matured upon fifteen monthly payments, the borrower has paid in monthly installments amounting to \$150. The company has applied to expense account, in accordance with its contract, \$44, leaving as his legal reserve \$106.

This \$106 plus 3 per cent interest is not equal to the credit of \$150 which he receives on his loan, nor does interest at 3 per cent upon the accumulating reserve become equal to this \$44 until about sixty payments. But, after about the sixtieth payment, the interest begins to exceed \$44.

(h) The contract reads, "Nor can any representative promise a loan at any particular date, nor bind the corporation \* \* \* as to when a loan can or will be made." This provision is printed in capital letters in every contract form before me.

(i) The contract contains a clause providing for the making of certain so-called "temporary loans" to the subscriber, in amount equal to one-half of the cash surrender value of the contract. This clause provides that "not more than one-fourth of the monthly receipts of the loan or trust funds in any one month shall be used in paying such surrenders and making temporary loans or contracts"; while the first page of the contract provides that, after the subscriber has duly paid six monthly installments, he shall be entitled to a loan of the amount of the contract, "provided the contract has been reached and funds accumulated for a loan in its regular order as provided for in Sections 1, 2, 3 and 4," etc.

Thus the borrower of the 3 per cent loan described in clause g, supra, which is the main object of the undertaking, is favored at the expense of not only the "temporary" borrower, but of the subscriber who seeks the cash surrender value, to which the law entitled him, without any preference supervening.

This, it is believed, summarizes the principal features of the scheme. It is thus apparent that

(1) The subscriber pays in \$1010 but may not receive back his entire amount of cash in settlement earlier than ninety-five months from the date of his contract.

(2) The maximum amount of cash guaranteed to be returned is \$1076.95, making his gross gain \$66.95 during the period of eight and one-half years. This return is far less than would be gained by depositing the money in the same manner in any solvent savings bank. From such bank he could draw the entire amount deposited with compound interest at practically any time. And other more profitable forms of sale investment are, of course, readily available. Hence the investment feature and the savings feature are negligible.

(3) The plan is wholly lacking in mutuality, since the profits of the company go to the company and not to the subscribers.

(4) The substantial attraction of the scheme is that the subscriber is



offered a loan of money on real estate at the rate of 3 per cent (or 4 per cent) per annum, while money is worth in the market 8 per cent or more for such loans. The subscriber receives a credit on this loan of an amount greater or less than the law requires him to receive, according as the loan is reached, earlier or later. When greater, it is the only instance where more than the legal requirement is paid or allowed a subscriber. This loan is given certain precedence over other obligations of the company.

(5) Such loan is available to the subscriber at an indefinite time, depending upon the contingency of the relative number the contract may happen to get, the number of earlier contracts upon which loans may be granted, the rapidity of the accumulation of the "loan fund" and of the "reserve fund," and the number of demands for "temporary loans" and for cash surrenders. *This contingency moves the company to refuse any guaranty as to the time of making such loans* and to give such refusal a most conspicuous place in the contract.

Does this investment scheme constitute a lottery?

It is a familiar law that a lottery consists of three elements, viz.: consideration, prize and chance. See 17 R. C. L., "Lotteries," Section 10.

In the scheme of these concerns the element of consideration is, of course, present. Do the elements of prize and chance exist? It is plain that a loan of money at a rate of interest far below the market value of such a loan is a thing of special value, calculated to actively attract all those who are interested in building. The appeal of these companies in furthering these loans is to persons who desire to construct homes. As indicated above, those whom chance favors with a loan immediately upon completing their fifteenth monthly payments, receive a credit in excess of the legal reserve of the company and in excess of the prescribed legal liability of the company, and also in excess of the cash surrender value of the contract.

Such excess would not be vicious if it were evenly distributed to all contract holders by a fixed standard, but as shown above this is not the case. It diminishes as the loan falls farther away until it disappears at about the sixtieth payment, when it falls below the legal liability of the company, in that the interest on the legal reserve which has then accumulated increases such liability to an amount greater than the aggregate of the entire monthly payments.

This difference in value of the credit, so awarded, is manifestly of the character of a prize, great or less, as chance allots it. Besides, it is unquestionably not "fair," for it gives to the preferred contract holders money paid in by other contract holders or the profits thereon. Likewise, it deprives the later contract holders not only of equality in distribution of the company's accumulations, but awards them less than the law requires. Other unequal advantages of the holders of such early positions are that they get the earlier benefit of the 3 per cent loan, and they cease to contribute monthly payments which yield them no interest, while the later contract holders suffer corresponding disadvantages. Again, the fact that the 3 per cent loans are preferred over the cash surrenders and "temporary" loans, gives the former the character of a prize.

In 17 R. C. L., title "Lotteries," Section 10, it is said:

"As for the element of prize, it is not the mere value of the thing to be obtained that makes it a prize, but chance is a condition precedent to the existence of a prize. Thus, a stipulation to furnish an article, however valuable, would not impress it with the character of prize, because the transaction

would be merely contractual; but the same article, not obtained by stipulation, but through some scheme of mere chance, founded on consideration, would be impressed with the character of prize. Furthermore, as applied to a lottery scheme, a prize may be anything of value offered as an inducement to participate in such a scheme; it may be any inequality in value resulting from chance in the distribution of money paid back to the contributors thereto; and, to constitute a prize, this inequality need not necessarily be great, but the element of prize may exist in a scheme so arranged as to return to each participant something of value, or even in an equivalent, for all that he pays in. So the fact that there can be no loss to the participants in a scheme does not prevent it from being a lottery, when there may be contingent gains. Chance, as one of the elements of a lottery, has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity; and, as has been observed, it is essential in order to give to any scheme the character of a lottery. In the United States, however, by what appears to be the weight of authority, at the present day, it is not necessary that this element of chance should be pure chance, but it may be accompanied by an element of calculation or even of certainty."

In *State vs. Nebraska Home Company*, 92 N. W., 763, 60 L. R. A., 448, 1 Ann. Cas., 88, in a scheme strikingly similar to that here involved, in which the order of payment was fixed by the time of the receipt of the applications at the home office, it is pointed out that of one thousand applications received at the same time, twenty-two would receive their payments within twenty months; whereas, the holder of contract number one thousand would not receive any return from his investment until more than seventy years. The court says:

"The advantage of the fortunate holder of the early number is manifest. To obtain such a preference is to obtain something of value. 'It is idle to say that a sum or an obligation for a sum due and payable today or at an early day is of no more value than an obligation for an equal amount, without interest, payable at a remote and indefinite time.' *MacDonald vs. United States*, 24 U. S. App., 25, 12 C. C. A., 339, 345. The question, then, is whether the element of chance enters into the scheme by which one contract-holder obtains this advantage over another. The contracts are to be 'numbered and dated in regular numerical order as applications are received at the home office.' The applicant must take his chances as to how many applications may be received at the same time that it is received, and if there are several 'at the same time, he must take the chance of preference over other applications received with his.

"In *MacDonald vs. United States*, supra, Judge Woods said (page 344): 'Whether or not a purchaser will obtain a bond of one number or another depends \* \* \* upon the order in which his application shall reach the hand of the secretary, and that is largely a matter of chance. The secretary receives applications by mail and otherwise, sometimes singly, and sometimes a number together; and in the order of receipt, and, as he chances to take up one or another first, passes them through a registering device, and, in accordance with the notations thereby made upon the applications, the bonds are numbered and issued. But for the purchaser's hope, or, as it may as well be said, for his chance, of getting a multiple number, the business would soon cease.' He held that 'the element of chance incident to the numbering of the bonds before they were issued' made the scheme a lottery.

"The reasoning of the court in the *MacDonald* case was adopted by Judge McComas in a similar case recently decided in the Supreme Court of the District of Columbia. *United States vs. Sherwood*. Judge McComas fortifies his conclusions by quotations from other authorities, and holds that under such a plan, 'the number of the certificates, and their consequent value, depends upon chance.' A certified copy of his very clear and satisfactory opinion is on file in this case. He says: 'In different States, applicants, on the same day, mail subscriptions for certificates to this company. Whether or not an applicant will receive a certificate of one number or another depends upon the order in

which the applications may reach the officer of this company who issues the certificates, and that is a matter of chance. This officer receives these applications by mail, or otherwise; it may be one at a time; it may be many at the same time; and, according to the order in which he chances to receive them, or as he chances to take up one or another, and determines the number of each applicant's certificate, the certificates are numbered and issued. He who by these chances luckily receives an earlier number, will be paid sooner, and will pay in less money than another, who, subscribing on the same day, receives a later number, and will by these chances be required to pay longer and pay more money for his shares. It is this element of chance in the numbering of the certificates which I believe to be a violation of this anti-lottery law. It is evident that the inducement to subscribe consists mainly in the chance of securing an early or lucky number.' This reasoning is satisfactory to our minds, and we have been referred to no authority conflicting with the views so announced. The suggestion that the applicant will know the number of his contract before he accepts it, and if not satisfied, may reject the contract, is without merit. By his application he agrees to accept the contract and he is presumed to know the terms of the contract before he makes the application. The suggestion is predicated upon the idea that he will not perform the agreement that he has made in his application, but will forfeit the fee 'for registering and issuing each application and contract' and so risk only the three dollars. If that is the proper construction of the contract, the result is the same. It involves the payment of three dollars for the chance of obtaining an early number."

The illustration used by the Supreme Court of Nebraska suggests an extreme case. It has been criticised by counsel for the three per cent loan companies on this ground. It may be remarked that the fact that one holder may be postponed for seventy years assumes that he and all prior subscribers will persist until the end. This assumption is the most extreme feature of the case and is wholly insupposable. That many will drop out is inevitable, thereby the extreme remoteness in time of some payments is removed, for the lapses will serve the double purpose of augmenting the fund to apply on other contracts and of retiring some holders, wherefore later ones may receive their reward earlier.

This demonstrates that the plan is in part dependent upon lapses, but while many lapses must certainly occur, the number and order is the merest matter of chance, affecting materially the time of maturity of any given contract.

It may be added in case of any other smaller number of contracts coming at the same time, a corresponding difference in dates of realization would occur, and while the difference may not be as extreme it will be sufficient to come within the principle condemned by the court.

In the case of *Fitzsimmons vs. United States*, 13 L. R. A. (N. S.). 1095, 156 Fed., 477, the Circuit Court of Appeals said:

"In general, it may be said that anything of value offered as an inducement to participate in a scheme of chance is a prize. As applied to a scheme such as is disclosed in this case, a prize is any inequality in value resulting from chance in the distribution of money paid back to the contributors of the same. To constitute a prize, the inequality need not necessarily be great, and the element of prize may exist in a scheme so arranged as to return to each participant something of value, or even an equivalent, for all that he pays in. It is plainly to be seen that, in the scheme under consideration, it may happen that several new members may send in their first subscriptions on the same day, and that he whose subscription is, by chance, first numbered may obtain a great advantage over him whose number is lost. That advantage is undoubtedly in the nature of a prize.

It will be observed that the *Fitzsimmons* case involved not the award-

ing of a loan, but the payment of certain money to the subscriber. But if the awarding of the loan under the circumstances above mentioned has a value, then it would seem that the Fitzsimmons case is applicable.

It may be added that the Fitzsimmons case also says:

"It is true that, in the scheme thus detailed, the amount which each member is to receive is not uncertain, if he keeps on making his contributions. The uncertainty lies in the time when he shall receive it, and uncertainty so great as to vitiate the scheme as fully as would an equality in amount. Not only is there uncertainty as to time, but there is uncertainty as to the amount to be received, as compared to the amount paid in."

This last sentence is equally applicable in the case of a loan, for the subscriber, while obliged to pay in as much as 15 per cent of the face of his contract before acquiring a loan, may be obliged, by the chance above mentioned, to pay very much more than 50 per cent before he procures his loan.

United States vs. Fulkerson, 74 Fed., 619. In this case the facts were different from those under consideration, although the scheme considered was an investment scheme. There the contracts were not solvent. In some particulars, however, this case was closely similar to the one we are considering. On the subject of prize above referred to, Judge Wellborn quotes with approval from MacDonald vs. United States, 63 Fed., 426 (C. C. A.), as follows:

"It was insisted at the hearing that since every bondholder who shall continue to pay his dues will ultimately receive the promised sum, the prizes are equal, and therefore there is no lottery. But it is idle to say that a sum or an obligation for a sum due and payable today, or at an early day, is of no more value than an obligation for an equal amount, without interest, payable at a remote and indefinite time."

Further on Judge Wellborn says:

"Furthermore, it seems to me incontrovertible that an obligation for a given amount due today is more valuable, by at least current rate of interest, than an obligation for the same amount due one year hence without interest. If this be true, it follows, unavoidably, that time of payment is an essential element of value in non-interest-bearing obligations, and a scheme which involves such obligations and matures them by chance, the other requisites being present, is a lottery."

What is said here with respect to the payment in money of obligations seems to be to apply equally to the making of a loan in the circumstances which are detailed above.

Elsewhere in his opinion Judge Wellborn says, after quoting some authorities on the subject of chance:

"\* \* \* However, defendants quote from Judge Blodgett's opinion in United States vs. Zeisler, 30 Fed., 499, as follows:

"If these drawings determine only the time when these bonds would be paid, I should say that the mere determining of that time by lot or drawing would not give them the characteristics of a lottery."

"Whatever may be thought of this statement of Judge Blodgett, it is sufficient answer now to say that the statement was made in connection with facts which, in one essential particular, at least, were different from the facts of the case at bar. The bonds referred to by Judge Blodgett were sure of payment, some time or other; such, however, is not the situation here."

This reference to the Fulkerson case is given for the purpose of showing view of the court on the elements of chance and prize, al-

though the scheme involved a distinct element of gambling in another respect which I have not set out.

In 17 R. C. L., 1227, Section 14, it is said:

"It may be said in general, however, that any scheme whereby a fund is created by the payment of designated sums at stated intervals by the holders of certificates which shall be matured and paid in a manner dependent upon chance, and a greater sum received by the holders than he has paid in, constitutes a lottery within the meaning of a statute preceding such devices."

The element "a greater sum received by the holder than he has paid in," is met in the instant case by the feature in this scheme whereby the holder receives a cash credit upon his loan of a greater sum than he has paid into the loan fund of that company. In order to effect this credit the company draws from its other resources and contributes the difference in a credit as of cash.

The conclusion is necessary, when we apply these authorities to the scheme under consideration, that it amounts to a lottery.

This view is supported fully by the opinion in *United States vs. Purvis*, 195 Fed., 618-621. After reviewing a number of leading cases, the court proceeds:

"In *Fitzsimmons vs. United States*, 156 Fed., 477, 479, 84 C. C. A., 287, 289 (13 L. R. A. (N. S.), 1095), in the opinion of the Circuit Court of Appeals, by Circuit Judge Gilbert, it is said:

"It is plainly to be seen that, in the scheme under consideration, it may happen that several new members may send in their first subscriptions on the same day, and that he whose subscription is, by chance, first numbered, may obtain a greater advantage over him whose number is last. That advantage is undoubtedly in the nature of a prize."

"Afterwards in the opinion this is added:

"The uncertainty lies in the time when he shall receive it, an uncertainty so great as to vitiate the scheme as fully as would an uncertainty in the amount."

"In *Equitable Loan Company vs. Waring*, 117 Ga., 599, 662, 44 S. E., 320, 346, 347 (62 L. R. A., 93, 97 Am. St. Rep., 177), Judge Cobb, delivering the opinion of the majority of the court, says:

"If the plan had been to pay certificates in their numerical order, there would have been the same element of chance as there is under the plan actually pursued, because the time at which the certificates shall be called would be governed in each instance by the order in which the applications reach the secretary and numbers are placed upon the certificates."

"It is unnecessary to multiply authorities upon this question because nearly all pertinent authority, certainly the great weight of it, is to the same effect as the cases referred to.

"We find, therefore, that the elements of consideration and chance exist in this scheme. Was there a prize? There is little doubt from an examination of the loan contract, taken in connection with the charges made in the indictment, that the main feature of this scheme was the loan feature. It was the desire to obtain loans on the very attractive terms proposed by the defendants which made these contracts so much favored and which induced the purchases of these loan contracts. There was nothing particularly attractive about the investment feature. Anywhere in this country money could be deposited in perfectly solvent and reliable savings institutions on equally as good and perhaps better terms. The attractive thing, necessarily so, was the loan feature. The chance of getting a low number and thereby obtaining a loan at an early date was the prize held out in this scheme. Anything of value may constitute a prize. That the chance of obtaining one of these loans was considered a valuable thing is clear. Prize combined with the other features, chance and consideration, which have been found to exist, make this scheme a lottery."

It will be observed from the last paragraph quoted that the facts in that case were in substance parallel with those before us and the

decision is squarely in point. While it was rendered by a district court it is a well considered review of the law.

In *Fisher vs. State*, the Court of Appeals for the Eighth District of Ohio in an opinion rendered on February 7, 1921, said:

“\* \* \* The vital elements in the business as now conducted appear to be as follows:

“The league solicits memberships through more than one hundred agents in scattered places all over the United States and persons are invited to become participants in the league and to make the payments called for under the rules. The precise minute at which the signer delivers his applications to the agent of the league is marked upon it, and it is then forwarded to the home office. The applications are collected in several series consisting of \$140,000 face value in contracts in each series. It is stated that the object of this is to not allow the series to come below \$100,000 and the extra \$40,000 is to allow for lapses. As soon as a series is filled up a new series is begun and it is impossible for the signer to know into what series any specific application will fall as that is determined by the number received and the time dating which they bear. Monthly payments of \$10.00 on each thousand of participation are made by the numbers.

“When these are received at the home office not to exceed \$4500 for each \$100,000 is to be taken by the league for expenses, and the balance used as follows: When a sufficient sum is available in the hands of the trustees for use in a particular series, the holder of position number 1 in that series is entitled to borrow \$1000 at 3 per cent (minus such sums as are to his credit by reason of payments already made by him, which are then returned to him). The privilege of borrowing a substantial sum at 3 per cent being obviously valuable, the purchaser has the alternative right to have the league sell his privilege at a premium, which according to the record is stated to prospective purchasers to be sometimes as high as \$200. He has certain other options. After the holder of position number 1 has received his loan the remaining funds are used to make a loan to the second number in the series, and so on. The loans are payable at the time the hundredth payment by number 100 in the series is due. Obviously then number 99 will have paid in his \$10 payments for a considerable period of years, without interest, for the right to borrow the sum of \$10 for a short time at 3 per cent. The loans are to be secured by mortgage on real estate.”

With the exception that in but one of the contracts or schemes now under consideration, is the alternative right of the borrower to have the concern sell his loan privilege at a premium included, and that, instead of the loans being payable at the time the one hundredth payment in the series is due, in the instant scheme the loans are payable at the rate of \$1.00 per month for each \$100 borrowed, there is no noteworthy difference between the scheme discussed and that under consideration.

The court proceeds:

“The charge is based solely on the lottery statute, and no charge of fraud is considered by the court.

“Does the transaction constitute a lottery within the meaning of the statutes of Ohio?

“Generally speaking, a lottery is a scheme for the distribution of prizes by lot or chance. It is well established that to constitute a lottery three elements must be present. There must be consideration given, there must be a prize, and the winning of the prize must be determined by chance. See *Eastman vs. Armstrong-Byrd Music Co.*, 212 Fed., 662.

“There is no substantial dispute but what the applicants in the league gave a consideration. That the element of prize is present is clear. Obviously the rights of the holder of position number 1 in a given series are more valuable than those of a person with a larger number. It needs but little argument to show that if a number of persons put their money together in a pool and permit one of them to have the right to borrow it at 3 per cent, when the money is

worth 6 per cent or more, the right to borrow it is valuable. The alternative privilege to have it sold at a premium only emphasizes this fact. The person with position number 1 clearly has a desirable number in the series. See *McDonald vs. United States*, 63 Fed., 426, 431.

"The point primarily relied upon for plaintiff in error is that the element of chance is absent from the scheme in question. The clearest case of determining the rights by chance is where numbers are drawn out of a hat, or the position is determined by the spinning of a wheel. If the determination of who shall be the winner of a prize is by mere blind luck, the scheme is surely a lottery. By the best considered authorities it is sufficient that the element of chance is the controlling or predominant feature. *Stephens vs. Times Star*, 72 C. S., 112, and cases cited in 17 R. C. L., page 1224, note 14.

"The court in the case of *People vs. Elliott*, 74 Mich., 264, 267, defined a lottery:

"'A scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part; nor can human reason, foresight, sagacity or design enable him to know or determine such result until the same has been accomplished.'

"This is approved in the case of *Stephens vs. Times Star*, 72 C. S., 112, 147, and also by the upper Federal courts. See *Waite vs. Press Publishing Association*, 155 Fed., 58."

After reviewing authorities the court proceeds:

"It is attempted to distinguish the foregoing cases, to which numerous others might be added, on the ground that the numerical position of the purchaser of the bond or certificate was determined by the order in which the applications were received at the home office; whereas, in the case at bar the position is fixed by the time at which the application is signed. At the time the parties in the several cases enumerated paid their money into the scheme their position in the series was to be fixed by an event which was to happen in the future; whereas, in the instant case the rights of the parties are fixed by the time at which they sign. Stress is laid upon the passage in 17 R. C. L., page 1223, as follows:

"'Chance, as one of the elements of a lottery, has reference to the attempt to gain certain ends not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity.'

"The quotation is from the case of *Russell vs. Equitable Loan & Security Co.*, 129 Ga., 154. In the first place it will be noted that that case was affirmed by an equally divided court, three judges having voted to reverse. Moreover, the passage referred to is a mere dictum. The record of the case does not show what the plan of numbering the certificates was. See bottom page 163. The use of the word 'subsequent' does not correctly state the law applicable to the facts at bar. There is just as great an element of chance as far as the applicant who proposes to enter the scheme is concerned, whether the time of receipt or the time of signature is taken under the circumstances of this case. If certain parties come together and voluntarily agree upon a sequence in which each shall receive his consideration, there is nothing in the law of lotteries that would prevent it, but under the circumstances here disclosed and as admitted in the record by the principal operators of the league, a result is reached without regard to any man's choice or will, nor could any applicant by the exercise of any human reason, foresight, sagacity or design know or determine whether his membership would receive a late number in the series or an early number in a subsequent series. The determination based upon the latter ascertainment of facts unknown and unknowable at the time of the purchase of the participation is just as much a chance as if it were to be determined by a subsequent spinning of the wheel. See 1 Williston on Contracts, Section 119. If the distinction contended for is valid, one may not have a valid lottery or guessing contest regarding the outcome of an election on the day prior to election day, but if it is commenced one minute after the polls are closed and before the ballots are counted, the result would be determined by a past event, and would therefore not fall under the ban of the law. The argument contended for would lead to the conclusion that if the wheel had already been spun, two parties to whom the result was unknown could make promises

solely dependent upon the number which had come up, and have their contract not regarded as a wager. The distinction is without substance.

"An examination of the scheme shows that the benefits contemplated by the prospective member are determined by mere luck, if the scheme is honestly conducted. The scheme shows an attempt to come within the words of the older decisions, but to leave the substance of wager or lottery. One of the primary inducements to participate in it is the prospect of gain to a member by chance.

"Suppose that instead of the holder of position number 1 being entitled to borrow \$1000, he should be entitled to the entire \$100,000 merely because when all the applications were received his came in bearing the date later than one which was number 100 in a previous series. If that is not a lottery the courts will have found a new scheme to give those who desire to gamble all the benefits of the old method.

"The facts shown in the record establish that the business of the league includes all the elements of lottery."

The only decisions which the writer has found which treat schemes somewhat similar to that under consideration as being not lotteries are the following:

*McDonald vs. Pacific Debenture Company, 80 Pac., 1090 (Calif.).*

This was a suit by subscribers to contracts against the company to recover installments paid. The suit was defended by the Debenture Company on the ground that its plan was a lottery and that the subscriber was in no better position than it, and could not recover. It seems apparent from the tone of the decision that the court was not in sympathy with this attempt to defeat the recovery of moneys paid. The substance of the contract was that the holder should pay \$2.00 monthly for 120 consecutive months and the company was to pay the holder \$400 in the manner prescribed in the contract; eight coupons for \$50 each, payable to bearer and numbered consecutively, were attached to contract and to be surrendered and paid whenever "called for redemption." Fifty per cent of the monthly payments and other receipts was put into the Maturity Fund for this purpose, payment to be made as shown by the table of payments. This "table of payment" is recited in the opinion and the court says:

"There is no explanation of what this table of payment means. Whether the puzzle can be solved with or without extrinsic aid not afforded by the record, we need not decide, for it is at least clear that on its face it does not make the time or order of payment of any coupon depend on chance or hazard. The effect of the contract is that the defendant will pay the coupons in accordance with the table given, whatever it may mean, during the time that the holder is making monthly payments, and that at the expiration of that time (that is, ten years after the monthly payments begin) it will pay whatever then remains unpaid of the \$400 promised."

It proceeds thereupon to hold that the scheme is not a lottery, basing its decision, obviously, upon its finding of fact that the table of payments would not constitute a chance scheme.

*The Equitable Loan and Surety Company vs. Waring, 62 L. R. A., 103 (Ga.).* A suit was filed by Waring and others, holders of its certificates, against the loan company seeking the appointment of a receiver, to have the scheme of the company declared illegal and to recover judgment for what they might be justly entitled. The appeal was from a decision by Judge Lumpkin of the Superior Court and the report contains the entire opinion of Judge Lumpkin in which he held the scheme to be a lottery. His decision was reversed by a



divided court, the full bench not sitting, three justices concurring and two dissenting. Without attempting to review either of the opinions, which are quite lengthy, it is suggested that the reasoning of Judge Lumpkin is more sound than that of the Supreme Court and that the latter is not in harmony with the weight of authority in this country.

In reversing Judge Lumpkin's opinion on the ground that the element of prize did not exist in these contracts, the court said:

"If the element exists at all, it is to be found in the second clause of the certificate, which is as follows: 'that the holder hereof shall surrender for payment and cancellation this certificate whenever the same shall be called, before maturity, upon the payment to him of its time redemption value, which value shall be the full amount of the first payment, and all installments paid hereon, with interest on said amount at the rate of eight per cent per annum and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent per annum.' If this clause of this contract can be properly construed to mean that the company is compelled to or even may call for redemption any certificates before they have earned eight per cent interest per annum on the full amount of the first payment and on all installments paid, then there is an element of prize in the contract."

It thereupon proceeds to construe this clause so as to exclude the element of prize, and upon this ground it reversed the case.

It will be noted by examining the element of prize contained in the scheme under consideration is fundamentally different from that so construed and leaves no room for debate of its essential character.

This decision was subsequently brought under review in other litigation against the same defendant, but upon a different class of certificates. In the later case the certificates which were sued upon had been previously determined to be based upon a lottery scheme. A demurrer by the company which resisted the payment of the certificates on this ground, was sustained by the trial court. The decision of the Supreme Court is found in *Russell vs. Equitable Loan, etc., Company*, 12 Ann. Cas., 129. In this case a full bench sat and was equally divided. By reason of this the decision of the lower court was affirmed, thereby establishing the lottery character of the contracts. These contracts are decidedly similar to those now under consideration, hence it cannot be said that the attitude of the Georgia court is in favor of their validity.

It should be here observed that the quotation contained in *Fisher vs. Ohio*, supra, taken from 17 R. C. L. and attributed to the *Russell* case, which quotation defines "chance" in a limited way, is taken from the opinion of Justice Atkinson, who did not assent to the view that the contract under consideration construed evidenced lottery scheme. The opinion of Justice Lumpkin, representing the views of the other three (prevailing), states a less restricted view. However, reference to the element of chance in the present scheme will disclose that Justice Atkinson's definition does not relieve it of this character.

We have been referred to the case of *State vs. Lee*, 233 S. W., 20-29, in which the Supreme Court of Missouri held that the contract there under consideration was not subject to criticism on account of the making of loans in the order of their application. The plan there considered, however, was fundamentally different from the plan here under review. Its plan is closely similar to that of ordinary building

and loan associations and so far as indicated by its statement in the opinion contains no element of prize.

The question of the lottery character of the plan under present consideration was submitted to Mr. Stewart, Special Assistant Attorney General, advising the United States Postoffice Department, and in his "Memorandum for the Postmaster" he says:

"Its contract of sale to purchasers is in terms in accordance with the provisions of the act (of Texas Legislature) and is approved by the Commissioner of Insurance and Banking of the State as provided thereby.

"Its contract is not a lottery scheme within the prohibition of Criminal Code, Section 213, or a scheme to defraud within the prohibition of the Criminal Code, 215, objectionable matter hereinafter mentioned, if present, being eliminated."

It is urged that on account of this finding and of the fact that these concerns may, under this ruling, use the United States mail in furtherance of their schemes, the Commissioner of Insurance and Banking should not further inquire into their lottery character but should accept the Federal ruling as final.

Persuasive as such rulings may ordinarily be, the writer is not able to adopt the present one.

That the contract is a lottery scheme within the ordinarily accepted meaning of that term is believed to be demonstrated beyond question by the quotations from various authorities set out above.

That the contract may have been heretofore approved by our Commissioner, while given weight by Mr. Stewart, cannot preclude the Commissioner from revising his ruling if the further consideration of the subject leads to the view that the contract should not be approved.

That "its contract of sale to purchasers is in terms in accordance with the provisions of the act" of the Texas Legislature, is plainly incorrect. This holding of Mr. Stewart is urged upon us by counsel, who say that if these contracts are held to be invalid it must follow that we must construe the statutes to be invalid.

A reading of the statute at once discloses the complete fallacy of this idea. It will be borne in mind that our Constitution inhibits lotteries. Hence any statute must be construed as not having the purpose of authorizing these. That the Legislature had this in mind is apparent from this language of Section 4 of the act, relating to the powers of these corporations to issue contracts, providing for their redemption:

"By the accumulation of a fund or funds by the contributions made by \* \* \* the holders of such contracts \* \* \* or providing for the maturing or fulfilling of such contracts or agreements in the order of their issue or in series or in some other fixed or arbitrarily order or manner; or providing for the payment of moneys or the granting or giving of any consideration of money or personal property, real or mixed, greater in value or represented to be greater in value than the amount paid in upon such contracts or agreements, *together with* the actual net earnings accrued and accumulated thereon; or providing for the loaning of the funds contributed by the subscribers to or the holders of such contracts or agreements to such subscribers or holders at any fixed or arbitrary order or manner; or for the making of loans or advances from such funds to or for such subscribers or holders to be repaid in installments; and shall have the right to place or sell bonds \* \* \* on the partial payment or installment plan."

Care was used to enumerate these powers in the disjunctive, and

when a concern conjoins any of the several powers thus extended in such a way as to create a lottery, it steps beyond both the letter and the spirit of the statute, and, so far from acting under the authority of a valid statute, it is issuing contracts which the Legislature neither intended to nor could authorize. The real purpose of the Legislature in enacting the clause providing for the payment of moneys or giving of consideration "greater in value or represented to be greater in value than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon" is readily apparent upon a reading of that portion of Section 13 providing: "The liability of the contracts issued by any corporation transacting business hereunder shall at all times be the amount paid into the loan or reserve fund, together with interest at the rate of three per cent thereon," less the permitted deduction for expenses. From this it is apparent that the "net earnings" referred to in Section 4 are those discussed in Section 13 and that the plain effect of the clause quoted from Section 4 is to relieve the clause from Section 13 of the possible construction that the liability is limited to the items specified. Section 13 provides for a reserve similar to that required of life insurance companies. Section 4 empowers the corporation authorized by the act to apply profits to the benefit of the subscribers just as life insurance companies apply their profits in excess of the reserve, to the benefit of their policyholders. Similarity, however, seems to be limited to the opportunity, for the three per cent loan companies make no such distribution but only seek to avail themselves of the clause in Section 4 by converting part of the extra profit into a prize, varying in amount, according to the chance of position, etc.; a thing never contemplated by the Legislature nor permitted by its act. The clause in Section 4 which immediately follows the one just discussed reads thus: "*or* providing for the loaning of the funds contributed by subscribers to or the holders of such contracts or agreements to such subscribers or holders in any fixed or arbitrarily determined order or manner." This is a perfectly valid and innocent provision when the disjunctive "*or*" is respected, and the "arbitrarily determined order" is fairly used to distribute fairly earned profits. But when the word "*or*" is read out of the statute and the word "*and*" substituted, the entire meaning of the language becomes radically different and if read accordingly there might be ground for saying that it authorizes the contracts under consideration. But it could never be said that it would be a valid law.

We are informed by counsel for the concerns interested that at the time Mr. Stewart's conclusions were prepared the contracts of all these concerns contained a clause similar to that which is now contained in the contract of a "trust association," which was not included in the hearing. This clause provides in substance that in case the subscriber does not desire a loan when his contract matures the concern will sell his loan privilege for him at the highest price obtainable, charging him 25 per cent for the service.

Objectionable matter whose elimination is required in order to relieve this scheme of a lottery feature is indicated as follows:

"\* \* \* all representations in the contract providing that the purchaser may surrender his contract to the company when it matures for loan and receive back the amount of money paid in, together with a bonus, stipulated

in an amount or otherwise, should be eliminated therefrom. Provision for offering the contract for sale after maturing its loan privileges, at a profit or bonus, and if so sold the contract holder to receive part of the profits should be eliminated."

The writer is unable to perceive that the elimination of the agreement to sell the contract at a profit upon the maturing of the loan privilege removed the vice inhering in the prize features above discussed. Thus, a contract is issued and in the development of fortuitous circumstances the holder becomes entitled to a certain privilege, of substantial and extraordinary value, in the nature of a prize. This privilege is in truth the prime purpose of the undertaking, and the holder has gained it. Since he has a thing of substantial and relatively superior value, why is this thing the less the fruit of a lottery if the holder be denied the mere right to sell it through the company? Why is it the more such fruit if he is allowed this privilege in addition to that of himself taking this valuable loan, or of selling it by his own effort?

No copy of the clause referred to relating to bonus has been supplied to us, but note is made of the fact that the giving of a mere bonus, instead of actual earnings or stipulated interest rate, is condemned goes in full support of our position in regard to the fixed payment to borrowers by way of credit upon their loan of the amount of money paid in which is discussed in an earlier section of this memorandum.

It has been urged that these concerns are doing a building and loan association business, as they are empowered to do under the statute of their creation and that to condemn these contracts as lotteries will be to condemn all building and loan association plans.

That these corporations are authorized to do a building and loan association business is not questioned. The error of the proposition that they are doing it; and that the contracts they issued bear no relation to building and loan contracts seems hardly to require discussion.

Building and loan associations are mutual. The holders of their contracts are stockholders in the corporation, and participate fully in its profits. When a loan is negotiated credit is given for the amount paid in by the stockholder, with its profits, which consists chiefly of pro rata of the interest earned by lending the money to other subscribers. When he receives a loan it is at about the usual market rate of interest. When stockholders withdraw, the loan fund is not augmented by a profit from a lapse of his cash surrender value, for the subscriber withdraws his entire investment. The plan is for real reciprocal and mutual benefit. It is co-operative in an actual sense. See Enc. Britannica, 11th edition, title, "Building Associations," and Chapter 25A of the Revised Statutes of Texas.

It is true that in awarding loans various methods of chance are used, including the order in which received, or applied for, or by bidding, or frankly by lot. But its loans are awarded at their market value. If awarded the earlier or later borrowing subscribed does not lose, for he gets credit for his payments and the profits thereon, accruing up to the date of the loan. He is neither promised nor awarded a greater or less credit, varying according to the earlier or later date of maturity of his contract. The general scheme is not to make money

for a corporation or concern whose interests are distinct from and opposite to those of the subscriber.

It will be observed that the element of prize is not interwoven with that of chance. The claim that a building and loan association is a lottery would require no refutation. It may be added that in 17 R. C. L., title, "Lotteries," Section 14, it is said:

*"\* \* \* and since in any project formed for the purpose of making money for the promoters or earners thereon, the element of consideration is naturally present, it usually remains to be considered whether the scheme in question contains the two additional elements of chance and prize, in order to determine whether or not it is a lottery."*

The one is a plan for mutual co-operation whose prime purpose is this mutual accumulation of money for mutual benefit, and paying of mutual fair profits. The other is a self-serving, money-making plan whose prime purpose is the gaining, earlier, by chance, at an abnormally low rate of interest, a loan which may incidentally give him more or less than he is entitled to; which scheme is not designed for his benefit nor other financial benefit except such as may come by such award of loan, and primarily designed for the benefit of the company and not its subscribers. Its subscribers are not stockholders nor in any way interested in its assets.

It has been urged that Lord Halsbury's rule relieves the contract under consideration from the taint of lottery. In 15 Laws of England, 301, we read:

*"It seems that the substantial object of the whole scheme will be looked to in order to ascertain whether it is a lottery. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by law will not vitiate the scheme."*

If we take this as the American law upon the subject, it is apparent that it relieves the building and loan associations of the taint. But since the companies under consideration are operating a plan contemplating a very large number of subscribers, and which embraces as essential features as the independent characteristics above mentioned, it cannot be said that the general plan is other than as constituted by such distinguishing characteristics, viz., a lottery. It may be added that Lord Halsbury defines a lottery as follows:

*"A lottery has been described as a scheme for distributing prizes by lot or chance." Id., 299.*

The contention is made that these contracts are analogous to life, and other insurance contracts, in that the payment of the sum insured upon the contingency of death, fire, etc., being valid, the plan of these loan concerns must be approved.

In the earlier history of insurance contracts they were considered of doubtful propriety on account of the element of hazard, and they were questioned as being in the nature of gambling contracts. This view disappeared and they have been treated as contracts of indemnity and valid. The subject is treated in one of the above quoted cases and the claimed analogy shown not to exist. In *Public Clearing House vs. Coyne*, 194 U. S., at page 514, the Supreme Court discusses this contention and demonstrates its fallacy.

## III.

1. No feature of usury has been observed in these contracts nor has any operation of them been suggested which has the effect of making the rate of interest paid by the borrower upon the principal of his loan greater than ten per cent per annum. In case, by any device or operation of the contract, such rate of interest should result, then, of course, this would make such contract usurious.

Attention is drawn to the provision that the failure to pay any monthly installment when due shall subject a subscriber to a fine of fifty cents per month for each month of delinquency.

The power to impose a fine for such delinquency is given to building and loan associations as a part of their corporate powers and jurisdiction over their members who, be it observed, are stockholders of the corporation. The amount is limited to one per cent per month upon the amount delinquent. No such legal power exists in the corporations under consideration (except, perhaps, as they may operate as building and loan associations), nor in individuals nor associations. The so-called "fine" is merely a compensation for the use or forbearance or detention of money, and as such merely interest. Art. 4973. Accordingly, where the amount of the installment is such that fifty cents per month amounts to more than ten per cent per annum upon such installment, then the so-called "fine" becomes usurious.

Since it is expected that the section referred to elsewhere which is contained in one of these contracts, whereby the sale by the concern of a loan privilege for its subscriber will be eliminated, we will not discuss its possible operation as effecting usury in such case as the buyer of such privilege may thereby in effect pay to the company a sum of money for his loan which is in excess of the legal rate.

2. These contracts contain a common provision to the effect that the failure to pay all monthly installments up to and including the sixth, shall operate, in circumstances named, to forfeit all rights under the contract and all money paid.

The power to forfeit and expropriate all the moneys paid in by a subscriber is not granted in the section of the statute defining the powers of these corporations, nor elsewhere in the act. On the contrary, Section 11 of the act provides that:

"No contract \* \* \* shall be forfeited for nonpayment, but upon a failure to pay upon the same according to the terms thereof for a period of three months, the same may be cancelled and the holder thereof shall be credited with all payments made to the reserve fund as provided in Section 12 hereof, and such payment and such credit shall be payable to the holder in cash or paid-up certificates," etc.

Section 12 of the act contains provisions relating to the withdrawal by a subscriber of his contract. Section 13 provides:

"The liabilities of the contracts issued by any corporation transacting business hereunder shall at all times be the amount paid into the loan or reserve fund, together with interest at the rate of three per cent per annum thereon, less sixteen and two-thirds per cent paid to the loan and reserve fund, which may be deducted for expenses to become the actual property of the corporation, eighty-three and one-third per cent of the amount paid into the loan or reserve fund, together with three per cent thereon, which constitutes the certificate or contract reserve of the company. \* \* \*"

It is plain from the language of Section 11 that while a company

or association may cancel its contract in such manner as to deprive the contract holder of his right to have the terms thereof carried out, it does not contemplate that the money he has paid in shall be converted by the company to its own use. This and the other clauses show that the liability of the company to repay to him the amount of his money which has been carried to the reserve fund cannot be discharged in any other way than by such payment. It may be remarked that even if the language were less plain, then the actual forfeiture of money would not be implied unless such implication were necessary in the language. It has been suggested that building and loan associations have and exercise this right of forfeiture. The writer is not aware of such practice by building and loan associations. Article 1313j of the Revised Statutes provides that if a shareholder of a building and loan association be in arrears in the payment of dues, the shares may be forfeited after notice, but the withdrawal value of such shares at the time of forfeiture shall be ascertained and paid to such shareholder, etc. Accordingly, if the powers of a building and loan association could be construed to be exercisable in a scheme of this character, it remains true that the particular power does not exist.

3. It will be observed from the summary of the features of these contracts that the reserve fund described therein is a wholly different thing from the reserve fund prescribed by statute. Since it is generally understood that these concerns are required to carry a legal reserve, the impression necessarily made upon the minds of the subscribers is, that the fund described in the contract as a reserve fund is the reserve fund described by statute. Since this is not correct, it is improper to permit the fund in question to be so described in the contract, but any so-called reserve fund should be only the legal reserve which should be correctly described.

I have not undertaken to go into the details minutely of these contracts and compare their precise terms with specifications of the law as to the obligations, duties and liabilities of the company to its contract holders, as that would necessarily add a great deal to the present considerable length of this discussion. It may be said, however, that in any instance where the contract may seem to depart from the terms of the statutes, or may seem or undertake to impose a greater burden upon the contract holder, or a lighter burden upon the company than is directed by statute, such requirement is illegal, and contracts containing the same should be disapproved by you.

This Department will be glad in the event of any such instance arising to give it such further consideration as you may wish.

Very respectfully,

EUGENE A. WILSON,  
Assistant Attorney General.

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Op. No. 2496, Bk. 58, P. 62.

#### BUILDING AND LOAN ASSOCIATIONS—FINES.

1. Dues being the living principle in the whole plan of building and loan associations, such associations have the power to provide penalties for non-payment of dues at maturity.

2. The imposition of fines for nonpayment of dues must apply to all members alike, borrower and investor, both pledged and unpledged shares.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 18, 1923.

*Hon. J. L. Chapman, Commissioner of Insurance and Banking, Capitol.*

DEAR SIR: This Department is in receipt of your letter of the 29th of March, wherein you request to be advised as to whether or not an association has the right to incorporate in its by-laws a provision fixing a definite fine against pledged stock for delinquency of payments and providing that unpledged stock delinquent for three months shall have the dividends or earnings which might have been earned during that period forfeited.

In answer to your inquiry, beg to advise that the provisions of Title 25, Chapter 25a, are ample authority for a building and loan association to assess reasonable fines not exceeding, in any instance, 1 per cent per month against members for nonpayment of dues. It is our opinion, however, that the very nature of a building and loan association which depends for existence on dues would give to such association an implied power to assess fines against a member for nonpayment of dues at maturity without an express provision of the statute for the reasons that the measure of the prosperity of the whole plan depends upon the promptness with which each member discharges his obligations to every other to pay them. *Roberts vs. American Building and Loan Association*, 33 L. R. A., 744 (Arkansas Supreme Court); *Goodman vs. Durant Building and Loan Association*, 71 Miss., 310; *Endlich, Building and Loan Association*, paragraph 417.

But while there exists the undoubted right in a building and loan association to provide in its by-laws fines for the non-payment of dues at maturity, the imposition of such fines must not discriminate against shareholders in the same class, but must apply to each member alike.

"The power to impose fines, however, if unrestrained, might be abused, and thus cause injustice and oppression. Therefore courts of equity, operating with or without the sanction of the statute, will see that the fines are reasonable in amount, and equitable in every respect, having in view the object to be attained by them. They must be prescribed by the charter or by-laws, in precise and equivalent terms, so as to be readily understood by the members. *Endlich, Building and Loan Association*, paragraphs 419-22; *Occidental Building and Loan Association vs. Sullivan*, 62 Cal., 394; *Davis on Building Societies*, page 36; *Mulloy vs. Fifth Ward Building Association*, 2 MacArth., 594; *Roberts vs. American Building and Loan Association*, 33 L. R. A., 744.

It is, therefore, the opinion of this Department, and you are so advised, that a building and loan association organized under Title 25, Chapter 25a, while having the undoubted right to assess a fine for delinquency in the payment of dues, would not have the right to fix a fine against stock pledged for a loan and fix no fine against unpledged stock or would not have the right to make a discrimination as to the amount of fines in favor of or against any shareholder owning the same class of certificates.

Yours very truly,

F. M. KEMP,  
Assistant Attorney General.



Op. No. 2494, Bk. 58, P. 65.

## BUILDING AND LOAN ASSOCIATIONS—FULLY PAID STOCK.

1. Building and loan associations, if authorized by their by-laws, may issue advance payment shares bearing a reasonable fixed dividend payable, if earned, which may have priority of payment over dividends on the general shares.

2. The right of a building and loan association to issue advance payment shares bearing a reasonable fixed dividend would give them the right to issue a certificate of stock to which is attached coupons in the form of dividend coupons subject to their by-laws.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, April 9, 1923.

*Mr. J. L. Chapman, Commissioner of Insurance and Banking, Capitol.*

DEAR SIR: This Department is in receipt of your inquiry of March 30, 1923, wherein you desire us to advise you on the following questions:

1. Have building and loan associations operating under our laws the right to issue fully paid stock?

2. If you consider that they have the right to issue fully paid stock, have they the right to guarantee the payment of a definite dividend at fixed and regular intervals?

3. If you decide that they have a right to issue such stock and to guarantee fixed rate of dividends at regular intervals, have they a right to issue a stock certificate to which is attached interest coupons in the form of the specimen attached used by the Tarrant County Building and Loan Association of Fort Worth, Texas, or in a form substantially in keeping therewith?

4. If you rule that they may issue this stock, guarantee the dividend and use a certificate similar to the one attached, please advise what changes, if any, should be made in the specimen attached.

Your first two questions will be treated together; that is, have building and loan associations the right to issue fully paid stock guaranteeing the payment of a definite dividend at fixed and regular intervals? By the use of the term "fully paid stock," we presume that you mean advance payment stock. At any rate, the two terms may be used interchangeably, as they have practically the same meaning. An examination of Article 1313c, Vernon's Sayles' Texas Civil Statutes, 1914, reveals that the authority is there given building and loan associations organized under Chapter 25a, Title 25, Revised Statutes of the State of Texas, the authority to provide by their by-laws for "the advance payment of installment dues and for which there may be issued an advance payment certificate," and the further authority for the issuance "of shares in series, or at any time as the by-laws shall determine." \* \* \*

This Department on the 19th day of April, 1915, Opinion Book, 1914-1916, pages 715-722, inclusive, in an opinion to the Honorable John S. Patterson, Commissioner of Insurance and Banking, prepared by then First Assistant Attorney General C. M. Cureton, had occasion to consider the matter of law involved in your two first questions, and your attention is called to the following quotations from said opinion found on pages 719-722, inclusive, which are as follows:

"The statutes of this State governing building and loan associations do not contemplate but one class of shares. These, however, are evidenced by two different character of certificates. One class is the ordinary periodical installment certificate, payable in installments not exceeding two dollars per month on each share. The other class is that which may be provided in the by-laws

'for the advance payment of installment dues' and for which there may be issued an 'advance payment certificate.' We assume that the phrase 'investment shares' refers to advance payment certificates. The prospectus above referred to declares, however, that investment shares shall be 'preferred by the guarantee of a regular semi-annual dividend.' We do not think that any dividend can be guaranteed by a building and loan association. Whatever dividend is paid must be paid out of the earnings of the association, and not from any other source. If the earnings are not sufficient, then there would be no dividends paid on this class of stock and the use of the word 'guaranteed' in describing it is a misnomer, which ought not to be used in the by-laws of this corporation in describing this class of contracts. There is no express statute authorizing the creation of preferred stock. This being true, the general rule obtains to the effect that the preferred shareholder is but a shareholder with the right to have his dividend paid out of funds which the corporation has on hand available for such purpose and not otherwise. Says Mr. Thompson:

"The better view is that a corporation cannot contract to pay interest or dividends on the shares of its capital stock in excess of its earnings, unless expressly authorized to do so by statute. The reason is that a corporation cannot in the absence of legislative sanction divide its capital stock among its shareholders."

"Thompson on Corporations, Sec. 2236.

"Reagan Bale Co. vs. Heuermann, 149 S. W., 229-30.

"Our statute authorizes, as suggested, the payment for stock in a manner other than by monthly installments and the issuance therefor of an advance payment certificate. We believe that this advance payment certificate may be made to bear a specified dividend so long as the dividend declared is one within the probable earnings of the corporation, but we do not believe that preference could be deliberately made in favor of this class of stock; that is, we do not believe that a rate of dividend or interest on it could be properly fixed in a manner purposely to increase its income above that which the other shares of stock of the corporation might earn. In other words, no undue advantage must be given this class of shareholders, except that which arises from the larger investment which they make. The rule is stated in *Johnson vs. Nashville, etc., Loan Association*, 82 Am. St. Rep., as follows:

"It seems to be now settled by the preponderance of authority that a building and loan association, under its general power, may issue, besides the ordinary form of installment stock, shares which have been either fully or partly prepaid, and stipulate for the payment of a specified dividend thereon, as long as that does not exceed a pro rata share of the profits (or possibly, in the case of full-paid stock, the legal rate of interest, if the profits should fall below that), as long as the holders of such stock are given no undue advantage over the holders of the ordinary stock. *Murray vs. Scott*, 9 App. Cas., 519, affirming *In re Guardian, etc., Bldg. Soc.*, 23 Ch. Div., 440, 453; *In re Middlesbrough, etc., Bldg. Soc.*, 53 L. T., N. S., 203; *In re Reliance, etc., Bldg. Soc.*, 61 L. J., Ch. 453; *Latimer vs. Equitable Loan, etc., Co.*, 81 Fed., 776; *State vs. Equitable Loan, etc., Co.*, 142 Mo., 325, 41 S. W., 916; *People vs. Preston*, 140 N. Y., 549, 35 N. E., 979; *Criswell's Appeal*, 100 Pa., 488."

"This rule appears to be supported by other authorities:

"*People vs. Preston*, 35 N. E., 979.

"*Folk et al. vs. State Capital Saving and Loan Assn.*, 63 Atl., 1013.

"*Bingham vs. Marion Trust Co.*, 61 N. E., 29.

"*Latier vs. Equitable Loan and Investment Co.*, 81 Fed., 779.

"In the case last cited the United States Circuit Court for the Western District of Missouri, concerning the right of a building and loan association to issue paid-up shares or certificates, among other things, said:

"A necessary prerequisite to loaning money is to get it. Accordingly, investors are encouraged to take stock, and pay the installments in advance. They are allowed a fixed rate of interest, not exceeding 8 per cent, and the association receives the installments, some or all of them, in advance, and loans them out at a greater rate of interest than it pays, and in this way hastens the day of maturity of the stock, for the general benefit of its members. The general scheme thus indicated, the clear reference to advance payment of stock found in the statute, the provisions relating to full-paid stock found in the by-laws, clearly establish the abstract power on the part of the defendant to receive payment of its stock in advance, and issue certificates of full-paid stock

therefor. If this power exists, reasonable terms and conditions of its exercise may be fixed by the by-laws or board of directors. The payment of stock in installments confers many possible advantages upon its holder. He participates in the large premiums and interest received for money loaned, in the fines and other charges imposed upon associate members. He receives a share in all the profits of the association, and this goes to expedite the maturity of his stock, or the profitable winding up of his financial venture. These advantages or chances for gain do not appertain to the holder of paid-up stock. In the nature of the case, he cannot apply his share of profits to the payment of his stock. He takes no interest in the speculative feature of the venture. He has money to invest, and is content with a reasonable interest thereon. Considering all these things, I cannot doubt it was a reasonable exercise of power on the part of the defendant to fix the rate of interest payable to this class of conservative investors at 7 per cent per annum. I shall therefore hold that the defendant had power to receive payment in advance for the stock in question, to issue for it the certificates in question, and to obligate itself to pay interest thereon at the rate of 7 per cent per annum, in lieu of permitting the holders of such certificates to participate in the profits of the business of defendant corporation. This view finds ample support in authority. *Hohenshell vs. Association*, 41 S. W., 948; *Missouri vs. Equitable Loan and Investment Co.* (Mo. Sup., not yet officially reported), 41 S. W., 916; *Towle vs. Association*, 75 Fed., 938; *People vs. Preston* (N. Y. App.), 35 N. E., 979; *Kent vs. Mining Co.*, 78 N. Y., 159; *End. Bldg. Assns.*, Sec. 462.

"Mr. Endlich, in summing up a consensus of the leading authorities on this particular question, states the rule as follows:

"Under a like power and the right to pay dividends, they may issue paid-up stock bearing income at any given reasonable rate per annum payable in cash out of and to the extent of the earnings of the association,—an arrangement on the part of any corporation to pay interest or dividends to its shareholders, without reference to the ability of the company to pay them out of its earnings being wholly illegal and void."

"Endlich on Building Associations, Sec. 464, p. 441.

"*Hohenshell vs. Home Savings and Loan Association*, 41 S. W., 950.

"Judge Endlich, in Section 461 of his work, cited above, also uses this language:

"There is, however, nothing inconsistent with its character as such in permitting those of its members who feel themselves in a position to make a number of stock payments not yet due, to do so, thereby anticipating without inconvenience to themselves a duty which would have to be performed in any event, and putting into the hands of the association the means of hastening the final consummation of the enterprise. Accordingly, it has never been questioned that an association may allow its members to make advance payments on the stock held by them. Indeed, so obvious are the advantages accruing to the association from such advance payments that there can be little doubt as to the power of the association in order to encourage them to allow those willing to make them a benefit in return, as, e. g., a moderate rate of interest upon them and to secure repayment in the event of failure of the enterprise, of such proportion of the prepayment as may not then have accrued."

"We have directed your attention to these authorities as stating what we believe to be the correct rule. There are quite a number of respectable authorities to the contrary, while there are some which go so far as to hold that building and loan associations may issue preferred stock, even in the sense that it would have the right to participate ahead of other shareholders in the residue of the estate upon the dissolution of the corporation, but we are convinced that the Texas courts under our statute will take the middle course, which is the one suggested here; that is, that advance payment certificates may be made to bear interest in the form of a dividend which may be made payable before a general dividend is declared in favor of the installment shareholders, but these advance payment certificates are not guaranteed in any sense of the word, but the interest or dividends payable on them can be made payable only in the event it is earned by the corporation; and they are not preferred shares, except in the limited sense suggested above. In the drawing of by-laws with reference to this class of shares, the purpose of the corporation should be made plain, so that one unlearned in the law will readily understand what is intended."

From this opinion it will be seen that it was at that time the opinion of the Department that advance payment certificates might be issued by a building and loan association organized under Chapter 25a, Title 25, which said certificates might be made to bear interest in the form of a dividend, the dividend being payable before a general dividend is declared in favor of the installment shareholders. The opinion further holding, however, that the advance payment certificates were not in any sense guaranteed, but that the interest or dividend on said certificates could be payable only in the event earned by the corporation.

We see no reason at this time for the reversing or overturning of the opinion above referred to, and you are, therefore, advised, in answer to your first two questions, that a building and loan association organized under Chapter 25a, Title 25, Revised Statutes, when its by-laws so provide, may issue fully paid stock providing for the payment of a definite dividend on said stock at a fixed and regular interval, but that that will not be permitted to guarantee the advance payment certificates nor the interest or dividend thereon, unless earned by the association. We note that you suggest, in a separate letter to the Department giving your views on this matter, that this destroys the mutuality of the association. The authorities do not seem to uphold your position in this matter, as it has been held that one of the purposes of the association is to loan money for the purpose of building homes, and as was said in the case of *Latier vs. Equitable Loan and Investment Co.*, 81 Fed., page 779, "A necessary prerequisite to loaning money is to get it. Accordingly investors are encouraged to take stock, and pay the installments in advance."

In answer to your third inquiry, beg to state that we have examined the specimen of paid-up stock proposed to be issued by the Tarrant County Building and Loan Association, Fort Worth, Texas, together with the dividend coupons thereto attached, and that we can see no possible objection to the issuance of such certificate of stock with the dividend coupons therewith, if the by-laws of the Tarrant County Building and Loan Association, Fort Worth, Texas, authorized the issuance of such certificate and coupons.

In this connection, we desire to say that the dividend coupons attached to the stock certificate do not seem in any sense to guarantee the payment of a certain dividend, even though the same be for a definite amount. The coupon is simply a further evidence of an obligation to pay a definite rate of interest at fixed intervals and purports to be issued in accordance with the by-laws of the association and does not in any sense seem to be guaranteed.

Answering your fourth inquiry, beg to say that we have no changes to suggest in the said certificate.

A careful consideration has been given your general letter of March 29th, as well as to the former opinions of this Department and to briefs submitted by some of the attorneys for the building and loan associations, and while we agree with you that a building and loan association should not give to one shareholder of the same class anything which is not given to all others of that class, yet we are clearly of the opinion that such associations are authorized by statute to issue

different classes of certificates and give benefits to one class not necessarily given to another.

Yours very truly,

FRANK M. KEMP,  
Assistant Attorney General.

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Op. No. 2493, Bk. 58, P. 72.

BUILDING AND LOAN ASSOCIATIONS—ADVERTISING FIXED AND DEFINITE RATE OF INTEREST.

1. An advertisement of a building and loan association as follows: "Make your money earn 6 per cent. Dividend start from date money received. Earnings continue to actual date of withdrawal. Dividends on amounts up to \$5000 exempt from Federal income tax as provided by Act of Congress," or "\$1000 with us earn 6 per cent, which equals the earnings on \$1500 at 4 per cent. Make your money earn what it is worth. Our loans benefit you because they build up Galveston. Do business here because of: 1. Safety. 2. Profit to us. 3. Benefit to our city. 4. Dividends on amounts up to \$5000 exempt from income taxes," does not seem to violate any laws of the State of Texas, nor any of the provisions of Chapter 25a, Title 25, Revised Statutes.

2. Building and loan associations, if authorized by their by-laws, may issue advance payment shares bearing a reasonable fixed dividend payable, if earned, which may have priority of payment over dividends on the general shares.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 9, 1923.

*Honorable J. L. Chapman, Commissioner of Insurance and Banking,  
Capitol.*

DEAR SIR: This Department is in receipt of your letter of March 30th, wherein you enclose certain advertisements of the Guaranty Building and Loan Association of Galveston, Texas, and a copy of the by-laws of the said building and loan association, and you desire to be advised, first, has the company a right to advertise as evidenced by their literature that they will pay 5 and 6 per cent to stockholders, fixing in their advertisement a definite percentage? Second, are the by-laws submitted within the law, though stating that a certain class will be paid 5 per cent and a certain class 6 per cent?

In reply, beg to say that we have examined the advertisements submitted and do not find that said advertisements fix a definite amount which the company will pay its stockholders. The advertisements referred to are as follows:

"Make your money earn 6 per cent. Dividend start from date money received. Earnings continue to actual date of withdrawal. Dividends on amounts up to \$5000 exempt from Federal income tax as provided by Act of Congress," and "\$1000 with us earn 6 per cent, which equals the earnings on \$1500 at 4 per cent. Make your money earn what it is worth. Our loans benefit you because they build up Galveston. Do business here because of: 1. Safety. 2. Profit to us. 3. Benefit to our city. 4. Dividends on amounts up to \$5000 exempt from income taxes."

We can see no objection to building and loan associations organized under the laws of the State of Texas inserting such advertisements in the press.

We have examined the by-laws of the Guaranty Building and Loan

Association submitted, and beg to say that we believe that they are within the provisions of Chapter 25a, Title 25, Revised Statutes of the State of Texas, and in accordance with the opinion of this Department of April 19, 1915, pages 715-722, Opinion Book, 1914-1916, and in accordance with an opinion, No. 2494, this day rendered to you.

Yours very truly,

FRANK M. KEMP,  
Assistant Attorney General.

Op. No. 2495, Bk. 58, P. 58.

BUILDING AND LOAN ASSOCIATIONS—USE OF THE WORD "SAVINGS."

1. A corporation under Title 14, Chapter 2A, is not authorized to use as a part of its corporate name the words "bank," "bankers," "banking," "trust," etc., found in Article 557, Revised Statutes.

2. A building and loan association organized under Title 25, Chapter 25A, is not authorized to use as a part of its name or in its advertising the word "saving," "savings," "bank," "banker," "banking," "trust," "trust company," "savings bank."

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, April 19, 1923.

*Hon. J. L. Chapman, Commissioner of Insurance and Banking, Capitol.*

DEAR SIR: This Department is in receipt of your letter of March 30, 1923, which is in part as follows:

"1. Can a corporation organized under Title 14, Chapter 2A, 1920 Revised Statutes, use as a part of its corporate name any of the words carried in parentheses in Article 557, Revised Statutes?

"2. Is a building and loan association organized under Title 25, Chapter 2A, 1920 Revised Statutes, authorized to use as part of its name or in its advertising, any of the words, especially the words "saving" or "savings" which are shown in parentheses in Article 557, Revised Statutes?

"3. If you rule that under the law they may use in their advertising the words referred to in paragraph 2. above, please advise what limitations, if any, should be prescribed."

In answer to your first question, that is, whether or not a corporation organized under Title 14 of Chapter 2A, is authorized to use the words "carried in parenthesis" in Article 557, R. S., beg to say that in the regular edition of the Revised Statutes, there are no words carried in parenthesis; however, we take it you refer to the words "bank," "banker," "banking," "savings," etc., carried in quotations. In answer to this question, we beg to advise that so much of the article in question as is pertinent to your inquiry reads as follows:

"It shall not be lawful \* \* \* for any incorporated bank, other than corporations chartered by the United States, or trust company, savings bank, or any corporation save and except such as are organized under the provisions of this act (title), or which take advantage of this title as provided in Article 563, or corporations created by virtue of the acts of the Legislature passed prior to the adoption of the Constitution of 1876, and now authorized to do business in this State, to advertise or put forth or to use as their name, or part of their name, or any sign, advertising or letterhead or envelope, the word 'bank,' 'banker,' 'banking,' 'trust,' 'trust company,' 'savings bank,' 'savings' or any other term which may be confused with the name of corporations organized under this title."

Then follow exceptions of certain corporations heretofore organized under the laws of this State, and foreign corporations authorized to do business in this State, if such corporations, foreign and domestic, are authorized by their charter to use names or parts of names as are prohibited in Article 557. Corporations chartered by Acts of the Legislature before the adoption of the present Constitution and now authorized to do business in this State are excepted from the provisions of Article 557. Corporations organized under Title 14, Chapter 2A, Acts of the Thirty-sixth Legislature, are not within any of the exceptions named in Article 557, and you are, therefore, advised that such corporations organized under the above title and chapter are not authorized to use as a part of their corporate name any of the words such as "bank," "banker," etc., above mentioned, if the use of said words would be to advertise or put forth a sign as a bank, trust company or savings bank, etc. It is our opinion that the use of such words as a part of the corporate name of such corporation would have the effect to advertise and put forth a sign that such institution is engaged in the banking or trust company business or that they are savings banks, and you are, therefore, advised that such corporations would not have authority to use as a part of its corporate name any of such words.

In answer to your second inquiry, beg to advise that a building and loan association organized under Title 25, Chapter 25A, for the reasons stated by its not being within the exceptions mentioned in Article 557, R. S., would not be authorized to use as a part of its name or in its advertising any of the words mentioned in Article 557; however, we do not mean to be understood by saying that a building and loan association organized under Title 25, Chapter 25A, could not advertise that "savings" might be had by investment in its stock and that it might not use the term "saving" in its advertising, but we believe it was the intention of the Legislature, in the passage of Article 557, to prohibit any other corporation, other than a bank or trust company, to mislead the public by the use of a name which might lead them to believe that such institution was a regularly incorporated bank, trust company or savings bank.

You are, therefore, advised that in the opinion of this Department, a building and loan association organized under Title 25, Chapter 25A, is not authorized to use as a part of its name any of the words mentioned in Article 557 such as "banks," "banking," "savings," "saving," etc.

The answer to the first two inquiries makes it unnecessary to answer your third.

Yours very truly,

F. M. KEMP,  
Assistant Attorney General.

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Op. No. 2472, Bk. 58, P. 10.

MONOPOLIES AND TRUSTS.

1. One of the inherent rights incident to the ownership of real property, is the right of the owner to agree with his tenants as to the use to which the rented premises shall be put.

2. A lease limiting lessee in sale of goods, in rented premises, to those manufactured by lessor, not in violation of the anti-trust statutes of Texas.

3. Where a manufacturer acquires the ownership and control of real property, for the purpose of renting or subletting to tenants, as a part of, and incident to a general scheme, to secure a monopoly of goods manufactured by him, and for the purpose of evading the provisions of the anti-trust laws, agreement to restrict use of premises to sale of goods manufactured by lessor, would be considered a subterfuge to evade anti-trust laws, and the inherent right of owner to restrict the use of premises would be subordinated to the general scheme to procure a monopoly, and would be in violation of the anti-trust laws against public policy.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 27, 1922.

*Hon. W. H. Francis, General Attorney, Magnolia Petroleum Company,  
Dallas, Texas.*

DEAR SIR: This Department is in receipt of your letter of the 18th inst., which reads as follows:

"As stated to you in the conference with you and Judge F. A. Williams held on Thursday of this week, Magnolia Petroleum Company contemplates purchasing property in fee at certain points in the State on which to construct sales stations with the idea of leasing such property to tenants under written lease wherein it will be stipulated that the tenant shall exclusively sell Magnolia Petroleum Company's manufactured products from crude oil, such as gasoline, lubricants, etc. This policy is contemplated by the management of this company at points where it may not be profitable for Magnolia to operate sales stations through salaried or commission agents, when a tenant would be able to handle our business on the basis indicated in connection with a garage or with a side line of automobile accessories.

"I am of the opinion that a lease contract of the nature indicated is valid and not in violation of the anti-trust laws of this State in view of the decision of the Supreme Court in the case of Celli & Del Papa vs. Galveston Brewing Co., 227 S. W., 941 (same case by Court of Civ. App., 186 S. W., 278). This opinion is concurred in by Judge F. A. Williams, to whom, as you know, I have already submitted the entire matter as is herewith being submitted to you.

"For your consideration in conference, as requested by you on Thursday, I herewith hand you—

"(a) Brief digest of the authority above cited.

"(b) Suggested form containing the essential parts of the proposed lease contract, both where we own the property in fee and where we have a lease on property permitting us to sub-lease same.

"(c) Proposed sales contract to be executed by the tenant of the property.

"While these forms have not as yet been drafted in final minute detail, they will give you the main essential contents of the documents to be executed in connection with transactions of the character indicated.

"Also, as requested by you, I herewith submit form of contract that we have had under consideration with another refinery whereby it is contemplated oil owned by us is refined into by-products that are returned to us for a cash consideration. I would appreciate your views as to this last mentioned contract, both with and without the clause therein contained granting to us the option to buy the plant.

"After you have considered these matters in conference, will appreciate advice from you as to the views of the Department concerning the legality of these matters."

In entering into a consideration of the matters involved in your inquiry, we are met at the threshold with the principles of law, dealing with the inherent rights of one who owns or controls real property to put the same to such uses as he chooses, and, by agreement with a tenant holding under him, to impose conditions as to the use of the said property by the tenant, restricted only to the extent of forbidding an agreement to use the property for an unlawful purpose.



The question now arises whether, or not, a manufacturer, who owns or controls real property, can lease the same and, by agreement with the lessee, impose restrictions, requiring the lessee to sell only goods manufactured by the lessor, on said rented premises; and whether said restrictions, so imposed, would be an unlawful purpose. In other words, would such a contract be in violation of Article 7796, Chapter 1, Title 130, of the Revised Statutes of Texas, which denounces combinations of capital, skill, or acts, which (1) creates, tends to create, or carry out restrictions in trade, or commerce, or aids to commerce; (2) creates, or carries out, restrictions in the free pursuit of any business authorized or permitted by the laws of this State; (3) prevents, or lessens, competition in the manufacture, sale, etc., of merchandise, etc.; or (4) prescribes a free and unrestricted competition among themselves, or others, in the sale, etc., of any such article or commodity.

That a contract as outlined by you, as between parties not occupying the position of landlord and tenant, or lessor and lessee, would clearly be a combination, such as is inhibited by the anti-trust statutes of the State of Texas, is beyond question; but it would seem that the courts have made a distinction between contracts ordinarily held to be in restraint of trade, or a restriction in the free pursuit of a business authorized by law, in the absence of the existence of the relation of lessor and lessee, and contracts where such relation exists.

The Commission of Appeals has held in the case of *Celli and Del Pappa vs. Galveston Brewing Co.*, as follows:

"We think it cannot be denied that the defendant, in the furtherance of its business, had the legal right to impose upon its tenants, as a term of its lease contracts, an inhibition against selling the goods of a competitor upon the rented premises; and we think it clearly follows that defendant was within its rights in requiring its tenants to cease selling upon the rented premises the wares of its competitors, as a condition precedent to the renewal of the rental contracts.

"\* \* \* The right of defendant to restrict the use of its premises by lease agreements was absolute, except as it might be limited by considerations of public policy. But, aside from this, a limiting of the rights of defendant in a restriction of this character to the furtherance of its own business cannot be said to be infringed merely because the restriction is not confined to the particular article dealt in by defendant. If the right existed to prevent the sale of an article upon the premises, which would have constituted a direct competition with defendant, we think, as an incident to that right, and in order to secure to defendant the full advantage of the right to develop its own business upon said property, such right should be held to embrace the further right to prevent the sale of any wares of a competitor upon said premises. Especially should this be true where such other wares are of a similar character to those dealt in by the landlord." 227 S. W., 942.

The court cites in the discussion of its opinion the following cases:

*Railway vs. State*, 99 Texas, 34, 87 S. W., 336, 70 L. R. A., 950.  
*Hedland Fruit Co. vs. Sargent*, 51 Texas (Civ. App.), 619, 113 S. W., 330.  
*Lewis vs. Railway Co.*, 81 S. W., 111.  
*Wheatley vs. Kollear*, 133 S. W., 903.  
*Edwards vs. Old Settlers' Assn.*, 166 S. W., 423.

In all of which cases the principle announced in the *Celli and Del Pappa vs. Galveston Brewing Co.* case is upheld.

On the authority of the above cases it would seem that, generally speaking, the Texas courts have held that the owners of real property

have the inherent right to restrict the use to which such property can be put. We do not question the correctness of these decisions; but we know of no case where the courts have passed on contracts between lessor and lessee, restricting such use, where such contracts could have been part of a general scheme, for the owner of such real estate, being a manufacturer, to secure a monopoly of its manufactured goods; or where such contract or contracts would result in the manufacturer securing a monopoly on its manufactured goods.

We believe that such a scheme, when the main purpose appears to be the securing of a monopoly on goods manufactured by the lessor, rather than the inherent right belonging to the owner of real estate; or where the transaction would have that effect; or where the same would create, or tend to create, or carry out restrictions in trade or commerce, or aids to commerce; or where the same creates or carries out restrictions in the full pursuit of any business authorized or permitted by laws of this State; which would prevent or lessen competition in the manufacture, sale, etc., of merchandise, etc.; or whether the same would prescribe a free and unrestricted competition among themselves, or others, in the State, etc., of any such article or commodity; that such contract would be held to be a subterfuge for evading the anti-trust laws of Texas, and the inherent rights of the owner of the property to place restrictions on the use of the premises, owned or controlled, would be subordinated to the laws forbidding combinations in restraint of trade. Thus it has been held that in a scheme establishing a town or village all forfeitures inserted in deeds to lots, therein solely for the purpose of restricting a lawful occupation, in order that the grantor might enjoy a monopoly in it, are against public policy and void.

19 R. C. L., p. 130, and cases there cited.  
Burdell vs. Grandi, 14 L. R. A. (N. S.), 909.

We are therefore of the opinion, that there is no doubt that the courts of this State would not uphold contracts restricting the use of premises where the same was engaged in, in such a general way, as to indicate that the purposes of the owner might be to obtain a monopoly on its manufactured goods, or where the effect of such contract might be or tend to carry out restrictions in trade, or in the free pursuit of any business authorized by law, lessen competition, or prescribe a free and unrestricted competition in the sale of such articles or commodity when such contracts were attacked as being a general scheme to evade the anti-trust statutes, and as being contrary to public policy even though such contract might be upheld when covering a limited area.

Respectfully submitted,

FRANK M. KEMP,  
Assistant Attorney General.

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Op. No. 2512, Bk. 59, P. 1.

TRUSTS AND MONOPOLIES.

A contract between a manufacturer and a dealer in gasoline, oils and petroleum products, whereby the manufacturer for a nominal consideration

leases to the dealer a pump and tank with necessary attachments and equipments to operate the pump and tank, restricting the use of the property so leased to products manufactured by the manufacturer, is in violation of the Texas Anti-Trust Laws.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 24, 1923.

*Hon. A. S. Hardwicke, Attorney, Magnolia Petroleum Company, Magnolia Building, Dallas, Texas.*

DEAR SIR: This Department is in receipt of your communication of July 16, which is in part as follows:

"I am enclosing you a copy of the written contract we contemplate using in keeping with my conference with you on the 13th inst. in which I requested an opinion from your Department as to whether a contract between our company and a dealer in gasoline, oils and petroleum products, by which we for a nominal consideration lease unto the dealer a pump and tank with necessary attachments and equipment to operate the pump and tank; restricting the use of the property so leased to our own products; is in violation of the Texas Anti-Trust or monopoly statutes.

"By reason of the holding of the U. S. Supreme Court in Federal Trade Commission vs Sinclair Refining Co., it is contended that such contracts are not in violation of the Federal statutes, nor are they in violation of the Texas Anti-Trust and monopoly statutes. Will you please advise if the form of contract herewith submitted is or is not in violation of the Texas Anti-Trust or monopoly statutes?"

The contract as contemplated by you, in brief, provides that your company shall, at the request of a dealer in gasoline, etc., install on the premises owned or controlled by said dealer in gasoline, a gasoline tank with necessary piping, fittings and pump for which the dealer is to pay a nominal rental of one dollar per year and through which tank the dealer obligates himself to handle, store and sell only gasoline purchased from your company and the failure of the dealer for thirty days to purchase gasoline from your company terminates the contract.

You are advised that in the opinion of this Department the contracts as submitted by you as a form which you contemplate using would be in violation of Article 7796, Revised Civil Statutes, in so far as the same is quoted below, said contract, in our opinion, being one which creates and tends to create and carry out restrictions in trade and commerce and which creates and carries out restrictions in free pursuit of business authorized or permitted by the laws of this State.

Article 7796, Revised Civil Statutes of 1911, in so far as it is applicable to this question, is as follows:

"A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or with 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 \* \* \* to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this State."

Restriction or restraint is defined to be "limitation—restraint—hold back—hinder—repress—check—to hinder from unlimited enjoyment—to limit."

While the contract presented by you does not undertake to limit the dealer in gasoline to handling the products manufactured by you except through your tanks, the main purpose of the contract appears

to be the sale by your company to the dealer of products manufactured by the said company exclusively, and the furnishing of the tank is merely ancillary to the main purpose. While an isolated instance of the furnishing of the tank by a manufacturer of petroleum products to a dealer and a contract binding the dealer to sell through that tank only the products manufactured by the dealer might not be a violation of the anti-trust laws, in the absence of evidence of the intention of making such a contract for the purpose of evading the anti-trust laws of Texas, we believe that where such contracts are entered into on a scale of any substantial magnitude, it would indicate a system on the part of a manufacturer to obtain contracts from dealers to handle its products exclusively, and the furnishing of the tanks would be a mere incident to the obtaining of such exclusive contracts and an intention would be indicated to evade that part of the anti-trust laws of Texas above quoted.

Even if it be granted that every dealer with whom such a contract is made is able, independent of the company, to purchase on his account all necessary tanks, pumps and other equipment, still such a contract as contemplated by you, if entered into by a dealer, would not leave the dealer absolutely free in the conduct of his own business, but he would be, to the extent of the use of the equipment furnished by your company, limited by the contract to the handling of gasoline sold to him by you and would be thus hindered from unlimited enjoyment of his right to pursue a business authorized by law and would, to that extent, be held back, checked and repressed, but the statute denounces not only the creation and carrying out of restrictions in trade by contract, but denounces any combination which tends to create or carry out such restrictions. If it could not be said that the contract, as contemplated by you, absolutely creates and carries out a restriction in trade, we believe there is no question but that it has such a tendency and would, therefore, be denounced by the laws of this State. While in the case of a dealer amply able financially to equip himself with all necessary facilities for the handling of gasoline, the restriction might only be partial. It may readily be seen that in the case of the average retail gasoline dealer, the restriction would become absolute on account of the fact that experience teaches that the average dealer in gasoline would not be financially able to furnish the equipment for himself.

The anti-trust statutes of Texas denounce a combination creating or carrying out or tending to create or carry out restrictions in trade. In our opinion, this means any restriction. The dealer might by contract restrict himself in one particular and be free in all others, but we believe that this partial restriction is denounced the same as if it were absolute.

It is suggested that by reason of the holding of the United States Supreme Court in *Federal Trade Commission vs. Sinclair*, Sup. Ct. Advance Sheets, 1922-23, 67 Law Ed., p. 483, that a contract such as you propose would not be in violation of either the Federal or Texas anti-trust statutes, but we do not believe that the above case would be applicable to the Texas laws for the reason that Texas anti-trust statutes are much stronger than the provisions of the Sherman Anti-Trust Act.

Section 8820, United States Compiled Statutes, is as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, etc."

A comparison of the State anti-trust statute with the Federal law on the same subject reveals that the provisions of the State law are very much stronger and more far-reaching than those of the Federal law, and while a court might construe such a contract, as contemplated by you, as being valid under the Federal law, it does not follow that such contract would be valid under the Texas anti-trust law.

You are, therefore, advised that it is the opinion of this Department that a contract between your company and a dealer in gasoline, oils and petroleum products by which you have for a nominal consideration leased the dealer a pump and tank with necessary attachments and equipments to operate the same, restricting the use of the leased property to your own products, is in violation of the Texas anti-trust statutes and the form of contract submitted by you would, if used, be in violation of the law.

Yours very truly,

F. M. KEMP,  
Assistant Attorney General.

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Op. No. 2543. Bk. 59, P. 67.

GAS UTILITIES—CONSTITUTIONAL LAW—POWERS OF COMMISSION—  
JURISDICTION.

1. Gas Utilities Law—Powers of Commission.—Section 3 of the Gas Utilities Law gives the Railroad Commission power, among other things, to establish a fair and equitable division of the proceeds of the sale of gas between the companies transporting or producing the gas and the companies distributing or selling it; therefore, the Commission has the authority to modify or change the terms of a contract between a producing company and a distributing company, the public welfare being involved.

2. Constitutional Law—Police Power.—The rule against impairing obligations of contracts does not affect State regulations for the protection of rights of individuals, and these regulations, when exercised, are for the public welfare to which private contracts must yield.

3. Gas—Change in Rate—Inquiry by Commission—Discretion.—When application is to change the rate it is discretionary with the Commission whether it will go beyond the evidence educed by the applicant or others interested in the matter of the change.

4. Courts—Jurisdiction—Matter Committed to Railroad Commission.—Where the State has provided a remedy before the Railroad Commission, whereby the Commission is given authority to adjust and apportion the revenue between a producing company and a distributing company where the public welfare is involved, the court must yield the prior right of determination to such tribunal.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 27, 1924.

*Honorable Clarence E. Gilmore, Chairman Railroad Commission of  
Texas, Capitol.*

DEAR SIR: This Department is in receipt of your letter reading as follows:

"Chapter 14, Acts of the Third Called Session of the Thirty-sixth Legislature, approved June 12th, 1920, is known as the Gas Utility Law, and has for its purpose, as declared in Section 2 of the act, placing the duty upon the Railroad Commission of Texas of regulating 'the business of purchasing or of selling gas, or of distributing gas, or of transporting such gas or of producing or dealing in such gas,' other sections of the bill amplifying both the duties and powers of this Commission.

"The Lone Star Gas Company is a private corporation engaged in the business of transporting natural gas, both intrastate and interstate, and supplying this gas to local or distributing companies which, in turn, furnish it to local consumers of natural gas. The Municipal Gas Company is a private corporation engaged in the business of supplying or distributing gas for sale to individual customers or consumers in a number of cities in Texas. It is so engaged in the city of Wichita Falls, Texas. The Lone Star Gas Company furnishes to the Municipal Gas Company its gas supply. The Municipal Gas Company distributes the gas to the consumers in Wichita Falls, and pays to the Lone Star Gas Company two-thirds of the gross receipts from the sale of gas to the consumers, retaining for compensation for its own service one-third of the gross receipts. The price of the gas or division of the gross receipts is fixed in a contract formerly entered into between the Lone Star Gas Company and the Municipal Gas Company. It may be stated that, as between the two companies, this contract is not a matter of litigation, but the outcome of that litigation does not enter into or become a part of the question which we desire to propound to you.

"We shall thank you to advise this Commission if it has jurisdiction or authority, under Chapter 14, Acts of the Thirty-sixth Legislature, approved June 12, 1920, to in any way disturb or change the terms of the contract entered into between the Lone Star Gas Company and the Municipal Gas Company as it relates to the division of the gross proceeds from the sale of the gas by the Municipal Gas Company, or the distributing company, to the consumers; and would the Commission have the authority, under the law, to in any way alter or amend or change the division of these proceeds or to fix the price for the gas furnished by the Lone Star Gas Company to the Municipal Gas Company?

"In this connection we will appreciate your official expressions as far as possible upon the general powers and authority conferred upon this Commission in dealing with the practices and prices of the commodity of natural gas as between the wholesale or furnishing companies and retail or distributing companies."

It is apparent that under the terms of the Gas Utilities Law your chief question should be answered in the affirmative. We do not think there can be any doubt as to this construction, the only question being as to its constitutionality. The latter question has not been suggested to us, but inasmuch as the matter is of such importance we have made a careful investigation of the question.

It is well established that the general rule that a Commission cannot destroy or interfere with contract rights and obligations is subject to the necessities of the public.

28 C. J., 560.

State Utilities Commission vs. Telephone Assn., 110 N. E., 334.

State Utilities vs. Refrigerator Co., 108 N. E., 716.

Public Service Gas Co. vs. Board of Utilities Commission, 87 Atl., 651.

Cooley's Constitutional Limitation, 7th Ed., pp. 383, 833-9.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650.

People vs. Public Service Commission, 145 N. Y. Supp., 503.

We have investigated laws of other States affecting the regulation of gas, etc., by various Public Service Commissions and also a decision of courts of those States construing the powers of the Commission, and we find it to be the general rule that the courts are slow to

interfere with Public Service Commissions' decisions affecting the public welfare.

Public Service Commission vs. State of Washington, 204 Pac., 791.

Public Utilities Co. vs. Landon, 249 U. S., 235 (Kansas case).

Oklahoma Gas Co. vs. Oklahoma, 258 U. S., 234.

Union Dry Goods Co. vs. Georgia Public Service Corporation, 248 U. S., 372.

Clarksburg Light & Heat Co. vs. Public Service Commission, 100 S. E., 551 (West Virginia case).

People vs. New York Telephone Co., 141 N. Y. Supp., 1018.

Arkansas Gas Co. vs. Arkansas Railroad Commission, 261 U. S., 379.

We think the case of Arkansas National Gas Company vs. Arkansas Railroad Commission et al., 261 U. S., 379, answers the questions submitted by you. The state of facts in that case was very similar to those outlined in your letter. There the Arkansas Gas Company brought suit in the district court alleging that an order of the Arkansas Railroad Commission was invalid after establishing confiscatory rates for natural gas furnished to its consuming customers and after maintaining certain divisional rates, alleged to be wholly inadequate, fixed by contracts between the Arkansas Gas Company and the Little Rock Gas and Fuel Company and the Consumers Gas Company. The court granted an interlocutory injunction in respect of the rates to consumers, but denied it as to the divisional rates. The appeal concerned the review only of the action of the lower court in the latter respect.

By the divisional contracts referred to, applicant, in consideration of the payment to it of a stated proportion of the rates collected, agreed to furnish gas to the two companies named, to be distributed to their customers in the cities of Little Rock and Hot Springs, respectively. The gas was to be delivered at the intake of the distributing systems for these cities. Appellant asserted that the income afforded by the rates prescribed by these contracts is so inadequate as to have the effect of a virtual confiscation of its property, and that this result is in large part due to improper and wasteful methods of distribution on the part of the two distributing companies. The Commission was asked to fix a flat rate, called a city gate rate, for the gas delivered at the city borders, the effect of which would have been to abrogate the contract rights based upon a percentage of the collections. Appellant's application was made to the Arkansas Corporation Commission, but was decided by the Railroad Commission, to whom the Legislature in the meantime had transferred jurisdiction. There was no claim that rates to consumers were affected by these contracts; nor does it appear that the public interest was involved in the action which the Commission was asked to take.

The Commission denied the application primarily upon the ground that the power to grant it had been expressly withheld by the act of the Legislature known as Act 443, passed on March 25, 1921, which transferred the jurisdiction therefore possessed by the Corporation Commission, to the Railroad Commission, and providing that the latter "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities or distributing companies, and such contracts shall not be affected by this act or the act of which this is an amendment."

The Arkansas Gas Company appealed to the United States Supreme

Court and the opinion was delivered by Justice Sutherland. After reciting the above facts, the court said:

"The question, whether in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the Commission, under the circumstance disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (Union Dry Goods Co. vs. Georgia Public Service Corp., 248 U. S., 372, 375; Producers Transportation Co. vs. Railroad Comm., 251 U. S., 288, 232), there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise."

and concluded by affirming the judgment.

It will be noticed that the court in the above case inferentially held that if the public interest had intervened the Commission would have had the power to modify or abrogate the private contracts, but in that case there was no claim that the rates to consumers were affected by the contracts and the court held that the Commission did not have the authority to relieve the contracting party from the burdens of an improvident undertaking. The distinction of that case and the case submitted by you is that, there, the Arkansas Gas Company, which was situated the same as the Lone Star Gas Company, was asking for the relief itself, but asked for it solely because of its own unfortunate burdens and not because public interests were involved. By inference, the court said that had public interests been involved the Commission could have modified the contract. Here the Lone Star Gas Company was not asking for relief before your Commission, but the relief was asked by the Municipal Gas Company, the distributor, and the city of Wichita Falls answered that the contract between the Municipal Gas Company and the Lone Star Gas Company was improvident and that if said contract were equitable the Municipal Gas Company would need no relief. Therefore, we think that the contract between the Lone Star Gas Company and the Municipal Gas Company was a pertinent issue in the case and should have been gone into.

With reference to your question regarding the practice and procedure, we have reached the conclusion that it is within your discretion to go beyond the evidence adduced by the applicant or others interested in the matter of the change. This is the holding of *State vs. Public Service Gas Co.*, 136 Pac., 850. In that case the Commission's discretion was discussed and its refusal to go into further testimony was upheld by the Supreme Court at Washington. The case was quite similar to the case submitted by you, but in that case the court called attention to the fact, "it is worthy of note here that no evidence offered by the city was excluded by the Commission." I am informed by you that in this case the Commission refused to admit the evidence offered by the city with reference to the contract between the producer and the distributor.

The further question as to whether your Commission would have



jurisdiction to modify the terms of the contract between the Lone Star Gas Company and the Municipal Gas Company if that contract was the basis or subject matter of a suit in the courts. The only jurisdiction you have as to the modification of that contract grows out of the State's police power to protect the necessities of the public. This is peculiarly within your jurisdiction and your exclusive jurisdiction, and the courts must yield the prior right of *that* jurisdiction to your tribunal. This question was directly passed on by the Supreme Court of Wisconsin in *Campbell vs. Milwaukee Electric Railway and Light Company*, 170 N. W., 937, 6 A. L. R., 629.

The courts have appellate jurisdiction of your prior determination of this particular question, but they have no concurrent jurisdiction.

Answering your questions specifically, we advise that you have authority to inquire into the terms of the contract between the Lone Star Gas Company and the Municipal Gas Company and also authority to modify those terms and change the division of the proceeds. You have the authority of your own motion to bring the Lone Star Gas Company before you, and as above explained you have exclusive jurisdiction to inquire into that contract, the interest of the public being involved.

Yours very truly,

RILEY STRICKLAND,  
Assistant Attorney General.

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Op. No. 2491, Bk. 58, P. 188.

CORPORATIONS—PURCHASE AND OWNERSHIP OF STOCK—POWERS OF  
CORPORATIONS CHARTERED UNDER CHAPTER 24, TITLE 25,  
REVISED STATUTES, 1911.

1. A Texas corporation has no power either to subscribe for or purchase shares of stock in another corporation unless such power is expressly conferred upon it by its charter or statute, or unless such purchase and ownership of stock is necessary to carry out the purposes of the corporation.

2. The powers of a corporation, created under the laws of a foreign State doing business in Texas, are limited to such as the laws of this State may confer. Unless there is an express statutory provision, it is not within the general powers of such corporation to purchase or deal in the stock of Texas corporations for profit or for controlling the management.

3. A Texas corporation organized under Chapter 24, Title 25, R. S., 1911, has not the general powers to purchase and own the stock of corporations organized under the same chapter and title except:

(1) Such corporation may own the stock of a corporation organized under the same chapter and title which is conducting an oil pipe line business only.

(2) Such corporation may own the stock of a corporation organized in another State or country having the same powers of corporations chartered under this chapter and title.

4. Statutes construed: Articles 1303-1308a.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 2, 1923.

*Hon. Shelby S. Cox, District Attorney, Dallas, Texas.*

DEAR SIR: Your request of March 10th has been received, wherein you propound to this Department the following questions:

"1. Can such a corporation (chartered under Title 24, Chapter 25, R. S.,

1911, amended by Chapter 41, Acts of Thirty-fourth Legislature; amended by Acts of Thirty-fifth Legislature, Chapter 31), organized under the laws of Texas, and with the authority conferred by said acts, directly acquire by purchase, and hold, the capital stock of another Texas corporation, engaged in exercising one or more of the powers granted to corporations, organized under Title 24, Chapter 25?

"2. Can a corporation, organized under the laws of another State, buy such Texas corporation, in accordance with the authority conferred by said acts, acquire and hold the capital stock of another Texas corporation, engaged in exercising one or more of the powers granted to corporations, organized under Title 24, Chapter 25?

"3. Is such foreign corporation, so organized in accordance with the provisions of said acts, and owning the stock of another Texas corporation, engaged in exercising one or more of said powers, authorized to secure a permit to do business in the State of Texas, and to exercise the powers granted by its charter, under such permit, in the State of Texas?

"4. The Texas corporation desires, as I am advised, and as I believe, to comply with the laws of Texas. It has no intention of launching a subsidiary corporation in the oil producing business, or in the oil pipe line business. The Texas corporation possesses all of the powers set out in the acts above mentioned. The subsidiary corporation, under contemplation, will exercise only subordinate powers, covering only a small part of the powers conferred by Title 24, Chapter 25, as amended. The idea is to ascertain whether such a Texas corporation can hold and own the stock of such a subsidiary corporation, either directly, or indirectly, under and by virtue of the terms and provisions of said Title 24, Chapter 25, as amended."

We will undertake to answer these questions in the order in which they are presented. It will be necessary to restate some general principles relative to the powers of domestic and foreign corporations, particularly the power and authority of such corporations to purchase stock of other corporations of like or different charter powers.

While there are no decisions in the State of Texas relative to the power of a Texas corporation to take and hold stock in another Texas corporation, either for profit or for controlling the management thereof, yet we think that the public policy of the State, expressed in its laws, together with the judicial decisions upon kindred questions, undoubtedly indicate that the prevailing doctrine in America will be and is the law in Texas. That is to say, unless the power to purchase or hold stock in another corporation is expressly conferred by its charter or statute, the Texas corporation cannot exercise such power and authority. Of course, we are not considering the authority and power of a Texas corporation under Section 81 of Article 1121, R. S., 1911, passed by the Thirty-seventh Legislature, Chapter 136, 1921. The rule is expressed forcibly by the text-writers generally: Morawetz, Sec. 431, 10 Cyc., 1107; Thompson, Sec. 1102. The rule in Texas is that:

"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 construed strictly against them; that a corporation should always be required to show a plain and clear ground for the authority it assumed to exercise." *East Line Railway Company vs. Rushing*, 69 Texas, 314; *Morris vs. Smith*, 88 Texas, 521; and other authorities; 24 Texas, 127; 81 Texas, 494; 68 Texas, 62; 43 Texas, 1; 15 S. W., 200.

The rule construing the implied powers of a corporation in Texas is announced by Chief Justice Gaines in the case of *North Side Railway Company vs. Worthington*, 88 Texas, 562:

"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 decisions. 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.)

We call your attention further to the language of the Supreme Court of Illinois in the case of *People vs. Chicago Gas Company*, 17 Am. St. Rep., 319:

"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 purpose granted and to accomplish the purposes of their creation. An incidental power is one that is directly and immediately appropriate to the exclusion of the specific power granted and not one that has a slight or remote relation to it." Citing *Hood vs. N. Y. & New Hamp. R. R.*, 22 Conn., —; *Franklin Co. vs. Lewiston Savings Inst.*, 28 Amer. Rep., 9.

"Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of goods, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purposes."

Undoubtedly it is the rule in Texas, as announced in the great majority of the other jurisdictions of the United States, that the enumeration of the powers which a corporation has excluded all others. Unless express permission be given by legislative enactment, a domestic corporation shall not have the power to purchase or deal in the stock of other domestic corporations, either for profit or for the purpose of controlling their management.

Further, the rule in Texas undoubtedly is that foreign corporations authorized and permitted to do business in Texas are limited by the laws of this State and are subject to all of the laws of the State governing domestic corporations. It can have no right, power or authority not granted to domestic corporations, nor can it transact any business or engage in any business not permitted to Texas corporations. *Ramsey vs. Todd*, 69 S. W., 113; *Johnson vs. Townsend*, 124 S. W.,

417; *Staacke vs. Routledge*, 241 S. W., 994; *Fowler vs. Bell*, 90 Texas, 157; *Empire Mills vs. Allston Grocery Co.*, 15 S. W., 505, 12 L. R. A., 366; *Thompson*, Secs. 1885-1886; 54 L. R. A., 537; *Bank of Augusta vs. Earle*, 38 U. S., 519; also, 7 A. L. A., 386; 11 Pac., 360; 101 U. S., 356; 8 Wall., 181.

We now come to the consideration of the particular corporation in question in order to see to what extent the Legislature has changed the general rules announced above. Corporations chartered under Chapter 24, Title 25, are vested with the following powers generally:

1. Storing, transporting, buying and selling of oil, gas, salt, brine, and other mineral solutions, including sand and clay. (Art. 1303.)
2. To buy, sell and furnish oil and gas for light, heat and other purposes.
3. To lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, etc.
4. To own, use and occupy necessary lands. (Art. 1305.)
5. Such corporation has the right to condemn land for right of way, etc. (Art. 1306.)
6. To borrow money, issue stock mortgage franchises, and property.
7. Engage in prospecting and producing oil and gas. (Art. 1307.)
8. To conduct a similar business in other States.
9. To own or operate refineries, treating plants, etc.
10. To cause formation of companies outside of the State having similar powers to those within the State.
11. To hold stock of foreign corporations having same powers as those granted under Chapter 24, Title 25. (Art. 1308a.)
12. Companies organized under this act may not conduct the business of prospecting for and producing oil and gas and at the same time operate oil pipe lines, except:

(a) Such corporations may own the stock of a Texas corporation chartered under this chapter and title, operating an oil pipe line only.

We think the general enumeration above gives the broad outline of the major powers of a corporation chartered under Chapter 24, Title 25. There is only one instance where the Legislature has expressly authorized a Texas corporation so chartered to own stock of another Texas corporation similarly chartered. Texas companies organized under Chapter 24, Title 25, may own the stock of a domestic corporation similarly chartered conducting an oil pipe line business only.

Should a Texas corporation, chartered under the title and chapter referred to, exercising the powers conferred in Article 1308a, form a corporation in another State having the same powers as the parent corporation and should the foreign corporation seek permission to do business in this State (if at all this might be done), it could only have the powers granted to the Texas corporation in respect to ownership of stock. It could own the stock of another Texas corporation in only the instances above mentioned.

Therefore, we answer your questions above as follows:

A corporation chartered under Title 25, Chapter 24, as amended, R. S., 1911, may not purchase and hold the stock of another Texas corporation having the same powers and exercising one or all of them, except that such a corporation may own the stock of a domestic oil pipe line company so chartered.

A foreign corporation chartered in a foreign State having the same powers as domestic corporations under Chapter 24, Title 25, if permitted to do business in Texas, would be limited and restricted as to its power to purchase stock of a corporation similarly chartered, to the same extent as a Texas corporation is restricted.

The third question is answered in the last paragraph above, except that where a Texas corporation may own the stock of a pipe line company so chartered, this power is denied foreign corporations who seek to do business in Texas. Article 1307 contains the following language:

"Nor shall any corporation organized in any other State or country be permitted to own or operate oil pipe lines or engage in the oil producing business in this State, when the stock of such corporation is owned in whole or in part by a corporation organized under this chapter."

We readily see that the power granted to a domestic corporation chartered under this chapter and title to own the stock of a pipe line company similarly chartered is denied to a foreign corporation who seeks to do business in the State.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2471, Bk. 58, P. 75.

#### BANK GUARANTY LAW.

1. It is contemplated by the law that the cash portion of the Depositors' Guaranty Fund shall be deposited, and at all times kept, in a separate fund in the State Treasury.

2. The State Banking Board has no power or authority to take any portion of said fund from the State Treasury, and deposit it elsewhere, at interest or without interest.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 21, 1922.

*The State Banking Board, State House, Austin, Texas.*

GENTLEMEN: You have requested of this Department an opinion, as to whether the State Banking Board may take from the State Treasury a sufficient amount of the Depositors' Guaranty Fund to pay the depositors of an insolvent bank, which is in the hands of the Commissioner for liquidation, and deposit the same in one or more State banks, at interest, to be used as needed in paying the depositors of the insolvent bank.

Chapter 5, Title 14, of the Revised Statutes, which contains the acts of the Legislature comprising the bank deposit guaranty law, provides for two separate and distinct funds. The first is the Depositors' Guaranty Fund, which is intended to be an available fund of \$2,000,000, accumulated in the manner prescribed by Articles 448 and 449 of the Revised Civil Statutes. The management of such fund is thus provided for in Article 446, R. S.:

"Said Board (the State Banking Board) shall have the control and management of the Depositors' Guaranty Fund, hereinafter provided for, and shall have the power to adopt all necessary rules and regulations *in harmony with this chapter*, for the management of said fund."

One of the express stipulations of this chapter, with which all acts of said Board and all rules and regulations adopted by it must be in harmony, is the following, contained in Article 449, R. S.:

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

It will be noted that the language there used is not, "deposited *only* for safe-keeping with the State Treasurer," but, on the contrary, is "deposited for safe-keeping *only with the State Treasurer*." We think that the word "only," in the connection in which it is used, was meant to limit the place of deposit, and not the purpose or character of the deposit, since the purpose and character of deposit is elaborately described by stating that the State Treasurer is merely bailee of the fund, and that said funds shall never "be considered State funds." But, in either event, we consider this an express injunction as to the safe-keeping and the place of deposit for the fund, which must be observed by the Board in their control and management of the same, and that the Board has no power or authority to adopt any course, rules or regulations not "in harmony" therewith.

The second fund treated of in this chapter, is that consisting of the assets and proceeds of the assets of an insolvent bank in the hands of the Commissioner for liquidation. The statute provides that when a State bank or trust company shall become insolvent and come into the hands of the Commissioner of Insurance and Banking, such Commissioner shall take "possession of the property and business of such State bank," and he "is authorized to collect moneys due to such corporation, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, as provided in this chapter." Article 456 and Article 453. In the course of the litigation it is contemplated that funds from many sources will come into the hands of the Commissioner.

Thus, by the terms of Article 457, he "shall collect all debts due and claims belonging to such State bank."

Upon the order of the district court, or in vacation of the district judge, he "may sell or compound all bad or doubtful debts, \* \* \* may sell the real estate or personal property of such State bank." Article 458.

He may pay the debts of such bank and enforce the individual liability of the stockholders. Article 459.

Articles 460 to 467, inclusive, conferring upon him other powers and duties, in respect to the method and means of liquidation of the affairs of insolvent banks, and then Article 468 provides that the moneys collected by him shall be disposed of in the following manner:

"The moneys collected by the Commissioner shall be, from *time to time*, deposited in one or more State banks, and, in case of the suspension or insolvency of the depository, such deposit shall be preferred before all other deposits."

By no kind of reasoning could it be plausibly insisted that the fore-

going provisions have any application whatever to the Depositors' Guaranty Fund. Both, the language used and the connection in which the same is used, clearly show that reference is had to moneys received and collected by the Commissioner of Banking and Insurance, in the course of the liquidation of an insolvent bank, through the sources and by the means prescribed in Articles 455 to 467 of the Revised Statutes, immediately preceding. Besides, the language used is, "moneys collected by the Commissioner," whereas none of the Depositors' Guaranty Fund is paid to the Commissioner alone, but, as expressly provided in Article 449 of the statute, is paid to the State Banking Board.

It should here be noted that the Commissioner of Banking and Insurance is not directed, by Article 468, to deposit the moneys, collected by him up to this stage in the course of the liquidation of a bank, at interest, but he is merely directed therein to deposit such moneys in one or more State banks, and "such deposits shall be preferred before all other deposits." Indeed, it might, with some plausibility, be insisted that it was not contemplated that such deposits should draw interest because of the preference given, and also because of the policy of the law "that deposits upon which interest is being paid, or contracted to be paid, directly or indirectly," by the depository bank, shall not be paid out of the Depositors' Guaranty Fund; and also because later on the act specifically enjoins that certain other moneys, which have come into the hands of the Commissioner, during the liquidation of an insolvent bank, shall be placed at interest. Thus Article 480 provides:

"Dividends and unclaimed deposits *remaining unpaid in the hands of the Commissioner for six months after the order for final distribution* shall be by him deposited in some State bank to be designated by the State Banking Board, to the *credit of the Commissioner* in his name of office, in trust for the several depositors with, and creditors of, the liquidated State bank from which they were received, who are entitled thereto."

Indeed, the idea, that it was contemplated that the only deposits which should bear interest are the "dividends and unclaimed deposits remaining unpaid in the hands of the Commissioner for six months after the order for final distribution," is strengthened by the following language used in Article 483:

"The State Banking Board may apply the interest earned by the moneys *held by the Commissioner*, or may authorize him to apply the same, toward defraying the expenses incurred in payment and distribution of *such unclaimed deposits or dividends* to the depositors and creditors entitled to receive the same, and the Commissioner shall include in his official report a statement of the amount of interest earned *by such unclaimed dividends*."

It is not, however, necessary for us, in answer to the inquiry made, to here decide this last question, and we merely content ourselves with calling attention to this state of the law. It is proper also to here state that no duty is imposed, by the law, upon the Commissioner of Insurance and Banking to place at interest any of the moneys received by him, in the course of the liquidation of an insolvent bank, except those dividends and unclaimed deposits remaining in his hands unpaid for a period of six months after the order for final distribution.

In conclusion, after careful consideration of all provisions of the Bank Deposit Guaranty Law, it is the opinion of this Department that

the cash portion of the Depositors' Guaranty Fund shall be kept, at all times, in the State Treasury, as provided in Article 449, R. S., and that the State Banking Board has no power or authority to withdraw the same, or any portion of the same, and deposit it in one or more State banks, at interest or without interest. The State Treasurer is bailee of this fund, and must hold it for the special purpose involved in the bailment. The law imposes the trust upon him. This trust he assumes, and knowingly assumes. The funds can be paid out only by him, and by him only, "on warrants drawn by the order" of the State Banking Board, of which he is a member. He assumes all of the responsibility of the trust. *McGee vs. French* (S. C.), 27 S. E., 487.

Very truly yours,

JNO. C. WALL,  
First Assistant Attorney General.

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Op. No. 2483, Bk. 58, P. 339.

INSURANCE—WORKMAN'S COMPENSATION LAW—TEXAS EMPLOYERS'  
INSURANCE ASSOCIATION—STATUTES CONSTRUED.

1. Chapter 103, General Laws, Regular Session Thirty-fifth Legislature.
2. The Texas Employers' Insurance Association has no power or authority, either express or implied, to engage in a reinsurance business.
3. It has no power or authority to loan funds accumulated through the operation of the Compensation Law. It has no right to or interest in such funds except to do with them what the statutes specifically direct.
4. The purpose of this act and the object in making this Association a State agency was to furnish at the lowest cost to employers of labor the advantages of compensation insurance, and, at the same time, provide for workmen reasonable and just compensation for injuries received in course of employment. Indemnifying against loss other companies writing a different character of insurance would defeat this object and purpose.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 21, 1923.

*Honorable Woodville Rogers, Chairman, Senate Investigating Committee, Building.*

DEAR SIR: By letter dated February 17, 1923, and addressed to the writer, you advise that the Texas Employers' Insurance Association, created and existing under and by virtue of Chapter 179, General Laws, Regular Session, Thirty-third Legislature, as amended by Chapter 103, General Laws, Regular Session, Thirty-fifth Legislature, has entered into an arrangement with other companies in the North and East by which they reinsure each other against abnormal losses. This pool has been entered into by the said Association, the Employers' Casualty Company, a Texas corporation, which will be referred to again in this opinion, and six other mutual casualty companies, to wit: Security Mutual Casualty Co., Chicago, Ill.; Michigan Mutual Casualty Co., Detroit, Mich.; Integrity Mutual Casualty Co., Chicago, Ill.; Federal Mutual Casualty Co., Boston, Mass.; Lumbermen's Mutual Casualty Co., Chicago, Ill., and Jamestown Mutual Insurance Company of Jamestown, N. Y.

You then ask an opinion of this Department as to whether the Texas



Employers' Insurance Association has the power and authority to engage in such a reinsurance business.

It is not necessary to go into the particular plan of reinsurance being employed in the instant case, since all plans of reinsurance contain certain common elements, which are the only ones necessary to be considered to properly answer your question. These common elements are thus aptly stated in the well considered opinion of the Supreme Court of Nebraska in the case of Allison vs. Fidelity Mutual Fire Insurance Company, 116 N. W., 275:

"In Barnes vs. Hekla Fire Ins. Co., 56 Minn., 38, 57 N. W., 314, 45 Am. St. Rep., 438, it is said: 'Reinsurance \* \* \* is a contract of indemnity in which the insurer reinsures risks in another company, and is solely for the benefit of the latter, and not of the policyholders.' In Hunt vs. New Hampshire F. U. A., 68 N. H., 305, 38 Atl., 145, 38 L. R. A., 514, 73 Am. St. Rep., 602, it is said: 'By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not in law directly liable to the insured.' In the case of Appeal of Goodrich, 109 Pa., 523, 2 Atl., 209, it is said: "'Reinsurance" is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other.' It is apparent, therefore, that the contract of reinsurance is not to insure the owner of the property against its loss by fire, or other casualty, but is a contract to indemnify another insurance company or underwriter. Strictly speaking, it is purely a contract of indemnity, not against loss by fire or other hazard provided in the original policy, but against loss by or on account of the outstanding contract of insurance with the owner of the property. A contract of reinsurance is simply to indemnify the original insurer for a loss he may sustain upon his contract of insurance. It is a guaranty to reimburse him for any sum he may be compelled to pay under a contract of insurance with the owner."

The question, then, resolves itself into this: Did the officers and directors of the Texas Employers' Insurance Association have the right, power and authority to guarantee the other companies in the pool against losses that might be sustained by them, and to pay losses so sustained by said companies out of the funds of the Association?

To answer this question it will be necessary to determine just what power and authority said officers and directors have over the funds of said Association and just what right and interest they have in and to the same.

Fortunately, our Court of Civil Appeals, at Amarillo, in the very well considered case of City of Dallas vs. Texas Employers' Insurance Association, 245 S. W., 949, has completely covered this entire subject, and we quote liberally from that case, as follows:

"In creating appellee such an agency, the Legislature has fashioned it upon the general plan of a mutual benefit association, from which it was not contemplated that anyone should derive any profits as such. \* \* \* That it was the intent of the Legislature that neither the appellee as an organization nor any subscriber thereto should ever derive any profits from it is made plain by that part of the act which provides for the collection and distribution of its funds. Article 5246v provides that the board of directors shall divide the subscribers into groups in accordance with the nature of the business and the degree of hazard incident thereto, and that the subscribers within each group shall annually pay in cash such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year.

The next article provides that the association may, in its by-laws and policies, fix the mutual contingent liability of the several subscribers for the payment of losses and expenses, not provided for by its cash fund, and as a further evidence of the intent of the Legislature that it should not be an organization from which any profits might accrue to anyone, and that it should handle only such funds as are necessary for paying the actual losses and expenses incident to the enforcement of the act itself, it is provided by Article 5246vvv that if the association at any time is not possessed of cash funds above its insured premiums sufficient for the payment of incurred losses and expenses, *it shall make an assessment for the amount needed to pay such losses and expenses, such assessment to be levied upon the several subscribers in proportion to their several ability.* Article 5246w provides that the board of directors may from time to time fix the amount to be paid as dividends upon the policy's expiring during each year, after retaining a sum sufficient to pay all compensation which may be payable on account of injuries sustained and expenses incurred, and further provides that all of the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any approved claim for compensation against the association. While the amount which this article requires to be refunded to the several subscribers is called a dividend, it is clearly not so in the strict sense, but is simply a requirement that all surplus money in the hands of the association, over and above the amount required to properly administer and carry out the purpose of the act, shall be returned to the subscribers, thus demonstrating that the Legislature intended by the act to reduce the expenses incident to injuries resulting in industrial pursuits to actual cost, freed of any profits to any person or association of persons. \* \* \*

"The act does not provide that any reserve or surplus fund may be invested or loaned to its policyholders, stockholders, or other persons, as is usually the case with co-operative or mutual life insurance companies, such as is provided for in Title 71, C. 6, V. S. C. S. As we understand the act under consideration, all of the funds coming into the hands of appellee over and above that required for the payment of claims and expenses is clearly the property of the subscribers, and is held by appellee simply as a trustee, to be refunded to them in accordance with the above quoted provisions of the act. So construed, the act does not invest the appellee as owner in its own right with any property whatever. Without express authority from the legislative body which created it, appellee cannot legally own any such property. The fact that it has not been authorized to own property we think accounts for the failure of the Legislature to levy any tax upon the funds which it is authorized to collect. \* \* \*

"The appellee is not a trustee as that term is used in said subdivision, because it cannot and does not hold any 'estate' as such in any surplus in its hands. It simply holds any such surplus as a naked trustee. This is clear from the language of the various provisions of the statute under which appellee was created, and which provide that it is entitled to *have and hold only* such funds of its subscribers as may be necessary in carrying out the purposes of the act. Because of the uncertain number of claims and the amount required to be on hand for their payment, in the very nature of things such surplus is variable and contingent. If at any period appellee should have more money than it has used in the payment of expenses and claims, then as to such surplus there is created a passive, dry, or simple trust, which 'is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the mere legal title rests in the trustee.'

"In our opinion by the provisions of the statute quoted in the original opinion under the authority of which appellee was organized, it is not contemplated that the association should ever hold as an active trustee any money over and above the sum necessary for the payment of expenses and claims, and that any surplus which may by chance be on hand is to be returned from time to time as 'dividends' to the subscribers. The association is clearly not the 'owner' in the sense in which the word is used in Vernon's Sayles' Ann. Civ. St., 7509, subdivision 1, nor is such fund 'controlled by' appellee as 'agent' under subdivision 2 of that article, nor is it entitled to either the possession or control of any part of it as against the subscribers. \* \* \*

"The appellee, under the statute, is not supposed to have in its possession or under its control any of its subscribers' money as a surplus. It cannot be held to be a trustee of any such fund in a technical sense. *It holds all such*

*surplus as a naked trustee under a passive trust, with the sole duty of returning it, promptly to the real owners. \* \* \**

"We think the instant case is a much stronger case than the Boyd case. In the Boyd case he was vested with the legal title for a definite purpose. *In the instant case, if appellee had any title to the fund sought to be taxed, it was for the purpose of paying claims and expenses only.* Boyd had the right of possession, control, and management under the orders of the court. In the instant case, after the payment of claims appellee had *neither the right to hold, control, or manage the surplus in its hands. It was absolutely and without qualification the property of the several subscribers, and could only be assessed to them under the above quoted article of the statute.* Boyd, as referee, held the property as against all claimants, subject to the orders of the court. *As against the subscribers the appellee could not hold any of the surplus upon any valid claim.*"

If the conclusions of the Amarillo Court of Appeals are correct, and we think they are, the officers, directors and subscribers of the Texas Employers' Insurance Association have no power whatever to indemnify other insurance companies against losses sustained by them, or to pay such losses out of the funds of said Association. The law creating such Association and prescribing its duties and powers nowhere expressly gives it the right to so indemnify other insurance companies or to use the method of reinsurance to indemnify it against losses of any character. On the contrary, the statute definitely prescribes the manner in which losses of the Association shall be met. Among the means expressly provided by the act for the payment of losses sustained by the Association are the following:

Section 23 of Part III, which is as follows:

"The Association shall set up and maintain reserves adequate to meet anticipated losses and carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and Banking."

Section 15 of Part III, which is as follows:

"If the Association, at the end of any calendar year, is not possessed of admitted assets in excess of unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, first upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a deficiency for the group, and second only upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a surplus, and in no event shall it make an assessment for any aggregate amount more than is needed to pay losses and expenses. Every subscriber shall, in accordance with the law and his contract, pay his proportionate part of any assessment which may be levied by the Association on account of losses and expenses incurred during any calendar year while he is a subscriber."

Had it been intended that losses sustained by the Association might be met by reinsurance, such a plan could have easily been provided in the law. The fact that this was not done, although the subject of losses was specifically covered by the act, is convincing that the Legislature did not intend that such a plan should be pursued.

We do not gainsay the proposition advanced in briefs by attorneys for the Texas Employers' Insurance Association that, in the absence of express restrictions, corporations have implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred and to accomplish the objects for which they were created. We are, however, firmly of the belief that the statutes above quoted and those construed by the appellate court in the case of City of Dallas vs.

Texas Employers' Insurance Association, *supra*, constitutes express restrictions in respect to the rights and powers of the Texas Employers' Insurance Association, its officers, directors and subscribers over the funds, moneys and assets that have accumulated in the operation of this law, which forbid the hazarding of such moneys and funds by reinsurance contracts of the kind entered into.

Moreover, it is the opinion of this Department that the right to reinsure is not necessary to the transaction of an insurance business, and that said Association has no implied power to engage in such business.

In support of this view we are sustained by the Supreme Court of Nebraska in the well considered case of *Allison vs. Fidelity Mutual Fire Insurance Company*, 116 N. W., 274, from which the following quotation is taken:

"While it might be convenient, or even an advantage, to a mutual insurance company to possess the right to reinsure its risks that to it might seem excessive, or to reinsure a portion of its risks where it has too great a number in the same locality, and while we do not decide that this cannot be done in a company empowered to assume such risks, yet such right is not necessary to the transaction of the insurance business. It has the right to limit the amount of any one risk, or the number of risks, that may be offered to it to such an amount, or to such a number, as it appears safe. But in no event can it go beyond the limitation placed upon it by the statute. For the reasons given, we are of the opinion that Chapter 45, Session Laws 1897, authorizing the organization of mutual insurance companies, was not intended to and did not confer upon them the right to transact a reinsurance business."

Another determining factor in so answering this question is, that the central idea of creating the Texas Employers' Insurance Association as a State agency to administer the compensation insurance law, was to insure to the employers of labor in Texas the advantages of such insurance at the lowest cost consistent with safety and solvency, which would, at the same time, enable the payment to employes of reasonable and just compensation for losses resulting from injuries received by them in the course of their employment. Indemnifying other companies in this or distant States against losses that may be sustained by them is entirely inconsistent with this idea—so inconsistent that we do not hesitate to say that neither officers and directors, nor even the subscribers, of the Association, have the power to pay such indemnities or to contract to do so, regardless of any by-laws to the contrary that may have been adopted.

The money accumulated is not their money except to be used in the manner explicitly directed by the statute.

Another thing that is decisive of this question is that the companies in this pool with the Association are casualty companies writing various kinds of insurance other than compensation insurance. If the central idea for creating this Association and making of it a State agency was as hereinbefore stated, and if reinsurance were permitted, this idea would be defeated by permitting a company empowered to write only compensation insurance to indemnify other companies against losses sustained by them under policies covering other kinds of risks.

In your letter you also state that from the investigation made by your committee it has been ascertained that the Texas Employers' Insurance Association, in the beginning of its operations in Texas, found itself handicapped by the fact that competing companies could sell the

insurer not only compensation insurance but also employers' liability insurance; that to remove that handicap the officers of the Texas Employers' Insurance Association organized the Employers' Casualty Company, which company can write every kind of casualty and surety business; that more than half of the \$150,000 of capital stock of this last named company was sold to the junior officers and employes of the Texas Employers' Insurance Association; that said last named Association loaned out of its funds \$19,988.32 to such junior officers and employes to enable them to purchase the stock of the Employers' Casualty Company, taking as collateral for said loan 194 shares of the stock of said Casualty Company; that these loans have been repaid.

You then ask whether the officers and directors of the Texas Employers' Insurance Association had the power and authority to so use the funds of said Association in the organization of said Casualty Company.

You are advised that this action was entirely without authority of law. The Texas Employers' Insurance Association was authorized by statute to write only compensation insurance and had no authority whatever to engage in, or to hazard its funds, any other kind or character of business. The officers, directors and employes of said Association had for this purpose no more power over the funds and moneys coming into their hands by virtue of the operation of the compensation law, than that above indicated in respect to the business of reinsurance.

If the officers and directors of this Association had the right to loan its funds to individuals for the purpose of organizing, financing and putting into operation an entirely separate and distinct corporation, they had a right to use such funds in whatever way they saw fit. They might have so invested them in the stock of a life insurance company, or in the stock of any other kind of a corporation.

It cannot be successfully asserted that the carrying on of the casualty insurance business was in any manner necessary to the maintenance of a compensation insurance business. If the money so invested in the stock of the Casualty Company had been lost, we think the persons who made this loan could very probably have been held to be personally liable for the loss sustained.

Very truly yours,

JNO. C. WALL,  
First Assistant Attorney General.

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Op. No. 2558, Bk. —, P. —.

**BANKS AND BANKING—INSOLVENT BANKS—IDENTIFICATION OF TRUST  
PROCEEDS AND THE RIGHTS OF CESTUI QUE TRUST—THE CASH  
FUND THEORY AND THE PRESUMPTION OF LAW APPLICABLE  
THERE TO—ACCOUNTS WITH CORRESPONDENT BANKS.**

1. The method of identifying trust property, or its proceeds, is governed by the laws of the jurisdiction where it is sought to be identified.
2. A cestui que trust, in order to identify the trust property, or its proceeds, must trace such proceeds into a specific piece of property, or special fund.
3. Trust property, or proceeds, cannot be identified by merely showing that such proceeds augmented the general assets of the insolvent bank (trustee).

4. Where a cestui que trust has traced his property into a specific piece of property or special fund, the trust attaches to such specific piece of property, or special fund, to the extent only of the trust property, or the proceeds found therein, and never attaches to the entire estate of insolvent bank (trustee).

5. The mere entrance of the trust property or proceeds into the estate of the insolvent bank (trustee) is not a sufficient identification of the trust property.

6. No presumption of law that money has been identified by the cestui que trust arises until he has shown that the trust proceeds represented actual cash money collected by the trustee; that such money was mingled with the moneys of the trustee on hand; that the balance of actual cash money remained at all times equal to or greater than the amount of such trust proceeds; and that the balance of cash money on hand went into the possession of the receiver.

7. A cestui que trust who has established his claim against the cash balance on hand will be entitled to the smallest amount of cash fund contained after the trust moneys were mingled with it.

8. The preferential right of a cestui que trust who has established his claim against the cash balance in the hands of a receiver of an insolvent bank attaches to the actual cash money on hand at the time of the failure of the insolvent bank wherever situated, provided, that the insolvent bank, at the time of its failure, was the absolute owner thereof.

9. As between several entitled claimants who have established their rights against the cash fund, such claimants should be paid in inverse order. The inverse order of payment is a mere presumption of law and will not apply in the face of positive proof to the contrary.

10. The burden of proof as to the time in which the trust moneys were mingled with the cash fund of the insolvent bank is upon the claimant. If this burden is not sustained the fund should be prorated.

11. The relation existing between an insolvent bank and its correspondent is that of debtor and creditor, and a cestui que trust who establishes his trust against the cash balance in the hands of the receiver of such insolvent bank is not entitled thereby to a claim against the account of such insolvent bank with its correspondent; nor is such claimant entitled thereby to a claim against the account of the insolvent bank with other banks.

12. Cash or money, within the meaning of the cash fund theory, means money in the ordinary acceptation of that word.

13. The application of the cash fund theory is dependent upon the creation of the trust by the payment of actual cash money, and its entrance into the cash fund, and where the transaction amounts to a mere cancelling of one liability and the assumption of another, or an exchange of creditors, or where the trust proceeds are used to pay the debts of the insolvent bank, no trust will be created against the cash fund, or balance.

14. A cestui que trust is not entitled to any priority, or preferential right, over general creditors because of the *nature* of his claim, but his right to a priority or preference is dependent upon his ability to trace and identify the trust property or proceeds.

15. Certain conflicts pointed out and cases discussed.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 24, 1922.

*Hon. J. L. Chapman, Commissioner of Insurance and Banking, Building.*

DEAR SIR: Your communication of recent date is as follows:

"Incident to the failure of a number of State banks of Texas, many claims has been filed with this Department in which the claimants contend that the now defunct State banks were acting as agents for the claimant and that the funds involved were held by the insolvent State bank *in trust* at the time of suspension of business. The claimants further allege that in view of the foregoing facts they should be classified as preferred creditors and should subsequently be paid in full out of the entire assets of the respective banks.

"The legal complication has arisen as to whether or not a trust can be impressed against the entire assets of an insolvent bank, or whether the trust can only be impressed to the extent of the actual cash on hand in the bank at the time of its failure. If your opinion is that a trust can only be impressed

against the 'cash,' please state whether by that term you mean actual gold, silver and currency on hand in the bank, or whether we may construe it to include moneys deposited with other banks, including correspondent banks.

"I will greatly appreciate an opinion from you concerning the complication as set out above. Owing to the importance of the matter, I will thank you for an early reply."

In reply thereto, we are assuming for the purposes of this opinion that in each instance referred to by you a trust has been actually created. Assuming that each respective transaction did create a trust, the question becomes *solely one of identification*, for if, after the creation of the trust, the trust property cannot be identified the trust will be treated as lost, and the party asserting it relegated to the position of a general creditor. As said in L. R. A., Vol. 15 (N. S.), page 1100, note:

"In entering upon a discussion involving the right of a cestui que trust to reclaim trust funds, the fundamental principle may properly be recalled that the beneficiary of a trust fund is not entitled, solely because of the character of his claim, to the payment of the same in full, to the exclusion of other creditors, out of the assets of the insolvent trustee's estate; but that the right to reclaim a trust fund is founded on the right of property, and not on the ground of compensation for its loss. Accordingly, he must be able to point out the particular property into which the fund has been converted; but, when he is unable to do this, the trust fails, and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as the claims of general creditors."

What identification, then, of the trust fund is necessary? Is it sufficient to show merely that the trust property entered into the hands of the trustee and by virtue of such entrance became attached to and a charge upon the entire estate of the trustee, or is it necessary for the party asserting the trust to trace it into a specific piece of property, or into a special fund? And if the burden of proof necessary to trace the trust property, or proceeds thereof, has been sustained by tracing the trust property, or its proceeds, into a specific piece of property, or fund, does the trust attach as a charge against the specific piece of property, or fund, into which it has been traced, or does it become a charge upon the entire estate (assets) of the trustee (insolvent bank)?

The method of identifying the trust property, or its proceeds, and the tracing thereof, will be governed by "the rules prevailing in the particular jurisdiction." Thus, in Ruling Case Law, Vol. 3, paragraph 268, page 638, it is said:

"Where a bank improperly mingles the proceeds of a collection with its general funds, to enable the customer to demand payment, in preference to general creditors, it is necessary that the proceeds be traced into the hands of the receiver according to the rules prevailing in the particular jurisdiction as to tracing trust funds."

Again, in Vol. 15, L. R. A. (N. S.), page 1101, note, the proposition is expressed as follows:

"The disposition in any jurisdiction of the specific question under discussion will generally be governed by the attitude of the courts of that jurisdiction upon the general question as to what identification is necessary to trace a trust fund into any property on which it is sought to be charged."

We are not particularly concerned, therefore, as to the rules prevailing in other jurisdictions, but will proceed to determine the answer to each of the respective questions above set forth in the light of the

decisions of this State, citing, however, such other authorities from other jurisdictions as may be proper. We think it the settled law of this State, and in consonance with the decided weight of authority, State and Federal, that it is incumbent upon the party asserting the trust to sustain the burden of tracing the trust proper into a specific piece of property, or into a special fund. As said by one of the Courts of Civil Appeals of Texas, in the case of Dollar vs. Lockney Supply Company, 164 S. W., 1076, particularly pages 1080 to 1081:

"The court finds also as a conclusion of law: 'That the proceeds of the cotton belonging to the plaintiff and his assignors have not been traced into any specific property into the hands of the trustees, and that it would be inequitable to apply any of the property in his hands or the proceeds thereof to the payment of any preference claim on the part of the plaintiff or his assignors.'

"The appellant rests his right of recovery against the trustee on the rule that when property has been wrongfully appropriated by another and can be found or its substantial equivalent, if the form has been changed, will be impressed with the trust in favor of the owner, and if the trustee has mingled the trust funds with his own, he will be deemed to have used his own. From an examination of the court's findings, we think it clear that the proceeds of the cotton was not traced into the hands of the corporation and conveyed by the deed of trust. This the appellant was required to do in order to establish his equitable lien and thereby obtain a preference over other creditors. 'Now, then, the question is: Has the appellant a lien upon the general assets in the hands of the receiver for the proceeds so appropriated? We think not. To hold the affirmative on this proposition would be to declare that every one who receives the money of another in a fiduciary capacity and expends it in the payment of his own debts thereby creates a lien upon his entire estate in favor of the owner of the money so expended, but this is clearly contrary to the doctrine of constructive trusts. The true rule is that the trust estate must be clearly traced into other specific property in order that the cestui que trust may claim either the property or the lien upon it.' Bank vs. Weems, 69 Texas, 489, 6 S. W., 802, 5 Am. St. Rep., 85. The finding of the trial court, we think, clearly brings this case within the rule stated by our Supreme Court, and this rule is supported by a great number of cases, among which may be noted those cited by both appellee and appellant: Mills vs. Swearingen, 67 Texas, 269, 3 S. W., 268; Bank vs. Wheeler, 12 Texas Civ. App., 489, 33 S. W., 1093; Peters Shoe Co. vs. Murray, 31 Texas Civ. App., 259, 71 S. W., 977; Spokane vs. Bank, 68 Fed., 979, 16 C. C. A., 81; Little vs. Chadwick, 151 Mass., 109, 23 N. E., 1005, 7 L. R. A., 570; In re Marsh et al. (D. C.), 116 Fed., 396; Slater vs. Oriental Mills, 18 R. I., 352, 27 Atl., 443; Peters vs. Bain, 133 U. S., 670, 10 Sup. Ct., 354, 33 L. Ed., 696.

"We think the trial court's refusal to declare a lien and preference out of the assets held by the trustee in favor of appellant, under the facts found by him, was correct, and the judgment in that particular should be affirmed."

In the case of Continental Bank vs. Weems, 6 S. W. Rep., 802, decided by the Supreme Court of Texas, Justice Gaines directs attention to those cases which seem to hold a contrary doctrine, among which was the case of McLeod vs. Evans, 66 Wis., 401, 28 N. W., 173, 214, and says:

"With the greatest deference to the courts who decided these cases, we are constrained to differ with them upon the point, and to hold that, in order to fix the trust upon any part of the assets, the particular property into which trust money has been converted must be pointed out with at least practical definiteness and certainty."

It is interesting to note that the very case of McLeod vs. Evans, just cited, which Justice Gaines declined to follow, has since been overruled by the Supreme Court of Wisconsin in the case of Nonotuck



Silk Company vs. Flanders, 87 Wis., 237, 58 N. W., 383. Thus, in 15 L. R. A. (N. S.), page 1100, note, we find this expression:

"Some of the courts have held, as the 'modern' equity doctrine, that all that is necessary is to trace the trust moneys into the estate of the trustee, which then becomes impressed with the trust. This was the rule established by a number of cases in the Supreme Court of Wisconsin, until a return to the general rule was announced in Nonotuck Silk Co. vs. Flanders, 87 Wis., 237, 58 N. W., 383, and the former cases were overruled. \* \* \* The only course open in equity is to discover the corpus of the trust fund, or to follow the changes and transmigrations of the trust moneys into some particular property that can be charged with the trust, saving the rights of innocent purchasers for value."

Likewise, in the case of Bank vs. Weems, above cited, the court said:

"Now, then, the question is has the appellant a lien upon the general assets in the hands of the receiver, for the proceeds so appropriated? We think not. To hold the affirmative of this proposition would be to declare that everyone who receives the money of another in a fiduciary capacity, and expends it in the payment of his own debts, thereby creates a lien upon his entire estate in favor of the owner of the money so expended. But this is clearly contrary to the doctrine of constructive trusts. The true rule is, that the trust estate must be clearly traced into other specific property, in order that the *cestui que trust* may claim either the property itself or a lien upon it. This is the doctrine uniformly applied in the older cases, and laid down by the text-writers upon the law of trusts. *Perry vs. Phelps*, 4 Ves., 107; *Lewis vs. Madocks*, 17 Ves., 48; *Denton vs. Davies*, 18 Ves., 499; *Taylor vs. Plumer*, 3 Maule & S., 562; *Pennell vs. Deffell*, 4 De Gex, M. & G., 372; *Knatchbull vs. Hallett*, 13 Ch. Div., 696; *Phares vs. Leachman*, 20 Ala., 662; *Noble vs. Andrews*, 37 Conn., 346; *Roberts vs. Broom*, 1 Har. (Del.), 57; 2 *Perry, Trusts*, parag. 835, et seq.; 2 *Story, Eq. Jur.*, parag. 1258; 2 *Pom., Eq. Jur.*, parag. 1051. We have a line of decisions in our own court which, we think, have an important bearing upon the question before us. It is held that the wife may follow, through all its mutations, the proceeds in the hands of the husband, of her separate estate converted by him, and claim the property into which they have been invested. But at the same time it has been repeatedly decided that to enable her to do so the proceeds must be clearly and distinctly traced. *Rose vs. Houston*, 11 Texas, 163; *Chapman vs. Allen*, 15 Texas, 278; *Love vs. Robertson*, 7 Texas, 6; *King vs. Gilleland*, 60 Texas, 271; *Glasscock vs. Hamilton*, 62 Texas, 143. This results from an application of the doctrine of constructive trusts to the separate property of the wife, in the hands of the husband. The principal whose money has been misapplied by his agent occupies with us no higher ground than the married woman whose husband has misappropriated hers; and our courts have never held that the wife, in the latter case, is entitled to priority of payment out of the husband's estate, as against his general creditors. This is shown by the case of *Richardson vs. Hutchins*, 68 Texas, 81, 3 S. W. Rep., 276, in which the wife recovered a large judgment against her husband, executor for her separate property, used by him in the payment of his debts; but recovered only as a general creditor."

So far as we have been able to ascertain the case of Bank vs. Weems has never been criticised by any Texas court and it has been cited with approval by the courts of last resort in other jurisdictions, State and Federal. The only case in which any criticism of it has been found is the case of *Philadelphia National Bank vs. Dowd*, 38 Fed. Rep., 172, 2 L. R. A., 480, but the criticism was aimed at the "cash fund theory," to which we shall hereafter advert, and the case goes the extreme limit in holding that the alleged trust fund did not exist because "on the facts stated in the bill it appears that the money collected cannot be traced into any specific investment or fund, but has been indistinguishably mingled with the general assets of defendant's bank."

In the case of *Empire State Surety Company vs. Carroll County*, 194 Fed., 593, the Circuit Court of Appeals, by Judge Sanborn, said:

"The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of the county and of its other depositors in trust for them respectively. But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to cestuis que trustent to pay trust funds in full only to the extent that he receives them. How do the sureties claim to have made this proof? They argue that, as the bank received other deposits and earned profits sufficient to pay its operating expenses, the deposits of the county necessarily augmented the general assets which came to the hands of the receiver, and that this fact entitles them to have their claims paid in full out of the proceeds of the property of the bank in preference to its general creditors. The position is not without support in many remarks and in some decisions of the courts. *Beard vs. Independent District of Pella City*, 31 C. C. A., 562, 88 Fed., 375; *City of Spokane vs. First National Bank of Spokane*, 68 Fed., 982, 16 C. C. A., 85; *Smith vs. Township of Au Gres, Michigan*, 150 Fed., 257, 261, 80 C. C. A., 145, 9 L. R. A. (N. S.), 876; *San Diego County vs. California Nat. Bank (C. C.)*, 52 Fed., 59; *Page County vs. Rose*, 130 Iowa, 296, 299, 106 N. W., 744, 5 L. R. A. (N. S.), 886; 8 Ann. Cas., 114; *Lucas County vs. Jamison (C. C.)*, 170 Fed., 338, 347; *American Can Co. vs. Williams*, 178 Fed., 420, 423, 101 C. C. A., 634; *St. Louis, etc., Ry. Co. vs. Johnston*, 133 U. S., 566, 576, 578, 10 Sup. Ct., 390, 33 L. Ed., 683; *Richardson vs. New Orleans Coffee Co.*, 102 Fed., 785, 788, 789, 43 C. C. A., 583; *Western German Bank vs. Norvell*, 134 Fed., 724, 726, 69 C. C. A., 330. But the contention cannot be sustained on either reason or authority. A deliberate consideration of the questions in this phase of this case presents and a re-examination of authorities have convinced that these are the rules by which claims of this nature to preferential payments out of the proceeds of the property of an insolvent must be adjudged:

"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the *trust property or its proceeds went into a specified fund or into a specific identified piece of property which came to the hands of the receiver*, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver. *Peters vs. Bain*, 133 U. S., 670, 693, 694, 10 Sup. Ct., 354, 33 L. Ed., 696; *Spokane County vs. First Nat. Bank*, 68 Fed., 979, 982, 16 C. C. A., 81, 84; *Board of Com'rs vs. Patterson (C. C.)*, 149 Fed., 229; *Frelinghuysen vs. Nugent (C. C.)*, 36 Fed., 229, 239; *Board of Com'rs vs. Strawn*, 157 Fed., 49, 51, 84 C. C. A., 553, 555, 15 L. R. A. (N. S.), 1100; *Lowe vs. Jones*, 192 Mass., 94, 101, 78 N. E., 402, 6 L. R. A. (N. S.), 487, 116 Am. St. Rep., 225, 7 Ann. Cas., 551; *Cherry vs. Territory*, 17 Okl., 213, 89 Pac., 190; *St. Louis Brewing Ass'n vs. Austin*, 100 Ala., 313, 13 So., 908; *Little vs. Chadwick*, 151 Mass., 109, 23 N. E., 1005, 7 L. R. A., 570; *Howard vs. Fay*, 138 Mass., 104; *Attorney General vs. Brigham*, 142 Mass., 248, 7 N. E., 851; *Erie Ry. Co. vs. Dial*, 140 Fed., 689, 72 C. C. A., 183; *Ferchen vs. Arndt*, 26 Or., 121, 37 Pac., 161, 29 L. R. A., 664, 46 Am. St. Rep., 603; *Blake vs. State Savings Bank*, 12 Wash., 619, 41 Pac., 909, 910; *In re North River Bank*, 60 Hun., 91, 14 N. Y. Supp., 261; *Williams vs. Van Norden Trust Co.*, 104 App. Div., 251, 257, 93 N. Y. Supp., 821; *Bishop vs. Mahoney*, 70 Minn., 238, 73 N. W., 6; *Nonotuck Silk Co. vs. Flanders*, 87 Wis., 237, 58 N. W., 383; *Burnham vs. Barth*, 89 Wis., 362, 366, 62 N. W., 96; *Bradley vs. Chesebrough*, 111 Iowa, 126, 82 N. W., 472; *Lebanon Trust & State Deposit Bank's Assigned Estate*, 166 Pa., 622, 31 Atl., 334; *Marquette Fire Com'rs vs. Wilkinson*, 119 Mich., 655, 670, 78 N. W., 893, 44 L. R. A., 493; *Hauk vs. Van Ingen*, 196 Ill., 20, 39, 63 N. E., 705; *Ellicott vs. Kuhl*, 60 N. J. Eq., 333, 46 Atl., 945; *Ober vs. Cochran*, 118 Ga., 396, 45 S. E., 382, 98 Am. St. Rep., 118; *In re Mulligan (D. C.)*, 116 Fed., 715, 717, 718; *Holmes vs. Gilman*, 138 N. Y., 369, 376, 34 N. E., 205, 20 L. R. A., 566, 34 Am. St. Rep., 463; *In re Hicks*, 170 N. Y., 195, 198, 63 N. E., 276."

And again on page 608 (same case) it is said:

"Conceding that the amount paid to the bank for these drafts constituted, at the times they were respectively received, funds held by the bank in trust for the railway company, it was not sufficient to sustain a preference that the estate coming to the hands of the receiver was augmented thereby. *It was indispensable to a preferential payment that these amounts should be traced by adequate proof into some specific fund or property which came to the receiver's possession.*"

In the case of Board of Commissioners of Crawford County vs. Strawn, 15 L. R. A. (N. S.), 1100, the Circuit Court of Appeals for the Sixth Circuit, speaking through Circuit Judge Lurton, afterwards an Associate Justice of the Supreme Court of the United States, said:

"But, aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the bank, through the use of the general funds of the bank with which this trust fund had been blended, is not supported by the weight of authority; nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank, is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. To impress a trust upon the property of a tortfeasor who has used the trust fund in his private affairs, it must be traced in its original shape or substituted form. *City Bank vs. Blackmore*, 21 C. C. A., 514, 43 U. S. App., 617. 75 Fed., 771; *Re Taft*, 66 C. C. A., 385, 133 Fed., 511, 514; *Erie R. Co. vs. Dial*, 72 C. C. A., 183, 140 Fed., 689, 691; *Smith vs. Mottley*, 9 L. R. A. (N. S.), 876, 80 C. C. A., 154, 150 Fed., 266; and *Smith vs. Au Gres Twp.*, 80 C. C. A., 145, 150 Fed., 257,—are cases decided by this court, which recognize that the mere misapplication of a trust fund does not create a general lien upon the tortfeasor's estate. In other courts the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrongdoer, either in the hands of an assignee, trustee, receiver, or under a lien fastened by a creditor. *Peters vs. Bain*, 133 U. S., 670, 693, 33 L. Ed., 696, 704, 10 Sup. Ct. Rep., 354; *Fire & Water Comrs. vs. Wilkinson*, 119 Mich., 655, 44 L. R. A., 493, 78 N. W., 893; *Re Mulligan (D. C.)*, 116 Fed., 715; *Gianella vs. Momsen*, 90 Wis., 476, 63 N. W., 1018; *Little vs. Chadwick*, 151 Mass., 109, 110, 7 L. R. A., 570, 23 N. E., 1005. *Taylor vs. Plumer*, 3 Maule & S., 562, is a case which has been questioned only as to the difficulty, there referred to arguendo, of following money mingled with the agent's own money. *Carmany's Appeal*, 166 Pa., 622, 31 Atl., 334; *Cavin vs. Gleason*, 105 N. Y., 257, 11 N. E., 504; *Arbuckle Bros. vs. Kirkpatrick*, 98 Tenn., 221, 229, 36 L. R. A., 285, 60 Am. St. Rep., 854, 39 S. W., 3; *Spokane County vs. Clark (C. C.)*, 61 Fed., 538. Affirmed by the Circuit Court of Appeals for the Ninth Circuit, 16 C. C. A., 81, 29 U. S. App., 707, 68 Fed., 979, 991, 992; *Beard vs. Independent District*, 31 C. C. A., 562, 60 U. S. App., 372, 88 Fed., 375; *Richardson vs. New Orleans Debenture Redemption Co.*, 52 L. R. A., 67, 42 C. C. A., 619, 102 Fed., 780; *Multnomah County vs. Oregon Nat. Bank (C. C.)*, 61 Fed., 912; *Commercial Nat. Bank vs. Armstrong (C. C.)*, 39 Fed., 684, 692; and *Frelinghuysen vs. Nugent (C. C.)*, 36 Fed., 229."

In the case of *Boyle vs. Northwestern National Bank*, 1 L. R. A. (N. S.), 1110, the following quotation from *Burnham vs. Barth*, 62 N. W., 96, was approved:

"So, as stated by Mr. Justice Pinney, in one of the cases cited, and reiterated in others: 'When the trust fund cannot be identified or traced into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor. \* \* \* As the right to trace his trust fund is founded on the right of property, and not on the ground of compensation for its loss, he must be able to point out the particular property into which the fund has been converted. When he is unable to do this, the trust fails and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as

the claims of general creditors. \* \* \* Where the trust fund \* \* \* cannot be traced, and the substituted property into which it has entered specifically identified, the trust fund must be regarded as dissipated, within the meaning of the authorities,—scattered, dispersed, and, as such, destroyed.’ Burnham vs. Barth, 89 Wis., 367, 369, 370, 62 N. W., 96; Dowie vs. Humphrey, 91 Wis., 103, 64 N. W., 315.”

In the case of Burnham vs. Barth, 62 N. W., 96, above referred to, Justice Pinney, for the court, states the rule to be as follows:

“Since the decision of this court in the case of Silk Co. vs. Flanders, 87 Wis., 237, 58 N. W., 383, and In re Plankinton Bank, 87 Wis., 385, 58 N. W., 784, it must be regarded as settled in this State, at least, that in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent; that when the trust fund has been dissipated, or so confounded and mixed up with the property and estate of the trustee that it cannot be traced or identified, there remains nothing to be the subject of the trust, and the owner of the fund or property is not entitled to prove for it as a trust debt, and obtain a preference over the other creditors of the insolvent estate, out of the property to which no part of the trust fund or property or proceeds of it is traceable. The right to so trace trust funds and regain them has, it is held, its basis in the right of property. In Thuemmler vs. Barth (decided herewith), 62 N. W., 94, the rule laid down in the former cases was reaffirmed and applied. *When the trust fund cannot be identified or traced into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor.* \* \* \*

“And where the trust fund, as in this case, cannot be traced, and the substituted property into which it has entered specifically identified, the trust fund must be regarded as dissipated, within the meaning of the authorities,—scattered, dispersed, and, as such, destroyed. And this is the logical result of the case of Silk Co. vs. Flanders, supra, and other subsequent cases in this court. This is in harmony with the great weight of modern authority. Frieberg vs. Stoddart (Pa. Sup.), 28 Atl., 1111; Cavin vs. Gleason, 105 N. Y., 256, 11 N. E., 504; Bank vs. Dowd, 38 Fed., 172; National Bank vs. Insurance Co., 104 U. S., 54; Bank vs. Thurber, 8 C. C. A., 365, 59 Fed., 913; Ex parte Hardcastle, 44 Law. T. (N. S.), 524; In re Hallett & Co., Ex parte Blane (1894), 2 Q. B. Div., 273. For these reasons, we hold that the petitioner wholly failed to show himself entitled to the judgment he obtained. The judgment of the superior court is reversed, and the cause is remanded for further proceedings according to law.”

In the case of Dowie vs. Humphrey, 64 N. W., 315, Chief Justice Cassoday, for the court, again declared the rule to be:

“When the trust money becomes so mixed up with the trustee’s individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in this tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails.”

From the above authorities we have no hesitancy in advising you that it is not sufficient, in order to identify the trust property, to show that the trust property entered into the general estate of the trustee, but the party asserting the trust must trace the trust property into a special fund or particular piece of property. You are further advised that, where the burden of tracing the trust property, or its proceeds, into a particular piece of property or special fund has been sustained, the trust attaches only to the particular piece of property or fund into which it has been traced, and only to the extent and amount of the trust property so traced into said particular piece of

property or fund. Under no circumstances would the trust attach to the entire estate (assets) of the trustee. As to the latter proposition, we direct attention to the case of the Empire State Surety Company vs. Carroll County, 194 Fed., 593, and to paragraph 1, to be found on page 604 thereof, and the authorities cited.

We come now to a consideration of the "cash fund theory" and the presumptions of law and legal fictions created and recognized by the courts in sustaining that theory. In our view, the application of this theory depends solely upon *money transactions*, that is, actual cash money, and not merely book entries or credits. Assuming that a note has been sent to a bank for collection, and under such instructions as to clearly constitute the proceeds thereof a trust fund, the proceeds of said note having been actually collected in actual cash money, what successive steps in the burden of proof must the cestui que trust, the party asserting the trust, sustain in order to charge the balance of the actual cash money found to be in the hands of the trustee at the time of such trustee's (bank) failure and subsequently passing into the hands of the receiver?

A careful analysis of authorities from many jurisdictions, State and Federal, including those of our own State, has convinced us that the cestui que trust (the claimant) must establish the following propositions:

1. He must show that the note (or any other item) was actually collected by the payment thereof by the maker in actual cash money.
2. He must show that, after the actual cash money was collected, it went into and was mingled with the actual cash money (fund) of the trustee, the bank. (This, as applied to the cash fund theory, is merely a reiteration of the doctrine that the trust must be traced into a specific piece of property, and also, according to some authorities, in harmony with the authorities holding that the fund into which it has been traced must be augmented or increased by the proceeds of the trust.)
3. Having established propositions 1 and 2, he then must show that from the time of the collection so made, up to and inclusive of the time of the failure of the trustee (the bank), the balance of actual cash money in the hands of the trustee (the bank) remained *at all times* equal to or greater than the amount of the actual cash money collection made; and this, even though the amount of actual cash moneys of the trustee was constantly changing by being added to by other collections or deposits, or being reduced by withdrawals. If, however, in attempting to prove this proposition, he proves that after the collection of actual money was made, the actual cash balance was never entirely dissipated, but a small balance, less than the trust fund, remained at all times from the date of the collection up to and including the time of the coming of the cash balance into the hands of the receiver, then he (the cestui que trust) would be entitled to such balance, subject to the rule of payment in inverse order as hereinafter described.
4. Having established propositions 1, 2 and 3, he must go further and show that the actual cash money balance on hand at the time of the failure of the trustee (the bank) went into the actual possession

and into the hands of the receiver. We deem it necessary to explain this proposition to this extent:

Suppose at the time of the failure of the trustee (the bank) there was on hand actual cash moneys to the amount of five thousand dollars, but between the time of the failure and the taking charge of the bank by the receiver, this balance was stolen, and never actually came into the receiver's possession. The entire fund having been lost, the trust fund would be dissipated so far as the receiver is concerned. We do not intimate any opinion based upon constructive possession, or the personal liability of the receiver in the premises, but the illustration is given merely for the purpose of showing the necessity of actually tracing the balance into the hands of the receiver.

When the above propositions have been established, then and then only does the presumption of law arise that the identity of the money of the cestui que trust has been established. This presumption of law is based upon the fact that money cannot be identified, dollar for dollar, in that it has "no earmarks," and, therefore, the presumption, after the above facts have been proven, is indulged that a sufficient identification has been made.

The above propositions are sustained by the Texas authorities, and by the decided weight of authority, State and Federal. Thus, in the case of *In re Stewart*, 178 Fed., 463, particularly 476-477, Judge Ray, speaking for the court, Northern District of New York, sums up the matter as follows:

*"I think the opinion in this case shows the holding to be that, where a bank collects paper intrusted to it for collection and misappropriates the money collected or fails to account for and pay same over, it is sufficient to show, in order to justify collection from the funds in the hands of the receiver when appointed, that the moneys so collected went into and were commingled with the moneys of the bank; that the balance of money on hand was thereafter never less than the amount so collected and misapplied even in cases where there were large deposits and withdrawals by others; and that the balance of the moneys so commingled went into the hands of the receiver; but that it is not sufficient to show that the 'assets' of the bank were at all times greater than the amount misappropriated; and that such 'assets' came to the hands of the receiver. In short, the trust attaches to and follows the commingled fund so long as any of it remains, but never attaches to the general assets, or to funds deposited after the commingled fund has been drawn out. But if the commingled fund is being augmented by new deposits and drawn upon, and the fund is not reduced below the deposits in question, then it is assumed as matter of law that identity is established."*

In the case of *Empire State Surety Company vs. Carroll County*, it is said:

*"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver."*

And again:

*"(2) Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest*

amount the fund contained subsequent to the commingling (Board of Com'rs vs. Strawn, 157 Fed., 49, 51, 84 C. C. A., 553, 555, 15 L. R. A. (N. S.), 1100; Weiss vs. Haight & Freese Co. (C. C.), 152 Fed., 479; American Can Co. vs. Williams, 178 Fed., 420, 423, 101 C. C. A., 634, 637), as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs vs. Patterson (C. C.), 149 Fed., 229, 232; Spokane County vs. First National Bank, 68 Fed., 979, 16 C. C. A., 81)."

In the case of Crawford County Commissioners vs. Strawn, 15 L. R. A. (N. S.), page 1100, exact page 1105, Circuit Judge Lurton afterwards of the Supreme Court of the United States, expressed the opinion of the court as follows:

"The blending of the trust money with the money of the trustee was suffered at one time to defeat the owner's title and compel him to stand as a mere unsecured creditor. This was upon the idea that money was not earmarked, and, therefore, could not be recovered *in specie*. But the later cases have met this difficulty in the case of blended moneys in a bank account, from which there have been drawings from time to time, by the fiction that the sums thus drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use. It was upon this fiction that Knatchbull vs. Hallett, L. R., 13 Ch. Div., 696, 726, et seq., was decided. That case was approved in Central Nat. Bank vs. Connecticut Mut. L. Ins. Co., 104 U. S., 54, 26 L. Ed., 693, and has been followed in many subsequent cases when the trust fund has consisted of moneys on deposit. Smith vs. Mottley, 80 C. C. A., 154, 150 Fed., 266. But as this is a mere presumption, it will not stand against evidence. It is therefore a part of the rule applicable to following misappropriated moneys into a bank account that, if, at any time during currency of the mingled account, the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sums subsequently added to the account from other sources not being attributed to the trust fund. See the cases cited above and the following: Beard vs. Independent District, 31 C. C. A., 562, 60 U. S. App., 372, 88 Fed., 375; Boone County Nat. Bank vs. Latimer (C. C.), 67 Fed., 27; and Spokane County vs. First Nat. Bank, 16 C. C. A., 81, 29 U. S. App., 707, 68 Fed., 979."

In the case of Beard vs. Independent District of Pella City, 88 Fed., 375, particularly page 379, touching the necessity of actual cash being paid, the court said:

"In the bill filed in this case it is averred that when the bank closed its doors it had on hand cash to the amount of \$8000, which passed into possession of the receiver; it being further averred that the trust money belonging to the school district, and amounting to \$4676, formed part of this cash fund. Upon this question of fact the rights of the complainant depend. If this fund, coming into possession of the receiver as part of the assets of the insolvent bank, includes the money belonging to the school district, then the district is entitled to a preference in payment therefrom over the creditors of the bank; but, unless it appears that this fund does include such trust fund, the right to a preference does not exist. The evidence shows that when the bank closed its doors, on June 1, 1895, all the money credited on account to the independent district had been drawn out, and the balance of \$4676, claimed to be due, grows out of two credits entered on the account,—one for \$614, under date of May 6, 1895, and one for \$4340, under date of May 13, 1895; and it is admitted that these entries do not represent cash then actually paid into the bank, but represent checks given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the check, and then entered to the credit of the treasurer of the school district. The check for \$4340 was drawn by the treasurer of Marion County in favor of the treasurer of the school district, and represented taxes collected for school purposes for the benefit of the independent district of Pella. The account kept with the treasurer of the independent district, on the books of the bank, shows that money was drawn out of the bank from time to time for the use and benefit of the school district;

and it further appears that were it not for the credit given by reason of the two checks drawn May 6th and May 13th, and aggregating \$4954, the account would have been overdrawn, and the treasurer of the district would have been in debt to the bank in the sum of \$614. It thus appears that the balance of \$4676 now claimed by the school district is not composed of money actually paid into the bank on May 6th and 13th, whereby the cash assets of the bank were increased to that extent, but this balance is made to appear to be due to the school district by entries upon the books which neither increased nor diminished the cash held by the bank. That this is true will appear from an examination of the daily balance book of the bank, which is in evidence. This shows that on the 11th of May the total cash held by the bank amounted to \$7949, and the amount then to the credit of the school district was \$707. May 12, 1895, being Sunday, no entry appears for that day. On May 13th the cash balance was \$8436, or an increase of \$487 over the amount on hand on Saturday, May 11th. The amount to the credit of the school district on the 13th was \$5047, or an increase over the amount on Saturday, May 11th, of \$4340,—just the amount of the check drawn by the treasurer of Marion County on the bank, and by it credited to the account of the school district; *but the amount of cash held by the bank was not increased by this amount, but remained at just the figure it would have shown if this interchange of credits between the treasurer of Marion County and the treasurer of the school district had not taken place.* Under these circumstances, can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund belonging to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors? The relation existing between the bank and the treasurer of Marion County was simply that of debtor and creditor. In order to pay the amount of taxes due to the school district, the treasurer of the county drew his check on the bank for the sum of \$4340, and delivered it to the treasurer of the school district. The fund on which the check was drawn was not a trust fund, and the delivery of the check to the treasurer of the school district did not change the character of the account against which it was drawn. If, after the acceptance of the check by the treasurer of the school district, but before its presentation, the bank had failed and closed its doors, it could not be claimed that the bank held the sum in trust for anyone. The only obligation resting on the bank was to pay the check on presentation, and, if not paid, the bank would be indebted for the amount, not as a holder of a trust fund, but as an ordinary debtor. *It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?*

“The object of the bill filed in this case is to obtain a preferential payment of the sum of \$4976 out of the cash fund coming into the hands of the receiver as part of the assets of the bank, and the foundation of the right to a preference is the claim that this fund had been augmented and increased by the addition thereto of a trust fund belonging to the school district. The evidence clearly shows that if the treasurer of the school district had never deposited a cent in the bank, or had closed his account therewith on the 5th day of May, 1895, the sum of money coming into the hands of the receiver on June 1st would have been just the same that did in fact come into his hands; and the evidence therefore does not prove that the cash fund in the hands of the receiver has been augmented or increased by the addition thereto of a trust fund belonging to the school district. *If the evidence showed that there had been in the hands of the treasurer of the school district a sum of money which he in fact placed in the bank as an addition to the cash fund which subsequently passed into the hands of the receiver, the school district could make claim to this amount as a trust fund, without being required to prove the methods by which the money came into the hands of its treasurer; but, as the evidence in this case clearly shows that the cash fund coming into the receiver's hands does not include any cash actually paid into the bank by the treasurer of the school district, the complainant, in order to show that it has any claim against the bank, is com-*



*pelled to avail itself of the action of its treasurer in accepting from the treasurer of Marion County a check drawn on the bank, and against an ordinary account, not containing trust funds, and in having the amount of the check credited to the treasurer of the district. If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly, if the school district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank, holding an accepted or certified check. It certainly could not assert that the accepted check had become a trust fund, which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof; and, in effect, that was all that was done in this case, in that when the check was drawn the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good, and became bound to pay the amount thereof when called for by the treasurer of the district. The school district can wholly ignore all these dealings between its treasurer and the bank, and, under the decisions of the Supreme Court of Iowa, can hold its treasurer and his sureties for the amount of school funds coming under his control; but when, as in this case, the school district endeavors to establish a claim against the bank, it ought not to be allowed to avail itself of the benefit of the transactions between its treasurers and the bank, but avoid their obligations. This case is not one wherein it is made to appear that the school treasurer and the bank were in collusion to commit a fraud upon the district, and the actual contest is between the school district and the general creditors of the bank. It is open to the school district to assume the position occupied by its treasurer, and, by acknowledging his acts, become a creditor of the bank for the balance shown to be due to the school treasurer; but when the district attempts to avoid the position of a creditor, and to assume that of the owner of a trust fund, and as such to assert a preferential right to payment in full out of the cash fund coming into the hands of the receiver, to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries on books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund.*

"To illustrate the situation, let it be assumed that on the 13th day of May, when the check of the treasurer of Marion County was entered upon the books of the bank to the credit of the treasurer of the district, there was no cash then in the bank. Certainly the drawing of the check, and the entry thereof to the credit of the school treasurer, would not have placed in the hands of the bank any cash whatever; and, had the bank then closed its doors, it would be true that the school district could assert, as against the bank, that the amount due was a trust fund, yet it would be but a barren claim, because there would be no fund in the hands of the receiver against which a preferential claim could be asserted. Assume, however, that, before the bank closed its doors, some third party had made a deposit of \$5000 in cash, and this sum had passed to the receiver, as part of the assets of the bank; would a court of equity be justified in holding that under such circumstances the school district could assert a right to payment in full out of this fund, to the exclusion of the creditor of the bank who had created the fund by depositing it in the bank? In the supposed case it would appear, beyond question, that the trust funds belonging to the district had not aided in creating or augmenting the cash fund coming into the receiver's hands, and clearly it would be inequitable to give preference to the claim of the school district over that of the party whose money had in fact created the fund. In substance, this is the situation disclosed by the evidence in this case. As already stated, on the 5th day of May, 1895, the treasurer of the school district had no funds in the hands of the bank, but, on the contrary, the account was overdrawn. On the 6th and 13th days of May, credits on the account were entered, of checks drawn on the bank, which did not add one dollar to the cash in hand or other assets of the bank. The cash fund which passed into the receiver's hands is the balance of the funds on hand on May 5th, of which no part belonged to the school fund, the treasurer's account then

being overdrawn, and the cash paid in since May 5th, less the amount paid out; all of the cash paid in coming from sources other than from the treasurer of the school district. It is not sufficient for complainant to show that the account carried on the books of the bank under the heading, 'Treasurer of the Independent School District,' represented a trust fund, and that the amount shown to be due thereon from the bank was increased by crediting up the checks of the county treasurer. The point at issue is not between the school district and the bank, but it is between the school district and the creditors of the bank, represented by the receiver; and, to entitle the school district to enforce a prior equity or claim against the cash fund in the hands of the receiver, it must prove that this fund has been augmented by the addition thereto of trust funds belonging to the district, and, for the reasons stated, we hold that this has not been done; and therefore complainant is not entitled to a priority of payment out of the funds in the receiver's hands, nor to a prior lien upon the general assets of the bank. The decree appealed from is reversed, and the case is remanded to the circuit court with instructions to dismiss the bill on the merits."

In the case of *Brennan vs. Tillinghast*, 201 Fed., 609, exact page 613, the court declared:

"It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the extent that, he sustained the burden of proof of tracing this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. *Peters vs. Bain*, 133 U. S., 670, 693, 10 Sup. Ct., 354, 33 L. Ed., 696; *Board of Commissioners vs. Strawn* (C. C. A., 6), 157 Fed., 49, 54, 84 C. C. A., 553, 15 L. R. A. (N. S.), 1100; *In re Brown* (C. C. A., 2), 193 Fed., 24, 29, 113 C. C. A., 343, affirmed sub nom.: *First National Bank of Princeton vs. Littlefield*, 226 U. S., 110, 33 Sup. Ct., 78, 57 L. Ed., —; *Empire State Surety Co. vs. Carroll County* (C. C. A., 8), 194 Fed., 593, 604, 114 C. C. A., 435, and cases cited.

"And proof that the tort-feasor has mingled the trust funds with his own and made payments thereafter out of the common fund, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling, as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund nor invested it in other property, but kept it sacred. *Board of Commissioners vs. Strawn*, supra, at page 51; *Empire State Surety Co. vs. Carroll County*, supra, at page 605, and cases cited."

And further in its opinion, the court said:

"It is true that in the case of blended moneys in a bank account, consisting in part of trust funds, from which there have been drawings from time to time, it has been held, in favor of the cestui que trust, as a presumption of law, that the sums first drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund, which he had no right to use. *In re Hallett's Estate*, 13 Ch. D., 696, 727; *Board of Commissioners vs. Strawn*, supra, at page 51. *It is clear, however, in the first place, that this is a mere presumption, which will not stand against evidence to the contrary.* *Board of Commissioners vs. Strawn*, supra, at page 51."

In the case of *In re M. E. Dunn & Co.*, 193 Fed., 215, exact page 216, the court announced the following opinion:

"On the other hand, if, at any time after the misappropriation of the funds and mingling them with those of the wrongdoer, all the money is withdrawn, including that unlawfully mingled, the equities are lost, although moneys from other sources are subsequently placed in the same place. Or if a part of the funds so mingled is withdrawn, and the fund reduced to a smaller sum than

the trust fund, the latter must be regarded as dissipated except as to this balance. Sums subsequently added to the fund from other sources cannot be subjected to the equitable claim of the cestui que trust. *Beard vs. Independent District of Pella City*, 88 Fed., 375, 31 C. C. A., 562; *Spokane County vs. First Nat. Bank*, supra; *Board of Commissioners vs. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.), 1100; *American Can Co. vs. Williams*, supra."

In the case of *National Bank vs. Insurance Company*, 104 U. S., 54, particularly page 68, the following language is used:

"The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case of *Knatchbull vs. Hallett*, *In re Hallett's Estate*, 13 Ch. D., 696. *It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in Ex parte Dale & Co., supra. It was also held that the rule in Clayton's Case (1 Mer., 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular Pennell vs. Deffell was not followed. The Master of the Rolls, Sir George Jessel, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of Lord Ellenborough's statement in *Taylor vs. Plumer* (3 M. & S., 562), that 'it makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in *Scott vs. Surman* (Willes, 400), or into other merchandise, as in *Whitecomb vs. Jacob* (1 Salk., 161); for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail.' But he dissents from the application of the rule made by Lord Ellenborough, when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description'; for equity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of *Birt vs. Burt*, reported in a note to *Ex parte Dale & Co.*, 11 Ch. D., 773.*

"The principle is illustrated by many cases in this country. In *Farmers & Mechanics National Bank vs. King* (57 Pa. St., 202), a collector of rents deposited moneys of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership was given by the principal. It was held that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could. The law of the case was stated by Judge Strong in the following language: 'It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified.'"

In the case of *Plano Mfg. Co. vs. Auld*, 85 Am. St. Rep., page 769, exact pages 773 to 775, the court, speaking with reference to the identification of money, expressed itself as follows:

"According to the true doctrine, the relation of bailor and bailee continued after the mingling of the funds, and, as the money never became assets of the

bank, general creditors are entitled to no share in its distribution. One dollar being the same as another in every material respect, an earmark is not essential to its identification, and if a sufficient amount in kind remains in the vault of an insolvent bank, it may be reclaimed by its owner, to the exclusion of general creditors. A presumption governing modern courts in tracing a trust fund wrongfully mingled by a trustee with his own funds, out of which aggregate he had made disbursements in the due course of business, is that he used his own money in preference to embezzling that of others. So says the Supreme Court of Wisconsin in its latest utterance upon the subject (*Taylor vs. National Bank*, 6 S. Dak., 511, 62 N. W., 99): "When a trustee mingles trust money with his own in a bag, or box, or bank account, the right of the beneficiary attaches to have all that belongs to him out of the bag, box, or account, and whatever the trustee may take out will be deemed or presumed to have been taken from his own, instead of the trust, funds." Applying that doctrine to this case, the inference must prevail that the remaining money, which passed into the hands of the receiver, belongs to the persons for whom collections were made, and should be restored to them according to the principles of equity and good conscience. *Kimmel vs. Dickson*, 5 S. Dak., 221, 49 Am. St. Rep., 869, 58 N. W., 561. In the very recent case of *Richardson vs. New Orleans, etc., Redemption Co.*, 42 C. C. A., 619, 102 Fed., 780, the court says: "There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has been so used. So we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution." *Central Nat. Bank vs. Connecticut Mut. Life Ins. Co.*, 104 U. S., 54; *People vs. City Bank of Rochester*, 96 N. Y., 32; *Continental Nat. Bank vs. Weems*, 69 Texas, 489, 5 Am. St. Rep., 85, 6 S. W., 802; *Peak vs. Ellicott*, 30 Kan., 156, 46 Am. Rep., 90, 1 Pac., 499; *Harrison vs. Smith*, 83 Mo., 210, 53 Am. Rep., 571; *Quinn vs. Earle*, 95 Fed., 723; *Board of Fire, etc., Commrs. vs. Wilkinson*, 119 Mich., 655, 78 N. W., 893."

In so far as this case holds that the trust money must be prorated, we decline to follow it, and adhere to the inverse order of payment hereinafter mentioned. We concur in its holding that the general assets of the bank are not "available as a trust fund."

But, still dealing with the cash fund theory, assuming that several claimants have sustained the burden of proof hereinabove laid down, and have established their trust interest in the cash balance in the hands of the receiver, then in what order should the claimants be paid?

Before answering this question, we deem it necessary to say that the burden of proof as to the time in which the actual cash representing the trust fund came into the hands of the trustee is upon the claimant. As said in the case of *Empire State Surety Company vs. Carroll County*, 194 Fed., exact page 609, "the burden was on the railway company to prove the order of time of the payments and the deposits and the amount of the preference to which it was entitled." Other cases might be cited, but the principle is well established and further citation is unnecessary.

Recurring, then, to the question as to the order of payments to be made as between the entitled claimants (and by entitled claimants we mean those who have established their right to participate in the trust

fund consisting of cash in the hands of the receiver), you are advised that they should be paid in "inverse order."

Thus, in *Empire State Surety Company vs. Carroll County*, 194 Fed., exact page 605, the rule is announced as follows:

"Where a trustee has mingled in a common fund the moneys of many separate cestui que trustent and then made payments out of this common fund, the legal presumption is that the moneys were paid out in the order in which they were paid in, and the *cestui que trustent* are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund."

The principle is likewise approved in the case of *In re Stewart*, 178 Fed., exact page 477, in the following language:

"It seems to be assumed that 'first in, first out,' and in that such a case as this, as shown by the table, as there was always a balance greater than Mitchell's deposits, it is presumed his money was in the moneys on hand when the bank closed. *I think this more a legal fiction than a matter of fact; but, nevertheless, I am bound to follow the doctrine and apply it here on the theory that, when Mitchell's money was obtained by the fraudulent concealment, it was impressed with a trust for his benefit which attached to the general fund with which his deposits were commingled, and that this trust followed that fund so long as it was never exhausted but remained greater than the amount of Mitchell's deposits and finally came to the hands of the trustee, even though it affirmatively appears that the fund may have been kept up by the deposit of thousands of dollars by other depositors who have not been paid and whose moneys were not drawn out by them.*"

The principle of inverse order is analogous to the presumption entertained by the courts that the trustee will pay out his own funds first. It is, however, a mere presumption of law and it is so recognized as such in the case of *Brennan vs. Tillinghast*, 201 Fed., exact page 614, as follows:

"It is true that in the case of blended moneys in a bank account, consisting in part of trust funds, from which there have been drawings from time to time, it has been held, in favor of the cestui que trust, as a presumption of law, that the sums first drawn out were from the moneys which the tortfeasor had a right to expend in his own business, and that the balance which remained included the trust fund, which he had no right to use. In *re Hallett's Estate*, 13 Ch. D., 696, 727; *Board of Commissioners vs. Strawn*, supra, at page 51. *It is clear, however, in the first place, that this is a mere presumption, which will not stand against evidence to the contrary. Board of Commissioners vs. Strawn, supra, at page 51.*"

In other words, the courts have recognized in cases of trust arising from a mingled bank account the principle that the trustee will not knowingly violate the law and pay out trust funds, and that, therefore, it will be presumed where a balance is left in such account, that he paid out his own money first, leaving the trust fund in the balance. The inverse order theory is analogous to this proposition to the extent only that it will be presumed that the first trust moneys coming into the hands of the trustee were first paid out and that the balance remaining represented the last trust proceeds coming into the fund.

We have considered those cases such as *Plano Mfg. Co. vs. Auld*, 86 Am. St. Rep., page 769, exact page 775, wherein the holding seems to be that as between the parties asserting the trust, each should be limited in the distribution of the trust fund to a pro rata part, and we have also considered the case of *Boyle vs. Northwestern National Bank*, particularly the opinion of the court on motion for rehearing,

to be found on pages 1116 and 1117, of Volume 1, L. R. A. (N. S.), wherein it would appear that the inverse order method of payment was applied as to the last trust fund, the last collection made, and thereafter the balance was prorated between the other interveners.

We agree with the court as to the last collection being entitled to payment first, but decline to follow it in so far as it prorates the balance as between the other interveners. It may be that the court acted upon the assumption that the burden of proof as to the order of time in which the other interveners (*cestui que trust*) had placed their money in the bank was not sustained, and, therefore, it was impossible to apply the inverse order theory as to them. If so, we think the pro rata theory as to the balance was correct.

In other words, we think the true rule is that the burden is upon the party asserting the trust to show the time the alleged trust proceeds went into the actual cash fund and that when the respective parties have sustained such burden, then the inverse order should be applied. If, from the books of the bank and from the information gained from other sources, the *cestui que trustent* cannot determine, as between them, the times in which their money went into the actual cash fund, but have plainly established, by sustaining the burden of proof hereinbefore set out, their right to participate in the fund, then such fund should be prorated between them. For your protection, all of the entitled claimants should agree to this.

With reference to your question as to whether or not, where a party has plainly established his right to his interest in and to the cash fund coming into the hands of a receiver, such interest extends to the funds on deposit with the failed bank correspondent, you are advised that such party by establishing such claim against the balance of cash coming into the hands of the receiver has no claim whatever against the funds due from the correspondent bank to the failed bank. His right to claim any interest in the funds in the correspondent bank will be dependent solely upon his ability to show that his particular trust fund went into and became a part of the balance carried by the failed bank with the correspondent bank, subject, of course, to the other rules governing the tracing of a trust fund into a current bank account. The relation existing between the correspondent bank and the failed bank is that of debtor and creditor. It carries on hand no actual money the title to which is vested in the failed bank. The failed bank merely has an account with the correspondent bank just as any ordinary depositor has an account with any other bank. As stated, the relation is that of debtor and creditor, and it has been held that the correspondent bank would have the right to offset any debt due by the failed bank to it before remitting to the receiver of such failed bank the balance of said account. No trust arises as to the credit account due by the correspondent bank to the failed bank by *virtue of the cash fund theory*. Any liability of this account will depend upon the ability of the *cestui que trust* to trace and identify the proceeds of his alleged trust into that account and subject to the rules applicable to any bank account where trust funds and other funds have been mingled.

Thus in the case of Crawford County Commissioners vs. Strawn, 15 L. R. A. (N. S.), page 1105, it is said:

"Only to the extent of this sum of \$11,697.61 has the complainant identified the money which came into the receiver's hands as part of the trust fund, and only to that extent was there an actual augmentation of the moneys which came into the possession of the receiver. The decree below limited the complainant to the recovery of this identified money so far as this part of the case goes; and to that much of the decree we agree.

"But the complainant assigns as error that the court did not extend this rule to the balances to the credit of the Galion bank in banks with which it kept a deposit account. The balances to the credit of the Galion bank in these banks which have been received by the receiver aggregate something over \$6000. The balances with these several banks were shifting from day to day during the currency of the tax deposit account. The credits given to the Galion bank are shown to have sometimes come from collections, sometimes from proceeds of rediscounts, and sometimes from moneys sent from the vaults of the Galion bank to these reserve or corresponding banks. On the other hand, the account was drawn against when exchange was sold, and for other purposes. The trust fund is not traced into any of the rediscounts or collections, which in part made up the credits in these banks. That the moneys remitted were not out of the trust fund is to be presumed; for the presumption upon which equity acts in respect of the character of the funds drawn out of the mingled mass of money in the bank's vaults is that the bank drew out only its money, leaving in its vaults the money which it was obligated to retain and not used for any private purpose. The court below was right in holding that no part of the money deposited with the corresponding banks and which has come to the receiver's possession has been identified."

It may be that hereafter, by virtue of the statutes requiring certain amounts of cash to be placed with correspondent banks and the fact that such amounts are carried by the bank as "cash due from other banks," the courts will create the legal presumption that such accounts should be treated as actual cash, but until they have done so we must treat such accounts not as actual cash money but as merely a debt owed by the correspondent bank to the other bank.

We are fully cognizant of the holding in the case of First National Bank vs. Union Trust Company, 155 S. W., page 989, but that case represents an entirely different situation from that which we are discussing, in that, in that case the actual cash found in the branch offices of the Union Trust Company belonged to it. There was no relation of debtor or creditor. It was absolutely the owner of such money. But the situation existing between a bank and a correspondent bank is quite different. The bank in such case is one legal entity and the correspondent bank is another legal entity. If the correspondent failed the bank would not be heard to say that the account carried by it with such correspondent bank belonged to it absolutely and formed no part of the assets of such failed correspondent bank. In short, the bank would have to assert its claim against the failed correspondent bank just as any other common creditor or preferred claimant, as the case might be.

We direct particular attention to the closing language of the case above referred to, to be found on page 992, which is as follows:

"Appellee's illustration of money deposited by one bank in another is not in point, because, when a general deposit is made, the money ceases to belong to the depositor and the transaction creates the relation of debtor and creditor."

That is the exact proposition which we are advancing here, to wit: That the relation between the two legal entities, that is, the bank and its correspondent, is the relation between debtor and creditor. When money is deposited by the bank with its correspondent (unless other-

wise specifically set aside, as in case of a special deposit where the identical thing deposited must be returned) the title to such money vests in the correspondent bank and the bank in question is simply credited on the books of the correspondent bank with the amount of such money. The relation is plainly that of debtor and creditor. This is shown by the fact that checks and bills of exchange are constantly drawn by the bank on its correspondent and the account is immediately reduced to the extent of such checks or bills of exchange by the correspondent bank. Likewise, the account is constantly being changed by collections made by the correspondent bank for the other bank, etc.

The principles announced as to money deposited with correspondent banks apply with equal force to moneys deposited in any other bank. If the money was deposited just as any ordinary deposit, then title vests in the receiving bank and the relation is that of debtor and creditor, and a party who established his claim against the cash fund on hand at the time of the failure of the bank and passing subsequently into the hands of the receiver would have no claim against it. If, however, money was deposited with other banks for safe-keeping and the depositing bank (insolvent bank) retained full ownership and title thereto, then the principles announced in the case of *First National Bank vs. Union Trust Company*, 155 S. W., p. 989, would apply. In other words, it is not necessary that the actual cash owned by the failed bank be found in its vaults. The trust would apply to any actual cash money on hand, wherever situated, which was absolutely owned by the failed bank at the time of its failure.

With reference to that part of your letter which requests that we define money in the sense used with respect to the cash fund theory, we desire to say that we mean money as such term is used in the ordinary acceptance of that word. In short, we mean gold, silver and copper coins, bank notes and currency generally as distinguished from checks, bills of exchange, ordinary notes, and other evidences of debt. We shall not in any manner attempt to enter upon a discussion of what technically constitutes money or legal tender.

We do not regard it as open to question that there is any serious conflict upon any proposition announced in this opinion, except the apparent conflict on the question of whether or not, where the trust proceeds have been properly traced and identified, such trust proceeds become a charge upon the general assets of the insolvent trustee, the bank. Except in certain cases (such as *McLeod vs. Evans*, 28 N. W., 173, 214, since overruled, and certain Kansas, Nebraska and Missouri cases, which hold that the trust attaches to the entire estate of the insolvent trustee), we think that if, in considering the cases bearing upon the question, it be borne in mind constantly that the courts in using the term "general mass" do not mean the *entire estate of the insolvent*, but merely mean the *general mass into which the trust property has been traced*, much of the apparent confusion on this question will be done away with, and the authorities, as a general rule, but not always, will harmonize.

By the expression "general mass" is meant the "general mass" into which the particular trust fund has been traced. Thus, if the trust fund is created by the payment of actual cash money and is placed in the actual cash moneys of the bank, by the term "general mass" is



meant the "general mass" of money and not the entire estate of the insolvent consisting of real property, notes and other personal property and the like.

In Volume 86, American State Reports, page 804, speaking of the rule announced by some of the authorities that the entire estate, or general assets, would be charged with the amount of the trust fund even though the specific fund cannot be traced into the hands of the receiver, it is said by the annotator that such cases are contrary to the great weight of authority and go to an extremity which can scarcely be upheld upon equitable and just grounds. The language expressed is as follows:

"The cases of McLeod vs. Evans, 66 Wis., 401, 57 Am. Rep., 287, 28 N. W., 173, 214; Philadelphia Nat. Bank vs. Dowd, 38 Fed., 172; Francis vs. Evans, 69 Wis., 115, 33 N. W., 93, and Bowers vs. Evans, 71 Wis., 133, 36 N. W., 629, which attempted to establish a contrary doctrine in Wisconsin, were overruled in Nonotuck Silk Co. vs. Flanders, 87 Wis., 237, 58 N. W., 383, and are generally discredited. Under these cases and those which followed the doctrine laid down by them (Ryan vs. Phillips, 3 Kan. App., 704, 44 Pac., 909; Capital Nat. Bank vs. Coldwater Bank, 49 Neb., 786, 59 Am. St. Rep., 572, 69 N. W., 115; Kimmel vs. Dickson, 5 S. Dak., 221, 49 Am. St. Rep., 869, 58 N. W., 561), it is sufficient to impress a trust upon the assets of the bank in the hands of its assignee to show that the money was mingled with the assets of the bank and went to swell its general estate, and by reason of these facts alone a trust will attach to the entire estate, even though the specific fund cannot be followed into the hands of the receiver. This is contrary to the great weight of authority, and goes to an extremity which 'can scarcely be upheld upon equitable and just grounds.' Windstanley vs. Bank, 13 Ind. App., 544, 41 N. E., 956.

"3. Must Form Part of the Assets in the Hands of Receiver.—By the better rule the trust fund must not only be traced into the hands of the receiver, but must be shown to form part of the gross sum held by him. As is said in *In re Cavin vs. Gleason*, 105 N. Y., 256, 11 N. E., 504: 'Upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor.' *His right to recover is based upon his right to trace his property and reclaim it from the general mass.* If, then, such property forms no part of the fund which it is sought to impress with the trust, it is manifest there can be no recovery upon that theory. *St. Louis Brewing Assn. vs. Austin*, 100 Ala., 313, 13 So., 908; *Perth-Amboy Gaslight Co. vs. Middlesex County Bank*, 60 N. J. Eq., 84, 45 Atl., 704, explaining *Frelinghuysen vs. Nugent*, 36 Fed., 229; *Shute vs. Hinman*, 34 Ore., 578, 56 Pac., 412, 58 Pac., 882; *Wasson vs. Hawkins* 59 Fed., 233; *Boone County Nat. Bank vs. Latimer*, 67 Fed., 27.

"This does not, however, mean that it must be shown that the identical coins received by the bank are in the hands of the receiver. If the fund as a fund be traced into his hands it will be sufficient. This is, of course, an extension of the modern doctrine that money will be followed though mingled with other coin; but is supported by numerous cases: *Sherwood vs. Central Michigan Sav. Bank*, 103 Mich., 109, 61 N. W., 352; *Midland Bank vs. Brightwell*, 148 Mo., 358, 71 Am. St. Rep., 608, 49 S. W., 994; *First Nat. Bank vs. Sandford*, 62 Mo. App., 394; *Harrison vs. Smith*, 83 Mo., 210, 53 Am. Rep., 571; *Thompson vs. Gloucester, etc., Inst.* (N. J.), 8 Atl., 97; *Bergstresser vs. Lodewick*, 59 N. Y. Supp., 630, 37 App. Div., 629; *In re Cavin vs. Gleason*, 105 N. Y., 259, 11 N. E., 504; *Jones vs. Kilbreth*, 49 Ohio St., 401, 31 N. E., 346; *Richardson vs. New Orleans Debenture Redemption Co.*, 102 Fed., 780; *Richardson vs. New Orleans Coffee Co.*, 102 Fed., 785."

With reference to this apparent conflict, you are advised that if the courts of every State in the Union and the decisions of the Federal courts announced the rule to be that the trust fund became a charge upon the entire estate of the insolvent (its general assets), neverthe-

less, in view of the Texas decisions, including *Continental National Bank of New York vs. Weems et al.*, 6 S. W., page 802, we would still be compelled to advise you that it would not constitute a charge upon the entire assets, but that it would be limited to the specific property into which it had been traced, and then only to the amount of the trust traced therein; and this for the reason that the question of tracing trust funds must be determined in the light of the decisions and statutes of the particular jurisdiction in which the trust is sought to be identified and enforced. It is sufficient to say, however, that the Texas decisions reflect the decided weight of authority, and that we are entirely satisfied with the principle announced in numbered paragraph one, page 604, in the case of *Empire State Surety Company vs. Carroll County*, 194 Fed., page 593.

There is, of course, another proposition on which there is no conflict, and that is this: The mere fact that the bank at the time of receiving the proceeds of the collection had assets and thereafter the assets at all times remained equal to or greater than the amount collected (the alleged trust fund), is not a sufficient identification of the trust fund whatsoever. Thus in the case of *American Can Co. vs. Williams*, 178 Fed., page 420, the agreed statement of facts showed that the assets of the bank remained, at all times, sufficient to cover the trust fund, but the court said that this agreement did not in any manner furnish a basis for identifying the trust fund. As to this case, we desire to say that some of the language in it we think capable of the construction that the trust must be traced into a specific piece of property, and that another part of the language is susceptible of the construction that it is only necessary to show that the assets of the bank were augmented by receipt of the trust fund.

In so far as the case remarks or holds that it is a sufficient identification to show merely that the assets of the bank were augmented in order to establish the trust, it has been expressly criticized. In *Empire State Surety Company vs. Carroll County*, 194 Fed., 593, the court stated that such remarks and even decisions to that effect were neither sustained by reason nor authority.

We have stressed, throughout this entire opinion, the proposition that the cash fund theory is based upon the premise that actual cash money has been collected. In other words, the cash fund theory applies to money only for the reason that it must be shown that the cash fund in the vaults of the bank was added to by the addition of actual cash money. To illustrate: Let us say that a bank in Austin has received for collection various checks drawn by various parties on a bank at Houston, Texas, the said parties (the drawers of said checks) being depositors in the bank at Houston, Texas. The Houston bank receives the checks, deducts the amount of each respective check from the account of each respective depositor, remits the Austin bank in exchange, and immediately thereafter fails. The Austin bank could not assert a trust against the cash fund in the vaults of the Houston bank at the time of its failure, and subsequently going into the hands of the receiver, for the following reasons:

*Because the transaction did not add one dollar of actual cash to the actual cash in the vaults of the Houston bank, the transaction amounting to the "mere cancelling of one liability and the assumption of an-*

*other*"; and, because the transaction amounted to no more than an *exchange of creditors*,—that is, the Houston bank instead of owing each respective depositor, simply owed the Austin bank in lieu thereof. With the issuance of the exchange to the Austin bank by the Houston bank the relation was not that of cestui que trust and trustee, but merely that of debtor and creditor.

The illustration here given goes rather to the creation of a trust than to its identification, and we wish it distinctly understood that in this illustration we are neither undertaking to discuss the question of when a trust is created nor to review the authorities as to where the item is sent for collection, or for collection and remittance, or for collection and returns, and the various phases thereof as affected by the question of contracting with reference to a custom or based upon the general course of dealing between the two banks. The illustration is given solely for the purpose of showing the necessity of actual cash money being collected and added to the actual cash money in the vaults of the bank before the party asserting the trust can claim any interest in the actual cash money on hand at the time of the failure of the bank and going subsequently into the hands of the receiver. Nor, in making the statement that the relation of debtor and creditor arises, do we have in mind, neither are we discussing in any manner whatsoever, the rights of such creditor to partake of the Guaranty Fund under the Guaranty Fund Law.

The necessity of actual cash going into the hands of the receiver is illustrated by the case of *Beard vs. Independent District of Pella City*, 88 Fed., page 375, and by the case of *Empire State Surety Company vs. Carroll County*, 194 Fed., 593, wherein the judge was careful to set out the exact amount paid in actual cash for the purchase price of a draft and that part which was paid in checks. It is true that in that case the court said the matter was immaterial, for the very good reason that the amount allowed as a recovery did not exceed the actual cash paid for the drafts, and the question as to that part of the payment made by checks was ignored.

In connection with the above illustration, we quote from Volume 86, *American State Reports*, page 806, as follows:

"5. *Must Actually Augment Assets of Bank.*—It is well settled that the estate of the insolvent bank must actually be augmented by the money or property which it is sought to recover as a trust fund. *If the transaction amounted to no more than an exchange of creditors, the mere cancelling of one liability and the assumption of another, or if the money was used in the discharge of an indebtedness, it is obvious that the assets in the hands of the receiver have not been increased thereby and there can be no recovery as of a trust fund.* Thus it is said in *Insurance Co. vs. Caldwell*, 59 Kan., 156, 52 Pac., 440: "The mere saving of the estate by the discharge of a general indebtedness, otherwise payable out of it, or by the payment of the current expenses of the business, is not an augmentation or betterment of the estate within the meaning of the rule. If the estate has not been increased by specific additions to it, or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed." And this is the undoubted law. *Bradley vs. Cheeseborough*, 111 Iowa, 126, 82 N. W., 472; *District Township of Eureka vs. Farmers Bank*, 88 Iowa, 194, 55 N. W., 342; *Moore vs. Cheeseborough (Iowa)*, 81 N. W., 649; *Kansas State Bank vs. First State Bank*, 9 Kan. App., 839, 61 Pac., 868; *Sunderlin vs. Mecosta County Sav. Bank*, 116 Mich., 281, 74 N. W., 478; *Sherwood vs. Milford Bank*, 94 Mich., 78, 53 N. W., 923; *In re Seven Corners Bank*, 58 Minn., 5, 59 N. W., 633; *Midland Nat. Bank vs. Brightwell*, 148 Mo., 358, 71 Am. St. Rep.,

608, 49 S. W., 994; Frank vs. Bingham, 58 Hun., 580, 12 N. Y. Supp., 767; Freiberg vs. Stoddard, 161 Pa. St., 259, 28 Atl., 1111; Continental Nat. Bank vs. Weems, 69 Texas, 489, 5 Am. St. Rep., 85, 6 S. W., 802; Nonotuck Silk Co. vs. Flanders, 87 Wis., 237, 58 N. W., 383 (overruling McLeod vs. Evans, 66 Wis., 401, 57 Am. Rep., 287, 28 N. W., 173, 214); Thuemmler vs. Barth, 89 Wis., 381, 62 N. W., 94; Dowie vs. Humphrey, 91 Wis., 98, 64 N. W., 315; City Bank of Hopkinsville vs. Blackmore, 75 Fed., 771, 21 C. C. A., 514; Beard vs. Independent District of Pella City, 88 Fed., 375, 31 C. C. A., 562."

Attention is also directed to the case of Midland National Bank of Kansas City vs. Brightwell, 49 S. W., 994, in which the Supreme Court of Missouri remarks that it has gone to the extreme length in permitting a trust fund to be charged against the entire estate of the insolvent, but admits that this is contrary to the weight of authority in England and most of the States of the Union, and in which the court expressly holds that: "When the transaction was finished it was a debtor in the same amount but to a different person in a different capacity, and had not received an additional dollar, whereby the dividends of the other creditors would be enlarged." The facts of the case and the holding are correctly reflected in the syllabus, which is as follows:

"A bank sent to another items for collection, which it received and collected, partly by accepting a draft of another bank, and by charging the accounts of its depositors. Such drafts, together with one of its own, were forwarded in settlement, but were not paid, as both banks made assignments. Held, that the first bank did not have a preference over general creditors of the insolvent collecting bank on account of such collections, since, *as it received* no money, and there was no augmentation of its assets by such collection, no trust fund was created in its favor."

Also, see the case of People vs. Merchants and Mechanics Bank, 34 Am. Rep., page 532.

But what is the basic reason, as contemplated by all of the authorities dealing with the subject, for asserting the proposition that actual cash money must have been collected? The whole cash fund theory arose by virtue of the inability to identify money, dollar for dollar, coin for coin, and the courts in creating the legal presumptions surrounding this theory plainly had in mind that such cash fund must be added to by actual cash money, and to say that a mere book entry or mere credit adds one cent or one dollar to the actual cash in the vaults of the bank is to assert a proposition that refutes itself by its very statement, and it has been repeatedly held that:

"Checks of third persons on the bank with which they are deposited which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. Beard vs. Independent District of Pella City, 88 Fed., 375, 382, 31 C. C. A., 562.

"Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. City Bank vs. Blackmore, 75 Fed., 771, 773, 21 C. C. A., 514.

"Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, *in the absence of proof of the actual balance of cash* the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank. In re Seven Corners Bank, 58 Minn., 5, 58 N. W., 633; City of St. Paul vs. Seymour, 71 Minn., 303, 308, 74 N. W., 136; Willoughby vs. Weinberger, 15 Okl., 226, 229, 79 Pac., 777." (Empire State Surety Co. vs. Carroll County, 194 Fed., p. 606.)

We are not discussing in any manner the authorities which treat checks for certain purposes when so accepted as cash, but we are asserting the doctrine that actual cash money must be received where a party is seeking to assert a trust against the cash fund in the vaults of the bank.

Speaking generally, the cestui que trust from the mere fact that the transaction out of which his claim arose created a trust does not secure any preference over common or general creditors. In short, the mere fact that he has a trust claim does not give him a higher claim or right than other creditors. His claim to priority rests solely upon his ability to trace and identify the trust proceeds. When he has accomplished this, then and then only is he entitled to a preference over general creditors. He gets no preference on account of the *nature* of his claim, but his right to a preference depends upon his ability to identify the trust proceeds. If he cannot do this, his preferential rights are lost, and he stands precisely and exactly upon the same footing as any other common creditor. (Am. St. Rep., Vol. 86, p. 805, paragraph 3.)

Yours very truly,

W. W. MEACHUM, JR.,  
Assistant Attorney General.

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Op. No. 2550, Bk. 59, P. 6.

ACTS PROHIBITING PRIVATE BANKING—CONSTRUCTION OF PROVISIONS THEREOF.

1. The penalties and provisions of Sections 2, 3, 4, 5, 7, 8, 9, 10, and 11, Chapter 185, Acts Regular Session Thirty-eighth Legislature, do not apply to private banks in operation at the time said act took effect and which had been in operation for a period of two years next preceding said date.

2. The penalties and provisions of Sections 2-11, inclusive, of Chapter 185, Acts Regular Session Thirty-eighth Legislature, apply only to banks organized subsequent to June 14, 1921, and prior to the taking effect of said act.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 9, 1924.

*Hon. J. L. Chapman, Banking Commissioner of Texas, Capitol.*

DEAR SIR: In your favor of the 26th instant you state:

"The question that I desire a ruling from your Department on is whether or not private banks that were operating two years prior to June 14, 1923, are included in the restrictions and penalties set out in these sections." (Sections 76-88, inclusive, 1923 Digest.)

In another portion of your letter you state:

"The third paragraph of Section 78 (Section 2, Chapter 185, Acts of 1923) provides that the provisions of the sections of this act shall not apply to any person, etc., who at the time this act becomes effective are and have been for two years next preceding said date actively engaged in the operation of any bank, trust company, bank and trust company, etc. Therefore, our question is whether banks that were in operation *prior* to two years before June 24, 1923, are amenable to the provisions of Sections 76-88, or do they refer only to such banks that were organized subsequent to June 14, 1921?"

In answer to the above inquiries you are advised that Section 1 of Chapter 185, Acts of the Regular Session of the Legislature, 1923,

declares the public policy of this State to be that no additional private banking institutions or business shall be organized or established after the taking effect of this act and makes it unlawful for any person or association of persons, partnerships, or trustees acting under any common law declaration of trusts to hereafter organize or establish or begin the operation of any banking institutions or business within this State or to resume such operation except as provided in said act.

It is provided in the act that the provisions of the sections thereof shall not apply to any person, association of persons, partnerships, or trustees, or trustees acting under any common law declaration of trust, who at the time the act became effective are and have been for two years next preceding said date, actively engaged in the operation of any bank, trust company, bank and trust company, or savings bank within this State. The law thus having expressly provided that the provisions thereof should not apply to banks, etc., which at the time the act became effective had been for two years next preceding said date actively engaged in the operation of any bank, etc., you are advised that where a bank was actively engaged as a bank at the time the above act took effect and had been so engaged for a period of two years prior to the taking effect of said act, it would not be amenable to the provisions of Sections 76-88. The provisions of said sections could only apply to private banks organized subsequent to June 14, 1921.

Very truly yours,

JOHN W. GOODWIN,  
Assistant Attorney General.

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Op. No. 2541, Bk. 59, P. 8.

NATIONAL BANKS—FEDERAL RESERVE ACT—POWERS TO ACT AS TRUSTEES, ADMINISTRATORS, ETC.

1. Since the laws of the State of Texas authorize and permit State banks and State bank and trust companies to act as guardian, administrator, etc., without bond and be sole surety upon bonds, National banking associations doing business in Texas, although not authorized by the State statutes, may be authorized and empowered by the Federal Reserve Board and, therefore, act, do and perform such powers and functions in Texas.

2. State executive officers required by the laws of this State to perform the duties and exercise the powers prescribed in Article 540, Revised Statutes, 1911, for and in behalf of State banks and State bank and trust companies, may and should perform such duties for and in behalf of National banking associations authorized by the Federal Reserve Board to perform the corporate acts prescribed in said statute.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 11, 1924.

*Hon. J. L. Chapman, Commissioner of Banking, Capitol.*

DEAR SIR: The question of whether or not national banking associations may, in Texas, exercise power and functions of a trustee, executor, administrator, guardian of estates and other fiduciary capacities is again presented to this Department for determination.

This question was considered by the Attorney General in an opinion dated October 14, 1920 (Opinions of Attorney General, 1920-1922, p. 245). The conclusion there announced was, "We, therefore, advise

you that under the laws as they now exist in this State a national bank cannot avail itself of the privileges granted by Article 540, Revised Statutes, 1911. \* \* \*”

The Legislature, by the statute referred to (Articles 540 to 545), made available, and at their option, to State banks, State bank and trust companies, corporations incorporated under Title 14, Revised Statutes, 1911, corporations incorporated under general or special statutes of this State doing the character of business therein specified, and corporations organized under the laws of other States, the right and power “to (1) qualify as guardian, (2) curator, (3) executor, (4) administrator, (5) assignee, (6) receiver, (7) trustee by appointment of any court or under will, (8) or depository of money in court without giving bond as such, and (9) become sole guarantor or surety in or upon any bond required to be given under the laws of this State.” (Article 540, Revised Statutes, 1911.)

As stated in the opinion of the Attorney General above referred to, the Legislature did not make available such powers to national banking associations, for the reason that the corporate powers authorized could be availed of only by corporations organized under Title 14, Revised Statutes, 1911, other Texas corporations conducting similar business and corporations “organized under the laws of any other State.” We still adhere to the interpretation of the statute there given. The fact is that the sovereign State of Texas did not make available for national banking associations the corporate powers above quoted. Whether the Legislature of the State considered itself without power to invest national banks (Federal corporations) with corporate authority (Capitol Hill First National Bank vs. Murray, 212 Fed., 140; Easton vs. Iowa, 188 U. S., 220; Davis vs. Elmira Savings Bank, 161 U. S., 275; Opinions of the U. S. Attorney General, Vol. 27, pp. 37 and 272), or whether the Legislature, by refusing to include within the enumerated corporations permitted to avail of the granted authority, intended to specifically exclude therefrom national banking associations (Fellows vs. First National Bank, 159 N. W., 335; Sutherland Stat. Const., Sec. 491), is not discussed in the opinion, nor do we think it is material in the correct determination of the question presented. Under the existing Federal statutes it becomes immaterial whether or not a State has or has not made available such corporate powers for national banking associations.

A national banking association obtains its corporate powers from the Federal sovereignty. (Bank vs. Kennedy, 167 U. S., 365; Lake County vs. Bank, 123 N. E., 130.) The Congress is the judge of the extent of powers to be conferred upon such banks within constitutional limits. The Congress of the United States has made available to national banking associations the power and authority to act as trustee, administrator and fiduciary.

By the Federal Reserve Act (Act of December 23, 1913, Chapter 6, 38 Stat. L., 251, 6 Fed. Stat. Ann., p. 829) Congress authorized and empowered the Federal Reserve Board “to grant by special permit to national banks applying therefor, when not in contravention of State or local laws, the right to act as trustee, executor, administrator or registrar of stocks and bonds under such rules and regulations as said Board may prescribe.” The granted authority was attacked in 1916

because unconstitutional, a delegation of legislative authority and because in the particular State it was in contravention of the law and policy of the State (*Fellows vs. First National Bank of Bay City*, 159 N. W., 335), but without successful result, for in the opinion of the Supreme Court the legislation was construed to be a valid exercise of the power of Congress and the legislation was not objectionable as conferring legislative power and not in contravention of State and local law. The court, in effect, holding that there was no contravention of State law when the right to perform the corporate acts is given by State law or where the corporate power is expressly conferred on State banks or corporations competing with national banks. (*First National Bank of Bay City vs. Fellows*, 244 U. S., 416.) The law remained in this state until 1918. The authority of the Federal Reserve Board to confer the corporate powers, and the right of the national banking association within a given State to avail itself thereof, depended upon the determination of the question of whether or not State and local law forbade. (*Appeal of Woodbury*, 96 Atl., 299.) Their power to act as trustee, administrator, etc., therefore, was somewhat uncertain, if not precarious, hence the Congress amended the Federal Reserve Act in this respect to read as follows:

"To grant by special permit to National banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located.

*"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with National banks, the granting to and the exercise of such powers by National banks shall not be deemed to be in contravention of State or local law within the meaning of this act.*

\* \* \* \* \*

*"Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trust, National banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.*

"National banks shall have power to execute such bond when so required by the laws of the State.

"In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such National bank may take the necessary oath or execute the necessary affidavit.

\* \* \* \* \*

"In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly; provided, that no permit shall be issued to any National banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers." (Act of September 26, 1918, Chapter 177, 40 Stat. L., 967; Fed. Stat. Ann., 1919 Supp., p. 257.)

From the foregoing quotation it is observed that the Congress has



written into the statute the test as stated by the Supreme Court in the *Fellows* case for determining when State or local laws prohibit national banking associations from exercising the powers of trustee, executor, etc., that is, State laws do not prohibit national banks from acting as executor, trustee, etc., where the State makes available such powers to State banks, trust companies and corporations competing with national banking associations. Hence, since the State of Texas has authorized, by Articles 540 to 545, Revised Statutes, 1911, State banks and State bank and trust companies and certain other corporations to act as executor, trustee, etc., under the announced law as it now exists, there is no local or State law contravening or prohibiting national banks from exercising similar powers. The Federal Reserve Board in Texas, may, therefore, empower and authorize national banks to avail themselves of such corporate powers as are granted by the Federal Reserve Act above quoted. A national banking association obtains such corporate rights, not from the State statute and sovereign, but from the Federal statute and national sovereign. Hence, it becomes immaterial whether or not the State law makes available the corporate powers under discussion to national banking associations.

Although the Federal Reserve Board may confer the authority and the national banking association has the right and power to perform the duties of trustee, executor and administrator, the association must, nevertheless, comply with the qualifying feature of the State laws. The association is directed so to do, as will be observed from the above quoted statute, that is, the association is required to submit itself to the Commissioner of Banking that he may satisfy himself of its solvency and shall deposit with the State Treasurer such funds as are prescribed by Article 540. The final question then is, will the Commissioner of Banking and the State Treasurer, State officers, perform for national banking associations the duties imposed by Articles 540 to 545? It is usually stated that officers are creatures of the law and receive their powers and perform the duties prescribed by the sovereign creating such offices. But it is equally as well settled that power may be conferred on the State officer as such to execute a duty imposed by an act of Congress and that such officer may execute such duty unless prohibited by the Constitution and law of the State. (*Prigg vs. Pennsylvania*, 16 Pet., 539, 22 R. C. L., p. 455.)

Taking into consideration this principle of law and the provisions of Article 6 of the Constitution of the United States and Article 1836, Revised Statutes of the United States, and Article 16 of the Constitution of the State of Texas, requiring the executive officers of the State of Texas to bind themselves to support and discharge all duties incumbent upon them pursuant to the Constitution and laws of the United States and the State of Texas, we advise that the Commissioner of Banking and the State Treasurer of the State of Texas should do and perform such duties as are prescribed in Article 540 for and in behalf of national banking associations desiring to comply therewith.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

Op. No. 2460, Bk. 58, P. 116.

DEPOSITORS' GUARANTY FUND—LIABILITY OF A MEMBER BANK TO  
FUND—EXTENT OF LIABILITY OF NATIONAL BANK INCURRED  
PRIOR TO CONVERSION FROM STATE MEMBER BANK INTO  
NATIONAL BANK—REVERSIONARY INTEREST OF CON-  
VERTED STATE BANK IN THE DEPOSITORS'  
GUARANTY FUND.

1. Article 448, Revised Statutes, 1911, imposes an annual indebtedness of one-fourth of one per cent of the average daily deposit on a State bank operating under Depositors' Guaranty Fund during its continuance in business as a State bank—the bank being liable only for such payments as become due and payable while it is doing business as a State bank.

2. Same.—A State bank operating under Depositors' Guaranty Fund is liable not to exceed two per cent of its average daily deposits per annum, for assessments made by the State Banking Board, and this indebtedness exists in all member banks as of the time of depletion of the Depositors' Guaranty Fund. The depletion of said fund exists as of the time a member bank ceases to do business and is closed by the Commissioner of Insurance and Banking. The assessment levied by the Board only makes certain the extent of the depletion and the proportionate amount of liability of the member banks.

3. A National bank having theretofore operated as a State bank under the Depositors' Guaranty Fund is liable and is indebted to the Depositors' Guaranty Fund for assessments made by the Board levied after such conversion into a National bank for depletion of the Depositors' Guaranty Fund caused by the insolvency of a member bank occurring while such bank was doing business as such State member bank.

Same.—A State bank under the Depositors' Guaranty Fund becoming such subsequent to depletion of the Guaranty Fund caused by insolvency of an existing member bank, is not liable nor indebted for such assessment although levied after such State bank incorporated.

4. In the event of conversion of a State bank into a National bank, and when it shall be made to appear that all depositors have been paid in full, or such depositors have accepted deposits and pass books in the converted bank, the State Banking Board should return to said bank, or its successor, the pro rata paid into the Depositors' Guaranty Fund. Art. 490, R. S., 1911.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 17, 1922.

*Hon. J. L. Chapman, Commissioner Insurance and Banking, Capitol.  
Attention: Mr. T. P. Priddie, Deputy Commissioner.*

DEAR SIR: Under date of September 14, 1922, you forwarded to this Department a letter of September 9, 1922, addressed to you, and from attorneys representing the Commercial National Bank of San Antonio, and you asked that attention be given to the question presented and that proper action be taken thereon.

The controversy stated in the letter last mentioned affects the conversion of the Commercial State Bank of San Antonio into the Commercial National Bank and the liability of the bank to the Depositors' Guaranty Fund for certain assessments caused by depletion of that fund.

With certain additions, the facts presented in the letter transmitted are as follows:

"The stockholders (Commercial State Bank of San Antonio) authorized the conversion papers on April 4, 1922, and they were executed the same day. The Comptroller of the Currency issued the certificate of authority to commence on April 8, 1922. The charter of the Commercial State Bank and guaranty fund certificates were surrendered April 22nd, 1922, and accepted by the Bank Com-

missioner on May 2nd, 1922. The dissolution certificate was issued by the Secretary of State on May 3rd, 1922."

The Commercial National Bank has declined to recognize certain assessments made at the order of the State Banking Board to recoup the Depositors' Guaranty Fund of certain State banks, the material facts of which are as follows:

"The First Guaranty State Bank at Collinsville was closed on December 27th, 1921, and on March 21, 1922, there was withdrawn from the guaranty fund the sum of \$83,853.51. The assessment against the Commercial National Bank by reason of the closing of this bank is \$646.93.

"The El Paso Bank & Trust Company was closed on March 7th, 1922, and on March 13, 1922, there was withdrawn from the guaranty fund a little over \$129,000.00. The assessment undertaken to be levied against the Commercial National Bank on account of this failure is \$1023.13.

"The Traders State Bank of Cleburne was closed on April 15, 1922, and on April 18, 1922, there was withdrawn from the guaranty fund \$200,000.00. The assessment undertaken to be made against the Commercial National Bank on account of this failure was \$1597.44.

"The First State Bank of Gary was closed February 23, 1922, and on June 8th, 1922, the sum of \$47,777.77 was withdrawn from the guaranty fund. The assessment undertaken to be levied against the Commercial National Bank on account of this failure is \$374.17.

"The Farmers & Merchants State Bank of Gustine was closed April 22nd, 1922. (The assessment for the failure of this bank was made on July 5, 1922, and the proportionate amount against Commercial National Bank was \$438.80.)"

The status of the Commercial State Bank's account with the Depositors' Guaranty Fund is shown by deposit credit of \$12,108.53 on the books of the Commercial National Bank, a cash deposit of \$4036.15 in the State Treasurer's office in the Depositors' Guaranty Fund.

Due to the failures of the banks above referred to and the necessary depletion of the Depositors' Guaranty Fund, the State Banking Board drew from the Commercial State Bank's cash interest in the Guaranty Fund the sum of \$3641.67, in order to pay depositors in the first four banks mentioned above, leaving a balance of \$394.48. Later, it was ascertained that the assessment against the Commercial State Bank caused by the failure of the Gustine bank amounted to the sum of \$439.80. The Banking Board utilized the remaining \$394.48 in the Depositors' Guaranty Fund in favor of the Commercial State Bank for this purpose and drew a draft in the sum of \$45.32 upon the Commercial National Bank of San Antonio, which was refused and not paid.

The State Banking Board also ordered that after the payments of the assessments above set out that the Commissioner authorize the cancellation of the Depositors' Guaranty Fund on the books of the Commercial State Bank. The contention of the bank is set out as follows:

"In behalf of the bank we contend that it is entitled to have the \$4036.15 returned to it by your Honorable Board and to have the certificate of deposit showing the deposit with it to the credit of the guaranty fund cancelled. We base this upon the fact that the bank was nationalized prior to the making of any of the assessments which have been charged against said fund. \* \* \* We therefore do not concede the right of the Bank Commissioner to make the assessments at the time he undertook to make them. In addition, the law under which this bank was incorporated provided for a fund of two million dollars and contained restrictions upon the right to make assessments based upon the amount of money in the guaranty fund.

"By the Act of 1921 the Legislature undertook to change this law and went so far as to undertake to provide for levying assessments retroactively. We

believe such provision to be of such a character as to invalidate the act and that therefore the original act remains in effect."

In analyzing the facts to arrive at the legal question to be determined, it is necessary to first ascertain when the Commercial State Bank of San Antonio became the Commercial National Bank. The facts quoted above show that the Comptroller issued his certificate on April 8, 1922, although prior thereto—April 4th—the stockholders had authorized the conversion, and although the charter granted by the State had not been surrendered until April 22nd, and the certificate of dissolution had not been issued until May 3rd thereafter. The State bank became a national bank, therefore, on April 8, 1922.

In the case of *Casey vs. Galli*, 94 U. S., 673, Justice Swayne, in passing upon the identical question, stated:

"No authority from the State was necessary to enable the bank to so change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat., 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally. \* \* \* The giving of the Comptroller's certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate, and contradict it. *This cannot be done. The Comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation.*" (*Thatcher vs. West River National Bank*, 19 Mich., 196.)

Therefore, considering April 8th as the pivotal date, we find that the Guaranty State Bank of Collinsville (December 27, 1921), the El Paso Trust Company (March 7, 1922), and the First State Bank of Gary (February 23, 1922) became insolvent and were closed prior to April 8, 1922. The Traders State Bank of Cleburne (April 15, 1922) and the Farmers and Merchants State Bank of Gustine (April 22, 1922) became insolvent and were closed subsequent to April 8, 1922.

We further find that the assessments against the Guaranty Fund were made by the State Banking Board by reason of the failure of the First Guaranty State Bank of Collinsville (March 22, 1922), the El Paso Bank and Trust Company (March 13, 1922), prior to April 8, 1922, whereas, assessments on the Depositors' Guaranty Fund caused by the failure of the Traders State Bank of Cleburne (April 18, 1922) and the First State Bank of Gary (June 8, 1922), and the Farmers and Merchants State Bank of Gustine (July 5, 1922), were made subsequent to April 8, 1922.

While it is contended by the Commercial National Bank that it is entitled to all of the moneys paid into the Depositors' Guaranty Fund and also that placed to the credit of that fund on its books, we do not think, for the reason hereafter set out, that the same rules and legal principles are applicable to the entire amounts. Therefore, the questions to be determined are:

(1) What is the character and in what amount and of what time is the liability of a State bank operated under the Guaranty Fund System to the Depositors' Guaranty Fund under the statute and by reason of depletions of that fund?

(2) When does such liability of a State bank operating under the Guaranty Fund in favor of said fund cease?

(3) What, if any, should the reversionary interest in said fund be returned to a State bank ceasing to do business as such?

We shall attempt to answer the questions in the order in which they are asked.

Articles 445 and 447, Revised Statutes, 1911, provide that banking corporations exercising banking and discounting privileges shall protect their depositors, either by availing themselves of the Depositors' Guaranty Fund, or by the Depositors' Bond Security System. The control and management of the Depositors' Guaranty Fund is placed in the State Banking Board, which Board has authority to adopt all rules and regulations necessary for its management. The option to avail itself of either of the methods was required to be exercised as to existing corporations on October 1, 1909, effective on January 1, 1910. (Opinion Attorney General's Office, August 23, 1909, p. 515, Cureton and Harris Banking Laws.)

Article 450 applies to corporations organized less than one year to the taking effect of the law, or thereafter organized, and when so organized, the option must then be exercised. The application to operate under the Guaranty Fund plan must be passed upon by the Board and accepted or declined at the time of organization of a bank. (Art. 451, R. S., 1911.) Therefore, whether a State bank operating under the Guaranty Fund law exercised its option on October 1, 1909, or whether such bank organized less than one year prior to the taking effect of the law and thereafter came within the system, or whether such bank has organized subsequent to the enactment of the law, the Legislature imposed an indebtedness upon such banks in the following language:

"Art. 448. Any such bank or trust company which shall elect to secure its deposits under the Depositors' Guaranty Fund, provided for by this chapter, shall pay to said Banking Board, provided its application is approved by said Board as prescribed in Article 451, on January 1, 1910, one per cent of its daily average deposits, for the preceding year ending November 1, 1909, not including United States, State or other public funds, if otherwise secured, for the purpose of creating a depositors' guaranty fund. Annually after the first payment of said fund, each bank and trust company subject to the provisions of the guaranty fund plan of this chapter, shall pay to said Board one-fourth of one per cent of its daily average deposits for the year ending November 1 of the preceding year, as above defined, which amount shall be added to said guaranty fund; provided, that when the amount available in said guaranty fund shall reach the sum of two million dollars, the Bank Commissioner shall notify all banks and trust companies subject to this chapter, at least thirty days before the next annual payment; and thereafter the banks and trust companies participating shall not pay any further amount into said fund until said fund be depleted. In the event of a depletion of said fund from any cause so that it falls below two million dollars, or below the amount of the guaranty fund on January 1, preceding, or in the event of necessity to meet an emergency at any time, said Board shall have authority to require the payment for the current year of two per cent of such average deposits, or such part thereof as may be necessary to restore said fund to the maximum above named, or to its amount as of January 1, preceding, or to meet the emergency; but no bank or trust company coming under the provisions of this chapter shall ever be required to pay more than two per cent of said average daily deposits for any one year; provided, further, that first payment herein provided for shall be made to said Board without reference to said maximum sum.

"Art. 449. The fund provided for in this chapter shall be paid to the State Banking Board as follows: Twenty-five per cent of each payment required of

each such bank, or banking and trust company, shall be paid to said Board in cash, and shall be by it deposited for safe keeping only with the State Treasurer, as bailee for the State Banking Board, and shall be paid out by the State Treasurer on the warrants drawn by the order of said Board; and said fund shall never be diverted from the purpose specified in this chapter, nor shall it ever be considered State funds. The remaining seventy-five per cent of each payment required shall be paid by each such bank or banking and trust company, crediting the State Banking Board with such amount as a demand deposit subject to check upon the order of said Board. It shall be the duty of said Board to keep, at all times, twenty-five per cent of the amount of said fund deposited with the State Treasurer in cash as provided herein.

"Art. 450. State bank and trust companies, organized less than one year prior to the taking effect of this law, or hereafter organized, on approval of their applications, as provided for in Article 451, shall pay into said guaranty fund three per cent of the amount of their capital stock and surplus, which amount shall constitute a credit fund, subject to adjustment on the basis of their deposits as provided for other banks now existing, at the end of one year; provided, however, that said payment shall not be required of banks and trust companies formed by the reorganization or consolidation of banks that have previously complied with the terms of this chapter."

Exactly the same language was used in amending Article 448, above quoted, by the Legislature at its First Called Session, Thirty-seventh Legislature, 1921, effective November 15th, of that year, except that the words "five million dollars" were used in the place "of two million dollars" as contained in the original act. We are advised that in the year 1920 the Depositors' Guaranty Fund originally provided for reached the amount of two million dollars, in which instance the Bank Commissioner was called upon to notify all banks thirty days before the next annual payment, and thereafter the banks and bank and trust companies should not pay any further amount into said fund until said fund was depleted, but since the amendment by the Thirty-seventh Legislature this maximum of two million was raised to five million dollars, therefore making operative the charge of one-fourth of one per cent on average daily deposits of banks then existing, which liability had temporarily ceased. No hiatus, so far as this particular charge is concerned, has ever existed except for the year 1920. The Banking Board has regularly thereafter received the one-fourth of one per cent on average daily deposits as required by the statute, in the customary way, as had theretofore been received. But it is suggested that the act of the Thirty-seventh Legislature seeks to impose a liability on banks operating since January 1, 1910, in the amount of one-fourth of one per cent on average daily deposits for each year, and therefore the amended act is unconstitutional.

A sufficient answer to this is that the Banking Board has not attempted to collect such fund and has not so interpreted the statute. No retroactive effect has been given the act. (*State vs. G. H. & S. A. Ry. Co.*, 97 S. W., 71.) And even if it were true, as suggested, the result would not affect the prospective feature of the act, which alone is being enforced, unless the objection arises on the ground that existing corporations have contributed under a law which required payment until the maximum fund reached two million dollars, and that a new, different and more burdensome liability has been imposed by extending the maximum amount of the fund to five million dollars. (*Sherman vs. Smith*, 1 Black, 587; Art. 12, Sec. 3, Art. 8, Sec. 4, Constitution of 1876.) Untenable.

From the above quoted provisions of the statute we find that the

Legislature has imposed a charge upon all existing State banks operating under the Guaranty Fund equal to one-fourth of one per cent of its average daily deposits. This amount is fixed and certain and in no manner contingent; second, in the event of the depletion of the Guaranty Fund so that it falls below the amount of said fund on the preceding January 1st, or, third, in the event of necessity to meet an emergency at any time, the Banking Board shall have authority to require the payment for the current year of two per cent of such average deposits, or such part thereof as may be necessary to restore said fund to the maximum. It is noticeable that, in the latter two cases, the authority to impose a liability vests in the Board on certain conditions; that is, when the Guaranty Fund is depleted, or when an emergency exists. Necessarily, the determination of the existence of an emergency, or the depletion of the Guaranty Fund rests with the Board. When such emergency or depletion exists, the liability of banks has the same characteristics as the liability for the payment of one-fourth of one per cent of the average daily deposits annually. There is no difference in its nature. Immediately, we are interested with the character of this liability. The relationship of debtor and creditor exists between the Guaranty Fund and the bank. (*Elwood vs. Treasurer*, 23 Vt., 703.)

Confusion will be avoided in keeping clearly in mind that the privity exists between the bank and the Guaranty Fund in contradistinction to any supposed relationship between the bank and the depositors of a failed bank, for the liability to the depositors of a failed bank is that of the Guaranty Fund and the privity is between the Guaranty Fund and these depositors.

The validity of the statute imposing the debt upon solvent banks has been made to rest in the police power reserved to the States. (*Noble State Bank vs. Haskell*, 219 U. S., 111.) *Justice King in Bank of Broken Arrow vs. State*, 184 Pac., 63, in speaking of the character of this indebtedness, stated:

"But whether we regard it as the exercise of the police power, or the taxing power, or of both, clearly this cannot be a contractual liability. \* \* \* Evidently the Legislature did not regard this assessment as contractual in its nature. The act of 1907-08 (Laws 1907-08, C. 6, Art. 2) provided for a fund of 1 per cent. The 1909 act (Laws 1909, C. 5, Art. 2) raised this to 5 per cent. The act of 1913 substituted a fund of 2 per cent. The act of May, 1908, amended the law, so as to make it applicable to trust companies; and the act of 1911 changed the law, so as to exclude trust companies. It may repeal the law, and thus relieve all the banks from the payment of these future assessments. This law did not require or permit any act on the part of the bank for its enforcement. The bank's assent or dissent, was absolutely immaterial. Its agreement, express or implied, was equally so. The Legislature was proceeding under a power which required none of these. It was an enforced involuntary charge, as all taxes and all impositions under the taxing and police power are, in invitum, willing or unwilling, and is to be so construed; and, speaking only with reference to the exercise of these powers, an assessment is not a contract, and, if a contract, it is not an assessment.

"This law is therefore to be regarded as the lawfully expressed determination and purpose of the Legislature to impose these assessments as they became payable upon the banks as a condition of going on, and not of stopping business. If a bank is doing business when one of these assessments becomes payable, it is liable; if not, it is not. The consideration which this law gives for these assessments is the securing of current deposits, and thereby securing the banks; and when the consideration for the assessment fails, evidently the assessment itself fails."

Also, it was asserted in the above mentioned case that the Supreme Court in an identical case, *State vs. Farmers Bank of Cushing*, 150 Pac., 212, had decided contrarily on the ground that the liability was contractual, yet, a careful reading of the case does not warrant such conclusion.

In an early case, *People vs. Walker*, 17 N. Y., 502, the nature of this liability was discussed. Judge Johnson stated the question in the case as follows:

“And this brings the case to the question whether these payments are to be looked upon as standing on the footing of quasi contract, where the payment required is to be regarded as having been earned by a risk incurred, or whether they stand as a mere tax, regulated only by the expressed will of the Legislature.”

He concluded that:

“The safe rule and that which will lead to less uncertainty, and perhaps work out as just results as any other which we are at liberty to adopt, is to follow the terms of the statute, and hold that only corporations existing on the day when the payment was to be made are liable to make it.”

Having previously ascertained the nature of the indebtedness, we now must determine when such indebtedness and liability arise, and in what amount. As to the one-fourth of one per cent of the average daily deposits assessed against a member bank, the statute is plain that it is due and payable on January 1st annually, based on a report made on November 1st, preceding. The first payment is never subject to waiver even though the Guaranty Fund has reached its maximum amount (see last clause, Art. 448), for banks organizing to do business, the indebtedness arises whenever the application to be admitted to the benefits and protection of the fund is passed upon and accepted. (Art. 451.)

In respect to the time in which the liability arises by reason of a depletion of the Guaranty Fund, or in the event of necessity to meet an emergency, the Commercial National Bank insists that the liability arises only when notice of the assessment has been given. To this construction of the statute and the nature of the liability we cannot subscribe, for it is “in event of depletion of said fund” which creates the liability. The indebtedness arises on the part of a member bank to the Depositors’ Guaranty Fund at the very instant depletion thereof exists, or is made to exist. Therefore, the date of insolvency of a member bank, and at the moment its doors are closed by the Commissioner, and notice thereof made, at that same moment, depletion of the Guaranty Fund exists, and liability necessarily attaches to recoup this depletion as against member banks.

This principle was early announced in probably the first safety fund or guaranty of deposits law known to American jurisprudence. In the case of *Receiver of the Danby Bank vs. The Treasurer*, 39 Vt., 93, mandamus was brought against the custodian of the safety fund to compel payment by a member bank. The member banks asserted that their charters had expired subsequent to the date of insolvency of the petitioner bank, but prior to the date of assessment. Justice Barrett stated:

*“In view of the purpose for which the fund was created, it seems plain that the fund must be chargeable for the balance of such debts as of the time when the bank ceased to do business by reason of its insolvency. The proceedings in*



*the court of chancery, required by the law to be instituted upon the happening of such insolvency, are for the purpose of ascertaining the extent to which the fund is to be subjected, and to appropriate it accordingly. This being so, none of the banks that had contributed to the fund, now claimed by the receiver, were entitled to withdraw their contribution thereto, by reason of the expiration of their respective charters, unless it be the Vergennes Bank, for it stands confessed that none of their charters had expired at the time Danby Bank stopped business on account of being insolvent."*

The same effect must be given to the Texas statute; that is to say, the liability of the member bank, for a depletion, arises at the moment the Commissioner takes charge of an insolvent bank; the amount of the liability is uncertain until the Commissioner has collected the assets, paid the depositors as is required by the succeeding provisions of the Bank Guaranty Law (Arts. 454-457 and 486-487), at which time he may ascertain the exact amount and then the extent of liability is made certain. His determination of the insolvency of the bank is conclusive. (*Collier vs. Smith*, 169 S. W., 1108.) The depletion of the Guaranty Fund, therefore, is conclusive. The extent of the depletion is made determinate by his future statutory duties.

As suggested by the Attorney General (Opinion April 3, 1915, *Cureton and Harris*, page 717), "the Guaranty Fund system is merely a method of insuring banking deposits and, as such, the statutes governing it are largely applicable to the principles of purely mutual insurance. In fact, in Article 486, Revised Statutes, in defining the classes of deposits not protected by the fund, it is declared that the same 'shall not be insured under this chapter.' We are of the opinion, therefore, that so far as our Guaranty Fund is concerned, and the fund itself, the principles of mutual insurance are applicable and the contributors to that fund are entitled under the statutes to substantially the same privileges and rights as the contributors to the insurance fund of the mutual insurance companies."

Resorting to the analogy suggested, we find the rule to be well established in respect to mutual assessment insurance companies, that a member in the absence of special contract assumes liability to pay assessments during the continuance of his membership and that he is liable for dues and assessments levied after the termination of his membership to pay the death losses occurring while he was a member. In the case of *Provident Relief Association vs. Pelissier*, 45 Atl., 563, Justice Blodgett says:

"The defendant's second contention is that he is not liable for assessments levied after his membership ceased. It is hardly necessary to say that this contention cannot be sustained. The obvious test of liability is the time when the losses occurred upon which the assessments were made. The termination of his membership cut off the defendant's liability as to future losses, but, as before stated, it in no way released him from future assessments for the payment of losses then existing. They were valid claims against the plaintiff, the defendant's liability to pay his proportionate part of them was created by his contract of membership, and the plaintiff's right to enforce it against them by assessment is not limited, in respect of time, by his withdrawal from the association. The result is that the plaintiff is entitled to recover such items of its claim as accrued during the defendant's membership. Judgment accordingly." All concurred."

Complete authorities are annotated in the notes to the case of *Fire Insurance Company vs. Ionia Circuit Judge*, 32 L. R. A., 481. Vol. 4, L. R. A., Extra Annotations, *idem*.

Since the liability of the Commercial National Bank of San Antonio has caused depletion of the Guaranty Fund and such liability did not grow out of the "necessity to meet an emergency," which is mentioned as one of the events which authorizes the Banking Board to compel member banks to contribute to the Guaranty Fund, we do not deem it necessary to discuss the time or the amount of the liability in such an event.

We therefore conclude, and you are advised:

(1) That the liability of member banks to the Depositors' Guaranty Fund is one-fourth of one per cent of the daily average deposits determined by the report of such member bank on November 1st, preceding, and due and payable on January 1st of each year.

(2) That the liability and indebtedness of the member bank caused by a depletion of the Depositors' Guaranty Fund arises and dates from the moment the Commissioner of Insurance and Banking declares a member bank to be insolvent and proceeds to wind up the affairs of the corporation pursuant to statute. The order of assessment made by the Board only fixes the amount of liability which had theretofore arisen.

We are now concerned with the manner and the time in which liability on the part of the member bank to the Guaranty Fund ceases.

Again, with respect to one-fourth of one per cent of the average daily deposits assessed against member banks, we take the rule to be the same as stated in *Bank of Broken Arrow vs. State*, 184 Pac., 63, to the effect that the statute provides for annual payments during the continuance in business of the State bank, and the bank is liable only for such of these payments as mature, or, are payable while it is doing business as a State bank. It is true that one-fourth of one per cent of the average daily deposits is assessed on member banks and it is payable annually until the Guaranty Fund reaches five million dollars, but these annual payments do not constitute charges against a member bank after it has ceased to do business. We are aware of the decision by the Supreme Court of Oklahoma in the case of *State vs. Bank of Cushing*, 150 Pac., 213, but this decision is based on a statute, which in that case was held to levy in praesenti a given percentage, payable over a period of years, while the Texas statute evidently provides for annual assessments and payments only.

In respect to assessments caused by the depletion of the Guaranty Fund, or "in event of necessity to meet an emergency," we think the obvious rule is that only such banks as are doing business at the time of insolvency of a member bank are subject and made liable to the Depositors' Guaranty Fund in the amount of the depletion, that is to say, the date of insolvency of a member bank is a determination date from which must be determined the member banks that are required to contribute. The exact question was so determined in the case of *People vs. Walker*, 17 N. Y., 502.

The same rule is applicable in the case of assessments made upon members in a mutual insurance company. If the losses for the payment of which the assessment is levied occurred before a policy was taken out, then the member and policyholder is not liable for such assessment. *Mutual Fire Insurance Co. vs. Boggs*, 33 Atl., 349. Therefore, if by any of the lawful means a member bank has ceased to

do business prior to "the event of the depletion of said fund," then such member bank would not be liable for the assessment, "the event of depletion" being the date of insolvency of a member bank and the liability of the Guaranty Fund to its depositors.

For the reason stated above as to the cessation of liability in "the event of necessity to meet an emergency" of a member bank to the Guaranty Fund, we shall not discuss that question.

The termination of the business of banking in this State under the Guaranty Fund may result in a voluntary liquidation of a State bank, or the taxing over of the bank by the Commissioner of Insurance and Banking in pursuance of the statutes for liquidating purposes, or when a State bank converts into a national bank, or by liquidating all deposit accounts and filing amendments to their charters, stating that it is not their purpose to receive deposits. (Opinions of Attorney General, March 19, 1914, page 627, Cureton and Harris.)

In the first instance, in case of voluntary liquidation of a member State bank, advice has been given heretofore as to the time when said bank is no longer liable to the Depositors' Guaranty Fund, either under statutory assessments or assessments made by the Board. (Opinions of the Attorney General, August 18, 1915, page 725, Cureton and Harris.) Also, advice was given in the case of involuntary liquidation in the same opinion.

We are now concerned with the instance of a State bank converting into national bank. As stated above, this takes effect as of the date of the certificate of the Comptroller of the Currency. Thereafter, such converted bank would not be liable for annual payments of one-fourth of one per cent of the average daily deposits coming due on January 1st following (*State vs. National Bank*, 33 Md., 75), nor for assessments caused by the depletion of the Guaranty Fund where the insolvency of a member bank occurred after the date of the conversion of a State bank into a national bank, but the converted national bank is liable to the Depositors' Guaranty Fund for all assessments caused by the depletion of the Depositors' Guaranty Fund resulting from insolvency of member banks occurring prior to the date of conversion. A State bank by conversion into a national bank does not escape liabilities incurred by it while a State bank; that is, a national bank is responsible for all the liabilities incurred by it while a State institution. It is stated that a State bank passes from one jurisdiction to another, but its identity is not necessarily destroyed. It remains substantially the same institution under another name. (*Coffee vs. National Bank*, 2 Am. Rep., 488; *State vs. Bank of Cushing*, 150 Pac., 212; *Kelsey vs. National Bank*, 69 Pa. St., 426.

These principles cannot be contested and are well established. The liabilities of the Commercial National Bank are the same as were the liabilities of the Commercial State Bank as of date April 8, 1922. More specifically, the Commercial National Bank of San Antonio would, therefore, be liable and it is indebted to the Depositors' Guaranty Fund for the depletions of said fund caused by the insolvency of the First Guaranty State Bank of Collinsville on December 27, 1921, the proportionate assessment against the Commercial National Bank being \$646.93; for the El Paso Bank and Trust Company, which became insolvent March 7, 1922, the proportionate assessment against the Com-

mercial National Bank being \$1023.13; for the First State Bank of Gary, which became insolvent February 23, 1922, the proportionate assessment against the Commercial National Bank being \$374.17, the total amount of which is \$2044.23.

It will be remembered that the Traders State Bank of Cleburne having failed on April 15th, and the Farmers and Merchants State Bank of Gustine having failed on April 22, 1922, respectively, caused depletions of the Depositors' Guaranty Fund subsequent to April 8th, the date on which the Commercial State Bank of San Antonio converted into a national bank. Therefore, it would not be liable for its proportionate amount of the assessments caused by these later failures.

Full advice has heretofore been given on August 18, 1915 (page 725, Cureton and Harris), to the Commissioner of Insurance and Banking as to the reversionary interest of a State bank in the Depositors' Guaranty Fund and the time when such fund should be returned to the bank ceasing to do business.

We see no reason why the same principles would not apply to a bank converting from a State bank into a national bank when it has been ascertained that the depositors of the bank entitled to protection by the Guaranty Fund have been paid, or when such depositors have accepted their deposits in the converted national bank, the Banking Board would be authorized to refund and return such of the bank's funds as remain in the Depositors' Guaranty Fund rightfully belonging to it, and authorize the cancellation of the deposits in said converted bank to the credit of the Depositor's Guaranty Fund.

You are therefore advised, pursuant to the principles above announced, that the State Banking Board and the Commissioner of Insurance and Banking are authorized to adjust the credit of the Depositors' Guaranty Fund in the Commercial National Bank of San Antonio, and the funds of that bank remaining in the Depositors' Guaranty Fund, on the basis of the liability of the Commercial National Bank and its indebtedness as set out above in the sum of \$2044.23.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2503, Bk. 58, P. 47.

**BANKS AND BANKING—PRIVATE BANKS—SENATE BILL NO. 52, ACTS  
REGULAR SESSION, THIRTY-EIGHTH LEGISLATURE, CHAPTER 185.**

1. Senate Bill No. 52 is effective June 13, 1923, and prohibits the organization, establishment and operation of private banking institutions or business.
2. Senate Bill No. 52 makes it unlawful for "any person, association of persons, partnerships or any trustee or trustees acting under any common law declaration of trust" to use, advertise or put forth any sign as a "bank, trust company, bank and trust company, or savings bank" or to do business as such.
3. Private banks (a) having two years' continuous existence prior to June 13, 1923; (b) private banks successfully operated for twenty years now suspended reorganized prior to April 3, 1924; (c) private banks organized twelve months prior to June 13, 1923, and now liquidating another bank are exempt from the provisions in paragraph No. 1 above, sections Nos. 1 and 2 of the act.
4. Private banks (a) having two years' continuous existence prior to June 13, 1923; (b) private banks successfully operated for twenty years now suspended reorganized prior to April 3, 1924; (c) private banks organized twelve

months prior to June 13, 1923, and now liquidating another bank must comply with Sections 3, 4, 5, 7 and 8 of Senate bill No. 52.

5. Banks incorporated under special act of the Legislature granted prior to 1876 must comply with Chapters 1, 2, 3 and 6, Title 11, Revised Statutes, 1911—General Banking Act.

6. Statutory Construction.—General provisos to an act of the Legislature adjoined and appended to an intermediate section thereof, intended to apply to the preceding sections only, must be so construed as to give effect to the intention of the Legislature.

7. Words and Phrases—Private Banking.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 12, 1923.

*Hon. J. L. Chapman, Commissioner of Insurance and Banking, Capitol.*

DEAR SIR: Your letter of June 7th, addressed to the Attorney General, making inquiries concerning the interpretation of Senate bill No. 52 has been received and handed to me for reply.

You ask this Department to give you an interpretative opinion of Senate bill No. 52 with respect to its extent and application to private banking establishments and business in Texas. You state several inquiries made by private bankers have been received by your Department among which the following are typical:

Does Senate bill No. 52 apply, and, if so, what section thereof, to: The Imperial Bank and Trust Company, Sugarland, operates under common law declaration of trust begun January 1, 1919; the Bank of Miami has operated as a private bank for twenty years; the People's Bank, Paradise, unincorporated, organized in 1916, conducts a banking business; the Farmers bank, Peastee, has continuously operated a bank for seventeen years; D. Sullivan & Co., private bankers of San Antonio, have been conducting a banking business since 1883 in the name of "D. Sullivan & Co." and Mr. Sullivan is the sole owner; the Gordon Banking and Mercantile Company do a small banking and loan business, using their own capital, and have conducted the business for twenty years; and the Numismatic Bank of Fort Worth advises they do not conduct a banking business but buy and sell old coins. You desire to know what particular provisions of Senate bill No. 52 these and similar companies must comply with.

## I.

We reserve an expression of opinion as to the constitutionality of the act or any of its provisions. Senate bill No. 52, being Chapter 185, Acts of the Regular Session of the Thirty-eighth Legislature, was on March 7, 1923, finally passed and received the approval of the Governor April 3, 1923. In Section 14 the emergency clause is embodied in the bill, but upon its passage it failed to receive the required number of votes and therefore it is effective as a law ninety days after the adjournment of the Regular Session of the Thirty-eighth Legislature, which is June 12, 1923.

Senate bill No. 52, as its caption indicates, prohibits after June 12, 1923, the organization, establishment or operation of private banking institutions or banking business within this State. This prohibition is contained in Section 1 of the act. It provides that "it shall be unlawful for any person, association of persons, partnerships or trustee or trustees acting under any common law declaration of trust to here-

after organize or establish or begin the operation of any banking institution or business within this State or to resume such operation except as provided in this act."

In Section 2 the Legislature further makes it unlawful for "any person, association of persons, partnerships or any trustee or trustees acting under any common law declaration of trust" (1) to use, advertise or to put forth any sign "as a bank, trust company, bank and trust company, or savings bank"; (2) it further makes it unlawful for the named persons to solicit or receive business as such "bank, trust company, bank and trust company or savings bank"; (3) it further makes it unlawful for such named persons to use as their name or part of their name in any sign, advertising, etc., the words "bank, banker, banking company, trust, trust company, bank and trust company, savings bank, or any other term which may be confused with the name of chartered banking corporations"; (4) it is further made unlawful for the named persons to adopt or use any artificial name or business title other than the owners or managers named in the conduct and operation of private banking business.

Section 2, as will therefore be observed, is clearly related to Section 1 and undoubtedly was incorporated in the bill to make that general prohibition effective. This section likewise supplies by construction, if not directly, definitions of the words used in Section 1, which makes clearer the intention of the Legislature. It is the organization, establishment and operation of private banking institutions or business by "any person, association of persons, partnerships or any trustee or trustees acting under any common law declaration of trust" that is inhibited.

The term "private banking" signifies individuals or unincorporated firm conducting a banking business. In *re Surety Guaranty and Trust Company*, 121 Fed., 73; *People vs. Doty*, 80 N. Y., 225. A private bank is one which conducts the business of banking without incorporation and without authority of law. McGee on Banks and Banking, third edition, pages 25 and 29. Prior to the enactment of this bill the banking business in Texas could only be conducted by national banks, State banks under the general banking statutes, or special charter, and private individuals or associations. Revised Statutes, 1911, Article 559. Private individuals or firms conducting a business were required to use the term "unincorporated" after their names. Article 558, Revised Statutes, 1911.

However limited or extended the definition of "private banking institutions or business" may be, it is certain the Legislature intended to prohibit such business by unincorporated individuals or organizations in Texas except as therein limited. This is the extent of any intended definition by this Department. However, in arriving at a definition of the term "private banking institution or business" we must take into consideration the language contained in Section 2 which prohibits unincorporated bankers from advertising as a "bank, trust company, bank and trust company, or savings bank." The Legislature by these words evidently gives an extended and broadened meaning to the term "banking business," including therein the business authorized to be conducted by corporations under the provisions of Title 14, Revised Statutes, 1911, including (a) banks of deposit;

(b) banks of discount; (c) banks of deposit and discount; (d) banks and trust companies; (e) savings banks. See Articles 370, 380, 386, Title 14, Revised Statutes, 1911.

We are simply indicating the scope of the prohibited business and not defining in detail what is "private banking business." It is the conduct and acts done by persons and associations which determine the status of a particular business; that is to say, it is a question of fact in each instance whether or not a given person or association of persons is organizing, establishing or conducting a banking business within the meaning of this statute. It must be apparent that this Department cannot pass upon questions of fact. This has always been the rule and we adhere to it here. It is held that anyone carrying on a single banking operation is within a statute prohibiting private banking. *People vs. Bartow*, 6 Cow., 290. See also *Engle vs. Omalley*, 219 U. S., 128. See also *Oulton vs. Savings Institutions*, 17 Wall., 118.

Penalty for violations of Section 1 of the act prohibiting private banking is prescribed in Section 10. Violation is made a misdemeanor punishable by fine of not less than \$100 nor more than \$1000 or by imprisonment in the county jail for not less than thirty days nor more than twelve months or by both fine and imprisonment. Each day is a separate offense. Penalties for violations of Section 2, which prohibits advertising by private banking institutions "as a bank, trust company, bank and trust company, or savings bank," is provided in Section 10 of the act and punishable as violations of Section 1.

## II.

There are three classes of "persons, associations of persons, partnerships, trustee or trustees acting under any common law declaration of trust" who are exempted from the prohibitions contained in Sections 1 and 2 of the act, viz: (1) The named persons "who at the time this act becomes effective (on June 12, 1923) have been two years next preceding actively engaged in the banking business as defined above; (2) the named persons "who have successfully operated a bank for twenty years though suspended prior to June 12, 1923, which may resume operation within twelve months after the passage of this act, that is, prior to April 3, 1924; (3) the named persons who have for one year prior to the effective date of this act (June 12, 1923) conducted a bank and have acquired the assets or part of the assets and assumed the liability or part of the liabilities of a bank or trust company theretofore in liquidation. It is said with respect to persons, association of persons, partnerships or any trustee or trustees acting under common law declaration of trust conducting business within the three foregoing provisos that the right to conduct the business and to resume a banking business as therein provided "is expressly recognized, confirmed and fixed." Section 2.

The provisos to Section 2 read as follows: "provided, however, that the provisions of the sections of this act shall not apply to," and "provided further that the provisions of this act shall not apply to."

The language of the provisos seemingly exempts private bankers who have conducted a business for two years prior to June 12, 1923, and private banks which have been conducted for twenty years and have resumed within twelve months after the passage of the act, and

private banks which are organized within twelve months before June 12, 1923, and now liquidating some other bank, from all the provisions of the entire act. This because the term "act" is used. We do not, however, so construe the language.

Our reasons are apparent. We find that Section 3 prohibits the named persons from employing the funds of its depositors in speculative ventures promoted by the bank or its officers. Section 4 provides that the named persons shall within thirty days after the bill shall take effect (June 12, 1923) and annually thereafter, and on the 15th day of January of each year, file with the county clerk of the county of its principal place of business, under oath, a statement that the bank is solvent and has property and assets in excess of its liabilities. Section 5 provides that the named persons shall within twenty days after the effective date of the bill, June 12, 1923, and annually thereafter, not later than January 20th of each year, file with the county clerk of the county of its principal place of business a list of the partners, owners, etc., of the institution and publish such information. Section 7 prohibits such named persons from taking deposits when insolvent. Section 8 prohibits the named persons from advertising in a newspaper an untrue statement of the bank's financial responsibility. These sections immediately following the proviso to Section 2 conclusively contemplate the existence and operation of private banking institutions in Texas.

Undoubtedly, those persons, associations and common law trusts coming within the provisos of Section 2 must comply with Sections 3, 4, 5, 7 and 8. They alone may conduct and operate the business regulated. If it were otherwise, these provisions of the bill would be meaningless, since there would be no such institution or business to which they could apply. But this much is true, that the whole act is not applicable to the persons, associations and common law trusts contained within the provisos to Section 2. The act expressly so states. It must be determined what sections do and do not apply to the exempted persons and associations.

It is a general rule that a proviso limits or restricts the preceding section or part of the act. The provisos under discussion are not exceptions; that is to say, the persons and things or cases are not excepted in toto from the provisions of the bill, but the bill is restricted and limited in its application. The provisos can be construed without violence to their language as not to be inconsistent with the body of the act. This saves them from necessary rejection. It is often announced that the position of a proviso in a bill has controlling influence upon the extent of its applicability. This rule must not be carried to an extent that it overrides the general intention of the act. *Deven vs. York County*, 27 Atl., 274. We think the rule is peculiarly applicable in this case. The provisos contain the language that the "act shall not be applicable," yet by construing them with the immediately succeeding sections of the bill we know that they cannot be so broadened.

We may arrive at the intention of the Legislature by following the rule that a proviso to a section of a bill relates only to the preceding portions or sections of the enactment. *People vs. McMurrey*, 127 Ill. Ap., 248; *Fevet vs. McCustion*, 147 S. W., 867. Indeed, con-



sidering all the sections of the bill together, we think the Legislature plainly intended that the provisos to Section 2 were applicable only to Sections 1 and 2 and not to the succeeding sections of the act. Otherwise the succeeding sections would be meaningless and would have no application. The succeeding sections are in meaning and intent continuations of the provisos and relate to the provisos. Lewis' Sutherland's Statutory Construction, Vol. 2, p. 673; Block on Interpretation of Laws, p. 432.

Concretely stated, Sections 1 and 2 of the bill, respectively prohibiting private banking business and advertising as a bank or banker by persons, associations, partnerships or common law trusts, are not applicable to (1) named persons who have conducted a private banking business for a period of two years preceding the effective date of the bill; (2) the named persons who have conducted a bank for twenty years now suspended and which may resume its business within twelve months after the passage of the act; (3) the named persons who are conducting a private bank engaged in liquidating another.

While such exempted persons, partnerships and common law trusts must comply with Sections 3, 4, 5, 7 and 8 and (a) desist from using depositors' funds in speculative ventures promoted by the bank and its officers; (b) within thirty days after June 12, 1923, and annually thereafter, file a statement with the county clerk under oath that the bank is solvent and its assets exceeds its liabilities; (c) and within twenty days from June 12, 1923, and annually thereafter, file with the county clerk and publish a statement of the officers, managers, and owners of the bank; (d) and be subject to the provisions of Section 7 prohibiting the receipt of deposits when insolvent; (e) and refrain from publishing untrue statements of financial responsibility.

Section 6 of the bill requires that banks chartered under a special act of the Legislature prior to the Constitution of 1876 shall be subject to and regulated by Chapters 1, 2, 3, and 6, Title 14, Revised Statutes, 1911. That is to say, under the provisions of the bill banking corporations under special acts of the Legislature are no longer permitted to come under the General Banking Act as provided in Article 562, Revised Statutes, 1911, but it is now made mandatory that they shall accept Chapters 1, 2, 3 and 6, Title 14, Revised Statutes, 1911. Chapter 5 of Title 14 being the Guaranty Fund Act, is not included.

The remaining provisions of the bill are those fixing penalties for the violations of the provisions of the bill heretofore discussed and providing that if any section be held invalid it shall not effect the remaining ones, and, further, that the act shall be considered as supplementary to and in addition to all laws now in force in the State of Texas regulating and controlling banks and banking.

You are therefore advised that the Imperial Bank and Trust Company, Sugarland, Texas, now operating a bank under a common law declaration of trust, doing business January 1, 1919, and to June 12, 1923, is subject only to Sections 3, 4, 5, 7 and 8 of Senate bill No. 52; the Bank of Miami is subject to the provisions of Sections 3, 4, 5, 7 and 8; the People's Bank of Paradise is subject to the provisions of Sections 3, 4, 5, 7 and 8; the Farmers Bank of Peastee is subject to the provisions of Section 3, 4, 5, 7 and 8; D. Sullivan & Co., private bankers of San Antonio, is subject to the provisions of Sections 3, 4,

5, 7 and 8; the Gordon Bank and Mercantile Company is subject to the provisions of Sections 3, 4, 5, 7 and 8; the Numismatic Bank of Fort Worth is subject to the provisions of Section 2, paragraph 2, of Senate bill No. 52.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

Op. No. 2535, Bk. 59, P. 15.

BANKS AND BANKING—LIMIT OF INDEBTEDNESS—CERTIFICATES OF  
INDEBTEDNESS.

1. A company incorporated under Title 14, Revised Statutes, 1911, with trust powers, is prohibited from contracting debts or becoming "in any way liable" in an amount at any one time in excess of its unimpaired capital stock and unimpaired certified surplus, except for (1) moneys collected and deposited; (2) bills of exchange drawn on deposits; (3) liabilities for dividends and profits to stockholders; (4) liabilities authorized by Federal Reserve Act; (5) liabilities authorized by "Federal Agricultural Credits Act."

2. A company incorporated under Title 14, Revised Statutes, 1911, with trust powers, has authority to become indebted to the extent of its unimpaired capital stock and certified unimpaired surplus upon any contract or transaction within the scope of its powers, regardless of its liability for deposits, bills of exchange drawn on deposit, liability to stockholders for dividends and profits, liability under the Federal Reserve Act and liability under the Federal Agricultural Credits Act.

3. Liability of such companies on (so-called) certificates of deposit due in twenty years and issued for a sum in double the amount of consideration received therefor, must not exceed at any one time the unimpaired capital and certified unimpaired surplus.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 15, 1923.

*Hon. J. L. Chapman, Commissioner of Banking, Capital.*

DEAR SIR: The Attorney General is in receipt of your communication of December 7th with enclosures. The inquiry is twofold; first, whether or not a bank or a bank and trust company may issue certificates of deposit of the character and kind hereafter set out; second, to what extent may such corporations issue such certificates, or, in other words, is there a limitation upon the issuance of such certificates?

The instrument designated as a certificate of deposit reads as follows:

"FORM OF CERTIFICATE.

"The Security Trust Company of Austin, Austin, Texas, hereby certifies that it has this . . . day of . . . , 19 . . . , received a deposit in the sum of . . . dollars (\$ . . . ) and hereby promises to pay to . . . , or to its assigns, on or after twenty (20) years after date hereof, at the office of said Trust Company, the sum of . . . Dollars (\$ . . . ) in gold coin of the United States of America, of or equal to the present standard of weight and fineness, on the presentation and surrender of this certificate properly endorsed; which sum is the amount originally deposited plus accrued interest at the rate of five per cent (5%) per annum compounded semi-annually during the term of years elapsing between the date of issuance and the date of maturity of this certificate.

"It is specifically understood and agreed by the purchaser or holder hereof that at no time during the life of this certificate shall its total value be an amount greater than the amount paid in for same plus accrued interest to

date, at the rate of five per cent (5%) per annum, compounded semi-annually. This certificate cannot be cashed, however, until twenty (20) years after date.

"In witness whereof, the Security Trust Company of Austin has caused this certificate to be signed by its duly authorized officers and its corporate seal to be affixed this . . . . day of . . . . ., 19

Cashier.

President."

In discussing the questions presented, we are favored with written discussions and arguments from counsel and attorneys in behalf of the company desiring to issue such certificates, as well as the parties interested in having such certificates issued.

Since the inquiry is presented by a company organized under Title 14, Revised Statutes, 1911, having trust powers, the question will be answered with respect to such corporations only.

Such corporations, among other powers, are authorized "to conduct the business of receiving money on deposit and allowing interest thereon" (Art. 376, R. S., 1911), and "when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligation of the company may be given therefor, but it shall have no right to issue bills to circulate as money."

Without classifying the obligation evidenced by the copied contract, other than to say that it is the "obligation of the company" for (1) "moneys borrowed"; (2) or moneys "received on deposit"; (3) or for moneys received as "for investment," we advise that the issuance of such obligations is authorized and not within the prohibition restricting the right of such companies "To issue bills to circulate as moneys." (Raymond Adams vs. Compo Bone Corp., and the Maybrook National Bank, U. S. District Court, So. District of New York, July 25, 1922, unreported; Gueydon Bros. vs. Quintanilla, 2 App. Civ. Cases, par. 617 (Feb. 4, 1885); First National Bank vs. Greenville National Bank, 19 S. W., 334; Moore vs. Hanscomb, 103 S. W., 665; Heironimus vs. Sweeney, 83 Md., 158 (1896); Hunt, Appellant, 141 Mass., 515 (1886). Other cases are cited under Section 5183 of the United States Revised Statutes prohibiting the issuance of notes to circulate as money, Vol. 6, Federal Statutes, Annotated, p. 734; other State authorities, 7 C. J., 647, note 37.)

The statutes contain limitations upon the obligations and liabilities of companies incorporated under Title 14 of the Revised Statutes. For instance, the incurring of deposit liabilities in specified amounts in excess of the capital stock is prohibited. (Art. 564, R. S., 1911.) Such corporations cannot become liable for more than fifty per cent of the capital and surplus in the banking house nor more than fifteen per cent in furniture and fixtures. (Acts Reg. Ses., 38th Leg., Ch. 150, Sec. 2.) Further, such corporations are limited as to deposit liabilities in that it must retain statutory reserves. (Arts. 377 and 377a.)

However, the first specific limitation as such upon the indebtedness of companies organized under Title 14 (outside of Article 1162, General Corporation Statute, which up to 1917 prohibited borrowing in excess of the capital stock) was incorporated into the statute in 1914. (Acts Third Called Session, 33rd Leg., Ch. 3, p. 46; Art. 570a, R. S., 1911.) As amended the limitation reads as follows:

"No banking corporation 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 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 reserved profits.

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

“(d½) Liabilities incurred under the provisions of the ‘Agricultural Credits Act of 1923.’

“(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.

“(r) 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 2d C. S., 38th Leg., H. B. 182 (Art. 570a).”

The proper interpretation of the effect of restrictive Article 570a upon authorized powers of a bank and trust company under Article 376 and Article 385, material portions of which are hereinabove quoted, is apparent. As stated by Judge Gilbert in *Webber vs. Spokane National Bank*, 64 Fed., 208:

“While it has the power to enter into contracts and incur debts, a limitation is placed upon the extent of the indebtedness for which it may become liable. The purpose of this limitation may be conceded to be the protection of the depositors and others dealing with the bank. \* \* \* Taken in their ordinary sense and import we take them to mean that a national banking association is prohibited from contracting debts or liabilities other than those within the four classes named (U. S. R. S., 1911, Texas), except to the extent of its paid-up unimpaired capital stock, and that to that extent there is an implied authority to become indebted upon any contract or transaction which lies within the scope of its powers no matter what may be the amount of its debt or liability upon its deposits, its notice of circulation, its special funds subject to draft, or its declared but unpaid dividends.”

Excessive indebtedness other than that permitted is *ultra vires* subject to be called in question by the sovereignty. (*Brown vs. Scheiler*, 118 Fed., 981; *idem.*, 194 U. S., 18. Other authorities are *Bank vs. Vermont Nat. Bank*, 22 Fed., 186; *Waterberry vs. McKinnon*, 146 Fed., 735; *Hanover Bank vs. First Nat. Bank*, 109 Fed., 421; *Gratit County vs. Munson*, 122 N. W., 117; 17 Opinion (U. S.) Attorney General, 471.) Hence the banking and trust powers of a corporation under Section 9, Article 385, Revised Statutes, 1911, that “when moneys \* \* \* are borrowed or received on deposit or for investment the bond or obligation of the company may be given therefor” is limited by Article 370a. That is, the corporation cannot “at any time be indebted or in any way liable in excess of its unimpaired capital stock and certified unimpaired surplus except (1) for moneys deposited or collected; (2) for bills of exchange drawn against actual deposits or money due; (3) for liabilities to declared by unpaid dividends and profits to stockholders; (4) for liabilities regulated by the Federal Reserve Act; (5) for liabilities incurred under the Federal Agricultural Credits Act; (6) liability on a guaranty by a trust company whose demand deposits are less than its interest-bearing deposits.

The obligation evidenced by the contract first quoted herein is not that described in exceptions 2, 3, 4, 5 and 6. If the indebtedness or

liability of the company is one "of demands of the nature following: (a) moneys deposited with or collected by it," then there is no limitation on the extent to which the company may become obligated thereon except that required in Article 561, Revised Statutes, 1911. That is, Article 570a does not restrict the indebtedness or liability.

Succinctly stated, is the holder of the obligation quoted above a depositor and is the obligation of the bank that for a deposit?

The instrument is designated as a certificate of deposit. It is a receipt, let us say, for \$50, and a promise to pay \$100 at the expiration of twenty years. The basis of the indebtedness is described as for \$50 received and accumulated interest compounded semi-annually at 5 per cent, totalling \$50 for the term. Assuming that the instrument is a certificate of deposit, such ordinary obligation has universally been treated in substance and effect as the bank's promissory note. (Digest of National Bank Decisions, 1912-20, p. 148; *Guydon Bros. vs. Quintanilla*, 2 Civ. App. Rep., par. 617 (1885); *Moore vs. Hanscomb*, 103 S. W., 665; *First National Bank vs. Greenville*, 19 S. W., 334; *Miller vs. Austin*, 13 How., 218 (1851); *Orleans Bank vs. Merrill*, 2 Hill, 295 (1842); *Kilgore vs. Berkley*, 14 Conn. Rep., 363 (1839). *Contra: Bellow Bank vs. Rutland*, 48 Vt., 377.)

The court states, "and as such note, the State courts generally have treated certificates of deposit payable to order." At that time there had been only two reported decisions by the American courts. (Other cases, see 7 C. J., par. 336 and Note 39.) Ordinary certificates for money received in customary terms have been treated as negotiable. (Brannan's *Negotiable Instruments Law*, 3rd ed., pp. 7, 42, 184.) Subject to the rules of demand for payment applicable to demand notes. (Vol. 1, H. L. R., 253; 13 H. L. R., 304; 14 H. L. R., 468.) This evidence of indebtedness and liability, while called a certificate of deposit, may be based upon a deposit. (Opinions of Attorney General, March 12, 1915; *Cureton and Harris on Banks and Banking*, p. 396, and authorities there cited.) Or such evidence of indebtedness may be based upon a loan to the bank. (Authorities *supra*; *Logan National Bank vs. Williamson*, 2 Ohio Cir. Ct., 118; 1 Ohio Dec., 395.)

The character of the antecedent debt, if inquired into, would disclose, in ordinary cases of certificate of deposits, whether or not it is based upon such a loan or upon a deposit. The distinction between a loan and a deposit is difficult. This Department has undertaken to specify the general differences in its opinion of March 12, 1915, *Cureton and Harris on Banks and Banking*, page 696, pointing out, as is usually done, that a deposit is the delivery of money to a bank for safe-keeping, subject to order; that it is for the benefit of the depositor; that the depositor retains control over the deposit subject to banking principles, allowing the intermingling of the specific fund deposited; incidental benefit may come to the bank, etc. Likewise, the Department has specifically designated certain proposed transaction for the issuance of a certificate, as a loan. (Opinion of Attorney General, February 17, 1915; *Cureton and Harris, Banks and Banking*, page 675, where it was stated that a loan contemplates a lender, a principal sum, an interest rate and a payer or payers, and that certain concessions and discount are offered by the bank to obtain the loan, etc.)

We are not left in doubt as to the component parts of properties of

the obligation of the bank on the instrument in question. It is declared that the corporation has received \$50 in cash; it is declared that the other \$50 on a \$100 obligation is interest at five per cent compounded semi-annually, retained and added to the principal. The legality of a contract to pay interest on money due and an agreement to add such interest to the principal to bear interest again in future is without question. (*Banks vs. McClellan*, 24 Md., 63.)

However, we must get to the nature and substance of the transaction and the real true character of it ascertained. The form and simulated language must be penetrated to truthfully characterize the transaction. Separately considered, putting out of view the resultant obligation, the constituent elements as above indicated of the antecedent debt, represented by the instrument, might be designated as an obligation to return \$50 received and payment of an aggregate of \$50 being the aggregate amount of semi-annual interest installments.

In our view of the obligation, we do not consider it necessary to determine whether the resultant obligation is or is not a loan or deposit. Certainly the combined constituent elements of the antecedent debt cannot, in truth, be called a loan, because at least half of it is for interest, and so, in truth, the same may not be called a deposit, for at least half of it is for interest. The real nature of the transaction is none other than a contract of bargain and sale. The purchaser for \$50 is permitted to purchase promissory note of the corporation in the sum of \$100, payable in twenty years. The seller, the corporation, sells its credit designated as a "certificate of deposit" having the characteristics of a bank's promissory note. The obligation is called a "certificate of deposit." In the case of *Adams vs. Compo Bond Corporation* it was called a bond. Prior to the establishment of the national banking system and during the time of the Civil War, issuance of obligations having many of the same characteristics were called "bank notes." The differences between the obligation arising in such transaction and the relationship between a depositor and depositee bank are briefly described in the case of *Kidder vs. Hall*, 251 S. W., 499:

"Various distinctions may be noted between the relationship created by the issuance and sale of a draft, and the receipt of a deposit by a bank. In the case of a deposit, the money is placed in the bank in reality for the benefit of the depositors (*Elliott vs. Capital City State Bank*, 128 Iowa, 275, 103 N. W., 777, 1 L. R. A. (N. S.), 1120, 1134, 111 Am. St. Rep., 198), while in the sale of a draft the transaction is for the benefit of the bank making the sale. When a deposit is made the bank receives assets, and the depositor has a direct claim against the bank—the relationship is one of primary liability, directly on the contract—while in the issuance of a draft the bank sells assets, and the primary liability is that of the bank against which it is drawn, and the issuing bank is not liable until payment has been refused by the drawee bank. See *Texas Negotiable Instruments Act*, Title 1, Arts. 5 to 8; *Vernon's Ann. Civ. St., Supp.* 1922, Vol. 2, pp. 1772 to 1779; *Harper vs. Winfield State Bank (Texas Civ. App.)*, 173 S. W., 627. Another illustration may be given. Take the instance where money, belonging to another than the one making the deposit, is placed in a bank without the consent of the owner. In such a case the relation of banker and depositor is not created; the bank does not take title to the fund, and, regardless of the innocent purposes of the bank, it is guilty of conversion. 2 *Michie on Banks and Banking*, pp. 897, 898, 899; *Winslows vs. Harriman Iron Co. (Tenn. Ch. App.)*, 42 S. W., 698; *Mingus vs. Bank of Ethel*, 136 Mo. App., 407, 117 S. W., 683, 685; *Board of Fire & Water Commissioners vs. Wilkinson*, 119 Mich., 665, 78 N. W., 893, 44 L. R. A., 493; *Patek vs. Patek*, 166 Mich., 446, 131 N. W., 1101, 35 L. R. A. (N. S.), 461. See, also, *Wilson vs. Wichita Co.*, 67 Texas, 647, 4 S. W., 67, and 3 *Rose's*

Notes on Texas Rep., p. 810, and 1913 Supplement, p. 548. On the other hand, if one having the money of another goes to a bank and purchases a draft, and the bank innocently receives the money and issues a valid draft therefor, the bank becomes the owner of the money paid for the draft regardless of the title which the purchaser may have had to the funds. Oklahoma State Bank vs. Bank of Central Arkansas, 120 Ark., 369, 179 S. W., 509, 511; First National Bank vs. Gilbert, 123 La., 845, 49 So., 593, 25 L. R. A. (N. S.), 631, 131 Am. St. Rep., 382, and cases cited in notes; State Bank vs. United States, 114 U. S., 401, 5 Sup. Ct., 888, 29 L. Ed., 149; Holly vs. Missionary Society, 180 U. S., 284, 293, 21 Sup. Ct., 395, 45 L. Ed., 531; 27 Cyc., pp. 863, 865.

"These illustrations show a clear distinction between the obligations and rights which arise from contracts of deposit and of sale and purchase of drafts. Others might be stated, but we deem it unnecessary."

Without, therefore, further particularizing upon the complexion of the obligation other than the flat statement that the indebtedness or liability of the bank issuing such obligation is not for "(a) money deposited with \* \* \* the corporation under provisions of Article 578, Revised Statutes, 1911, we advise that it is our opinion that the corporation issuing such is limited in an amount, together with existing liability not of the character excepted, not exceeding its unimpaired capital stock and certified unimpaired surplus. (17 Opinions United States Attorney General, 471; also Opinion Attorney General, February 17, 1915; Cureton and Harris, Banks and Banking, p. 675.) (Article 528, Penal Code, prohibits certifying checks without funds.) Article 546, Revised Statutes, 1911, prohibits use of funds in trade and commerce. Taylor vs. Hutchinson, 40 So., 108; Gilbert vs. Bank, 214 Pac., 377; McQuerry vs. State, 195 N. W., 432.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2510, Bk. 59, P. 39.

BANKS AND BANKING—CONTRIBUTIONS AND ASSESSMENTS OF MEMBER  
BANKS FOR BENEFIT OF GUARANTY FUND—"DAILY AVERAGE  
DEPOSITS."

1. "Daily average deposits" within the meaning of Article 448, Revised Statutes, 1911 (as amended, 37th Leg., 1st C. S., Ch. 33), upon which annual contributions and occasional assessments are calculated and paid for the creation and maintenance of the Depositors' Guaranty Fund, include all deposits of member banks, except such as are expressly exempted by statute, viz.: secured public funds, savings department deposits notwithstanding all of such deposits are not protected by such fund but only the bona fide uncertified non-interest-bearing and unsecured deposits. (Acts Reg. Sess., 38th Leg., Ch. 45; Ch. 150, Sec. 4.)

2. A depositor whose deposits come within the meaning of "daily average deposits" is "one who delivers or leaves with a bank money or checks or drafts, and by virtue of which action the title to the money passes to the bank." The term "deposit" should be given the general accepted and understood meaning.

3. Money, property and funds received by a bank exercising the power of guardian, curator, executor, administrator, assignee, receiver, trustee by judicial appointment or by will, court depository, or guarantor or surety as such under Article 540, Revised Statutes of 1911, are, per se, neither included nor excluded in the term "daily average deposits," but the facts and the contract as to each of such funds control.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 26, 1923.

*Honorable J. L. Chapman, Commissioner of Insurance and Banking,  
Capitol.*

DEAR SIR: The Attorney General's Department is in receipt of your letter of July 13th, in which you advise that the Houston Land and Trust Company desires to know whether or not their annual report of "average daily deposits" on which its liability to the Guaranty Fund is calculated should include those deposits (1) carried on the miscellaneous ledger containing collections for rents, interest, and miscellaneous collections for clients of which statements are made periodically and payments distributed as directed. Such amounts are not subject to check and are held by the bank as agent. (2) Deposits carried on the trust ledger which include collections of income and principal for account of estate and trusts held for reinvestment and distribution. The amounts are not subject to check but held in a fiduciary capacity.

The question for determination is what deposits are included in the term "daily average deposits" as contained in Article 448, as amended by Acts of the Thirty-seventh Legislature, First Called Session, Chapter 33, 1921. This article levies an annual assessment upon Guaranty Fund banks securing its deposits under the Guaranty Fund equal to "one-fourth of one per cent of its daily average deposits" annually, and in case of a depletion of said fund below \$5,000,000 or in the event of necessity to meet an emergency, the Banking Board has authority to make additional assessments not to exceed two per cent of such "daily average deposits" per annum.

Heretofore the Attorney General on October 17, 1922, discussed at length the origin, character and determination of the liability of a member bank to the Guaranty Fund for its creation and preservation. We held that the liability of member banks rested in the police power reserved to the States, rejecting the bases for such liability announced in *State vs. Farmers National Bank of Cushing*, 154 Pac., 212; *People vs. Walker*, 17 N. Y., 502, as a contract, and the bases announced in *Citizens Bank of Broken Arrow vs. State*, 184 Pac., 63, as a tax, thereby avoiding rules of construction of a contract and the rules of uniformity and equality of tax measures.

The criterion and basis of the police regulations in Texas applies to "daily average deposits" on which assessments to the Guaranty Fund must be paid. Other similar statutes have uniformly used the capital stock as a criterion. While we may say as was said of the Vermont statute in 1851:

"This statute is doubtless very imperfect and unequal in many respects, but there does not seem to be any provision for making the debts of an insolvent bank a charge upon the bank fund upon any rule of equitable obligation among the several banks coming under the general denomination of safety fund banks. It is the fund and the entire fund which is made liable for the payment of all the debts of an insolvent bank, exclusive of capital stock, and this without reference to the time when the debts accrued or when the insolvency occurred or at what time any particular bank began to contribute." *Elwood vs. Treasurer*, 23 Vt., 703.

Yet because the contribution and assessment is based upon average



daily deposits regardless of whether such deposits are protected under such fund evidently does not render the levying statute unconstitutional upon the reasoning announced in *Noble State Bank vs. Haskell*, 219 U. S., 111, "and in the next it would seem that there may be other kinds besides the every day one of taxation *in which the share of each party in the benefit of a scheme of mutual protection is sufficient, compensation for the correlative burden that it is compelled to assume.*" There being no rule, therefore, that a member bank must contribute to the Guaranty Fund only upon such deposits as are protected thereby, however equitable it might be, we must look solely to the statute to determine the character of deposits on which the assessment is based.

Article 448, as amended, specifically exempts secured United States, State or public funds deposited from the "daily average deposits." Article 489 excludes deposits of savings departments. These are the only statutory exceptions and are exclusive, as said in *Denn vs. Reed*, 10 Pet., 546: "It is not for the court to say when the language of a statute is clear that it shall be so construed as to embrace cases because no good reason can be assigned why they are excluded from its provision." The rule applies that when the "enacting clause is general in its language and object and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fully within its terms." *United States vs. Dixon*, 15 Pet., 165. Therefore, the test of determining what is included in "daily average deposits" is not such deposits as are protected by the Depositors' Guaranty Fund, for the reason that the statute itself more closely restricts depositors secured by such funds.

The test to be applied in determining what is included within "daily average deposits" should be that as laid down by the courts, namely, "the term 'deposit' should be given its general accepted and understood meaning." *Austin vs. National Bank of Teague*, 205 S. W., 839. Depositors whose deposits come within the meaning of the term used in Article 448, amended, is "one who delivers or leaves with a bank money, or checks or drafts, and by virtue of which action the title to the money passes to the bank." *Kidder vs. Chapman*, 251 S. W., 497.

Article 540, Revised Statutes, 1911, which was Section 66 of the first General Banking Act of 1905, prior to the Guaranty Fund Law, enacted in 1909, which is cumulative (Section 47, Acts Thirty-first Legislature, page 428) of all existing banking laws, provides that any banking corporation chartered under Title 14, Revised Statutes, 1911, may upon depositing with the State Treasurer \$50,000 in cash or defined securities, upon obtaining a certificate from the Commissioner qualify as guardian, curator, executor, administrator, assignee, receiver, trustee by judicial appointment or under will, or depository of a court and become guarantor or surety upon bonds. The same section, Article 541, provides that the funds deposited with the Treasurer are primarily liable for the obligation of the company in the capacities above named. Such companies shall not exercise the powers together with the powers of bank and trust companies (Article 385) simultaneously unless it shall have a capital or surplus of at least \$100,000 in addition to the deposit with the Treasurer. The deposits received by the bank exercising these powers were secured as provided prior to the

enactment of the Guaranty Fund Law. Nevertheless, the latter act would not exclude such deposits from "daily average deposits" as in the case of deposits of the savings banks. Under the rules announced, it was evidently the intention of the Legislature to include the same therein, since the exceptions provided are exclusive.

Nevertheless, it is at once apparent that the banking corporations, under and by virtue of their general powers as well as under these specific powers, may have in their possession funds and property of others which are not deposits, as, for instance, cash from collecting commercial paper of another (*Langford vs. Schroeder*, 147 Pac., 1050) and funds collected as guardian, executor, assignee, receiver, trustee, etc., of another.

While it is true, as urged by the Houston Land and Trust Company, it may make collections of rents for estates, hold trusts as agent under Article 540, nevertheless, acting as such agent for its clients, it may be that such bank so making the collection as agent, likewise as agent for such clients, deposits such collections with the bank. The fact that an agent makes a deposit for his principal, even though it be the bank itself, does not thereby exclude such deposits from the term "daily average deposits." In fact, it is not prevalent that depositors deposit their funds in banks by agents. We cannot, therefore, say that, per se, the funds carried on the miscellaneous ledger and trust ledger of the Houston Land and Trust Company do not come within the term "daily average deposits," and therefore should not be reported, but, on the contrary, if it should appear that such collections having been made, thereafter the funds are placed on the books of the bank and left with it, by virtue of which action the title thereto passes to the bank, then they are deposits and should be included in the annual report. The facts and contract in each instance govern and the test should be applied as herein set out.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2511, Bk. 59, P. 27.

**BANKS AND BANKING—LIQUIDATION—DIVIDENDS—IMPAIRED CAPITAL STOCK.**

1. Depositors of an insolvent guaranty fund bank who failed to file claims in the manner and within the time prescribed by Article 463, Revised Statutes, 1911, are not entitled to participate in the Guaranty Fund.

2. Common creditors of an insolvent bank who failed to file claims in the manner and within the time prescribed by Article 463 may, nevertheless, participate in declared and approved dividends.

3. Common creditors of an insolvent bank presenting claims after the time prescribed in Article 463, Revised Statutes, 1911, are entitled to share in the assets of the bank, but may not participate in previously declared, approved and distributed dividends.

4. Unpaid dividends due to creditors and unpaid deposits due to depositors who have filed claims which have been so classified and approved should be deposited in an approved bank in trust for such creditors and depositors only.

5. The levy of an assessment by a banking corporation upon its shares, in compliance with the requirement of the Banking Commissioner to restore impaired capital stock, and its subsequent payment, does not relieve the share-

holders from the constitutional and statutory liability for debts of the corporation to the entire amount of shares held by them in case the bank subsequently becomes insolvent and the Commissioner levies an assessment.

6. The shareholders and not the directors of a State bank should determine whether or not the corporation will by assessment of its shares restore its impaired capital stock as directed by the Banking Commissioner.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 24, 1923.

*Honorable J. L. Chapman, Commissioner of Insurance and Banking,  
Building.*

*Attention: Mr. Peterson.*

DEAR SIR: Your letters of July 18th and 19th, propounding questions to the Attorney General have been received. The questions as presented are substantially as follows:

1. What dividends, if any, are creditors of an insolvent State bank entitled to receive when such creditors have failed to present their claims within ninety days after the date of the first insertion of published notice calling upon creditors of an insolvent State bank to present claims against it?

2. Should the directors or shareholders of a State bank comply with the order of the Banking Commissioner under Article 523, requiring the impaired capital stock of a banking corporation to be restored?

We will undertake to answer the questions in the order in which they are presented.

Article 463, Revised Statutes, 1911, provides that depositors and creditors shall be notified by advertisement in newspapers for three consecutive months. Depositors who are guaranteed by the Depositors' Guaranty Fund who failed to file their claims within the ninety days shall not participate nor be paid out of the Depositors' Guaranty Fund. No prohibition is contained in the article as against creditors of a bank who failed to file their claim within the time provided.

Article 464 vests in the Commissioner the power to classify and reject claims. Action upon such claims rejected must be brought within six months.

Article 465 provides that claims presented after the expiration of the time fixed in the notice are entitled to share equitably only in the distribution of assets of the insolvent bank.

Article 472 vests in the district court of the county wherein the bank is located power to make provision for "unproved or unclaimed deposits."

Article 480 provides that dividends and unclaimed deposits remaining in the hands of the Commissioner for six months after the order for final distribution shall be deposited in the bank to the credit of the Commissioner in trust for the depositors and creditors.

It will be seen from an examination of Article 463 that direct inhibition is contained therein prohibiting the payment out of the Depositors' Guaranty Fund of claims of depositors who have failed to file them within the time prescribed by the article. It is the usual provision customarily found attached to the liability of the guarantor or to a contract of insurance. The beneficiary must present his claim within the time or else it is barred. *Berian Bank vs. Alexander*, 110

S. E., 311. We would, however, call your attention in this respect to Article 472, which authorizes the court to make proper provision for "unproved or unclaimed deposits." Under provisions of the statute the court, like the Commissioner, would not be authorized to compel the Guaranty Fund to pay a depositor who failed to present his claim within the time prescribed.

While Article 463 requires similar notices to be given to creditors of a failed bank, yet, if such creditors fail to present their claims within the time prescribed, it does not constitute an absolute bar if thereafter the claim is presented. There is an absence of expressed statutory inhibition, but, on the contrary, Article 465 specifically provides that such belated claimants shall be entitled to share in the assets of the bank "equitably applicable thereto."

In all instances before a claimant may seek to have established, classified and approved his claim before a court under provisions of Article 464, the claim must have been presented to, approved or rejected by the Commissioner of Insurance and Banking. *England vs. Hughes*, 217 S. W., 13; *Innes vs. Chapman* (unreported).

Under Article 469 it is provided that immediately subsequent to the date fixed for the presentation of claims the Commissioner may declare one or more dividends and after the expiration of one year from the first publication of notice he may declare a final dividend. Such dividend shall be approved by the district court. A common creditor who has presented his claim after the expiration of ninety days and has had it approved by the Commissioner is entitled to his pro rata portion of the assets in the hands of the Commissioner "equitably applicable thereto." That is to say, that if the assets of a bank, in whole or in part, have been lawfully disposed of by the Commissioner as prescribed by the statute, to such extent the Commissioner does not have the assets in his hands equitably applicable to the creditors' claim. The definition and rule to be followed under such circumstances is most aptly and concisely stated in the case of *Wisconsin Trust Company vs. Cousins*, Bank Commissioner, 179 N. W., 805, as follows:

"As to the fourth of the above stated questions the answer must also be reached without help from other sources than from a construction of the statutory language. From such consideration we hold that it is the intent of the last clause of subdivision 5, supra, that the belated claimant shall share in the distribution only to the extent of the assets in the hands of the Commissioner at that time equitably applicable for such then distribution. That is, that the language 'equitably applicable thereto' must speak only as of the time at which such claim is presented to the Commissioner. Such belated claimant is not equitably entitled to share with the diligent creditor in dividends that have theretofore been paid to such diligent creditor. To the extent of such prior payment the assets used in such payment are no longer present to be subject to any equitable right of such belated claimant to participate in their distribution."

Your attention is directed to Article 480, which makes provision for the administration of unpaid dividends and unclaimed deposits remaining in the hands of the Commissioner for six months after the order for final distribution. This provision does not require the Commissioner to retain dividends nor deposits for creditors and depositors of the bank who have failed to present their claims, but the provision applies to creditors and depositors who have filed their claims and have

had the same approved and classified and yet who have not demanded or to whom has not been paid such dividends and deposits. *England vs. Hughes*, 217 S. W., 13.

*Banks and Banking—Impaired Capital Stock.*

We now come to the question of the character of liability of a banking corporation which has been called upon by the Commissioner to restore its impaired capital stock. Article 523, being Section 40 of the Act of 1905, which is the General Banking Act, provides substantially as follows:

1. When the Commissioner determines that the capital stock of a banking corporation is impaired by whatever cause "he shall require such corporation to make good the deficiency."

2. Whenever a bank is conducting its business in an unsafe and unauthorized manner he shall direct the discontinuance of such illegal and unsafe practices.

3. When wrong entries or unlawful uses of the funds of the corporation are made he shall cause the same to be corrected.

4. He shall require the corporation to submit statements and comply with such orders.

5. When the Commissioner shall determine that it is unsafe and inexpedient for a banking corporation to continue to transact business or that extraordinary withdrawals are jeopardizing the interest of depositors or that directors or officers are abusing their trust or the corporation has suffered serious losses, he shall call upon the Attorney General to remedy the criticisms by judicial action. The courts are given jurisdiction in such instances.

6. When a bank is declared insolvent the Commissioner may close the same and proceed to liquidation. (See, also, Article 453.)

The capital stock of a banking corporation is fixed upon a graduated scale according to the population of the city or town in which it is located. It is required that the capital stock shall be fully paid up. Art. 375, as amended Reg. Sess., 38th Leg., Chap. 47, p. 93; Arts. 384 and 392, R. S., 1911; Art. 16, Sec. 16, Const.

Article 531 permits banking corporations to reduce its capital stock to the minimum provided in Articles 375, 384, and 392. The reduction must be had upon the written consent of the owners of not less than two-thirds of the stock of such corporation. Thirty days' notice in newspapers is a prerequisite. The last notice must be ten days before the date of reduction and the resolution for reduction should be filed as the articles of incorporation.

Article 532 provides for the increase of capital stock with the consent of a majority of the stockholders of such corporation.

Article 534 makes it the duty of the directors to publish the notice calling the stockholders' meeting for the purpose of increasing or reducing the stock, and Article 536 specifies the procedure of the shareholders in thus increasing or reducing the capital stock.

Article 548 prohibits withdrawal of any portion of the capital stock of a corporation by any means. It prohibits dividends where the losses have consumed the profits. Directors declare the dividends only when the corporation is solvent and when earnings exist, but shall not declare a dividend when the capital stock is impaired. This article is

contained in Section 50 of the original Banking Act passed in 1905. This original section contained the clause that "when the capital stock shall have become impaired to the extent of twenty-five per cent thereof, \* \* \* then such corporation shall cease to do business unless such capital stock shall have been made good by assessment within sixty days, or reduced equal to the impairment in the manner provided in the next section." (Article 531, above stated.)

However, the Guaranty Fund Act of 1909, in Section 38, omitted this sentence and placed in lieu thereof the provision substantially stated in Article 548 above. Article 561 authorizes that the directors shall call a meeting of the stockholders to determine whether or not the corporation shall cease to do business, which meeting shall be had after sixty days' notice. Two-thirds of the shares of the corporation voting in favor of terminating the business of the bank will authorize the board of directors to wind up the business of the corporation.

Article 16, Section 16 of the Constitution, adopted in 1904, provides: "Each shareholder of such corporate body (bank) 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."

Article 552 makes effective the above constitutional liability and Article 459 vests power in the Commissioner to enforce such liability.

We have set out these provisions of the Constitution and statutes relative to capital stock of a banking corporation, its maintenance and liability of stockholders, in order to show the declared public policy with reference thereto. Undoubtedly the very statutes discussed require:

1. That the capital stock of a banking corporation must be in conformity with the minimum prescribed by the statutes.
2. It must be fully paid up.
3. It must at all times be maintained at the statutory amount.
4. It must not be impaired by the action of the corporation or its stockholders.
5. It may be reduced or increased by the shareholders only.
6. The Commissioner has the duty to require that capital stock be maintained.
7. The Commissioner may and should close the bank when stock is impaired if not restored.
8. Stockholders may voluntarily close and wind up the affairs of a banking corporation for reasons sufficient to themselves.
9. The Commissioner may close and terminate the business of a bank when directed to do so by the Banking Board (Article 513) and for the reasons stated in Article 523.
10. Stockholders are individually liable in any amount up to one hundred per cent of the shares held by them when the bank has been closed and the Commissioner has levied an assessment on such stockholders for the benefit of creditors.

Before discussing the question of the character of liability imposed upon a banking corporation to maintain its capital stock unimpaired,

we must clearly distinguish such liability with the constitutional liability of the stockholders to pay one hundred cents of an amount equal to one hundred per cent of the stock held for the payment of creditors of the corporation in case of insolvency. Determination of the impairment of the capital stock by the Commissioner is final on the stockholders and the courts. It is in the nature of a judicial function. *Sanders St. Bank vs. Hawkins*, 142 S. W., 84; *Aldrich vs. Yates*, 95 Fed., 80; *Kennedy vs. Gibson*, 8 Wall., 505; *Casey vs. Galli*, 94 U. S., 677; *Bank vs. Weinhard*, 192 U. S., 343. Likewise, determination by the Commissioner as to the necessity of assessment upon the constitutional liability of stockholders is final and conclusive. *Harris vs. Briggs*, 264 Fed., 726; *Brooks vs. Austin*, 206 S. W., 723; *Collier vs. Smith*, 169 S. W., 1108.

Liability to maintain capital stock upon call of the Commissioner to restore an impaired capital is voluntary on the part of the corporation. Inasmuch as it may comply therewith or wind up its affairs voluntarily or permit the Commissioner to close the bank for failure to comply with the order requiring restoration. The amount paid to restore the capital is paid to the corporation at its instance. It may or may not be used to pay its debts. It is not a liability to the creditors. Whereas, the constitutional liability on the shareholders is a direct primary liability to the creditors only and not to the corporation. The liability to restore the capital stock is not a contract liability between the shareholders and the bank. The assessment made by the corporation to restore its capital stock is in the nature of further investment in its capital. Whereas, the assessment by the Commissioner to satisfy its creditors occurs only after the bank has become insolvent and proceeds directly from his power. This liability the corporation cannot release, and finally it is the undoubted rule that, should stockholders of a bank, upon notification by the Commissioner, pay an assessment to restore its impaired capital stock, such assessment does not release the stockholders from the constitutional liability for debts of the corporation under an assessment made by the Commissioner after the bank whose capital has thus been restored becomes insolvent and is closed. This constitutional liability is not subject to any offset of debts held by a stockholder against the corporation. *Strangefellow vs. Paterson*, 192 S. W., 555; 23 A. L. R., 1354; *Dellano vs. Butler*, 118 U. S., 634; *Ann. Cases*, 1913D, 69; *Blackert vs. Langford*, 176 Pac., 532; *Bank vs. Weinhard*, 192 U. S., 243; *Devney vs. Harriett State Bank*, 177 N. W., 460.

The more pertinent question is when the Commissioner requires a corporation to restore its impaired capital stock, should the directors of the corporation determine the question of whether the bank should comply or wind up its affairs or permit the Commissioner to close the bank. We hold that should the Commissioner, under Article 523, notify a banking corporation to restore its impaired stock that the shareholders of such corporation shall determine whether or not the order shall be complied with and that the directors would not be authorized to act upon such directions of the Commissioner. This is the holding of the United States Supreme Court with respect to the enforcement of Article 5205, U. S. R. S. *Bank vs. Weinhard*, 192 U. S., 243. The same rule is announced in the State of Oklahoma in

the case of Blackert vs. Langford, supra, and in Minnesota in Deveney vs. Harriette State Bank, supra. The reasons announced by the United States Supreme Court apply under the statutes of the State of Texas.

"It would be going far beyond the usual powers conferred upon directors to permit them thus to control the corporation. \* \* \* The origin and continuation of the association would seem to be matters over which the owners and not the managers of the bank are primarily interested. \* \* \* Action upon the controller's order involves extraordinary action of the association and determines its future operations or liquidation and is not found within the powers conferred upon the directors for the management of the business of the bank. \* \* \* As it is a matter foreign to the powers of such boards and not conferred by statutes or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders."

The same reasoning applies under the Texas act. Specific authority is not granted to the directors under Articles 374, 378, 383, 390, 484, 530 to 536 and 561.

The United States statute (Art. 5205, U. S. R. S.) provides a method for enforcing the call of the Comptroller upon an association to restore its capital stock by vesting in the Comptroller the discretion to have a receiver appointed and the bank liquidated, and in case the stockholders should order the assessment the shares only become responsible and may be forfeited and sold to pay the assessment.

The Oklahoma statute provides that it shall be the duty of the directors to call a meeting of the stockholders for the purpose of levying an assessment, and also authorizes, in case the assessment is voted, the sale and forfeiture of the stock which is primarily liable for the assessment. The same is true as to the Minnesota statutes.

It will be noted that Article 523 of the Texas act only provides for the Commissioners to require the restoration of the impaired capital stock. No means is provided in the Banking Act for enforcement of the direction. It has been specifically held that Articles 1169 and 1170 of the general corporation statute, authorizing directors to require subscribers to capital stock to pay the same and giving them power to forfeit the stock if the subscriptions are unpaid, are not applicable to banking corporations. *First State Bank vs. First National Bank*, 145 S. W., 691. However, the absence of the specified procedure does not relieve the shareholders from complying with the direction of the Commissioner or else subjecting themselves to the alternative of either voluntarily winding up the affairs of the corporation or else permitting the Commissioner to close the bank and liquidate. This is the effective remedy under the State statutes specifically authorized by the United States statutes.

We therefore respectfully advise that the Commissioner, in issuing an order requiring a corporation to restore its impaired capital, that the order should be directed to the shareholders of the corporation either directly or that the order should be transmitted by and through the directors, who should call a meeting of the stockholders for the purpose of receiving said order and giving it full consideration.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.



Op. No. 2499, Bk. 58, P. 327.

SECURITIES DEPOSITED WITH COMMISSIONER OF INSURANCE AND BANKING OF THE STATE OF TEXAS—DUTIES OF THE COMMISSIONER OF INSURANCE AND BANKING WITH REFERENCE THERETO—TRUST FUNDS—RECEIVERS OF STATE COURTS AND BANKRUPTCY PROCEEDINGS.

1. Securities deposited with the Commissioner of Insurance and Banking of the State of Texas by virtue of Chapter 25b, Title 25, Complete Texas Statutes, 1920, are held by him in trust for the benefit of Texas contract holders only.

2. No State court has the power to compel the Commissioner of Insurance and Banking to deliver securities deposited with him into the registry of the court for delivery to its receiver, prior to the adjudication of the rights of the claimants.

3. It is the duty of the Commissioner of Insurance and Banking to administer the trust fund prior to the adjudication of the rights of the various claimants.

4. After the rights of the various claimants have been finally adjudicated the Commissioner of Insurance and Banking may, if he desires, deliver the securities to the receiver without responsibility.

5. Rights and duties of the Commissioner with reference to the payment of fire insurance policies stated.

6. As between two bankruptcy courts the one in which the petition is first filed has exclusive jurisdiction.

7. As to securities deposited with the Commissioner by virtue of Chapter 25b, Title 25, Complete Texas Statutes, 1920, the position of the Insurance and Banking Commissioner as against the bankruptcy court should be that of an adverse claimant.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, MAY 8, 1923.

*Honorable J. L. Chapman, Commissioner of Insurance and Banking, Capitol.*

DEAR SIR: Incident to the receivership proceedings relating to the United Home Builders of America pending in the Sixty-eighth District Court of Dallas County, Texas, you have orally requested this Department to advise you as to your legal rights and duties with reference to the securities deposited with you by such company as provided for by the various articles of Chapter 25b, Title 25, Complete Texas Statutes, 1920.

By Article 1313d it is provided that these securities shall be held by you "in trust for the common benefit of all the holders of contracts issued by such corporation." By Article 1313½y the provisions of Chapter 25b, Title 25, apply to all individuals, associations and joint stock companies.

The depositing of the securities with you, created a trust fund and made you a trustee thereof. Texas Fidelity and Bond Company vs. City of Austin, 246 S. W., 1026; Phillips vs. Perue, 229 S. W., 849; State vs. Matthews, 60 N. E., 605; Rollo vs. Andes Insurance Company, 14 Am. Rep., 147; Beach on the Law of Insurance, Vol. 1, par. 82; Vandiver vs. Poe, 46 L. R. A., 190; Ann. Cases 1914D and notes on page 439; Crowell vs. Terrell, — S. W., —; Falkenback vs. Patterson, 1 N. E., 757. It was likewise clearly the intention of the Legislature that these securities were to be deposited with you and held by you in trust for the benefit of Texas contract holders only and none other. Phillips vs. Perue, 229 S. W., 849; Morrill vs. Colonial Security Company

(Texas), 102 S. W., 937; Northwestern Title Insurance Company vs. Fishback, 188 Pac., 469; Notes to Vandiver vs. Poe, Ann. Cases 1914D, exact pages 439-440.

The creation of the trust fund and the appointment of you as trustee therefor conferred upon you the power and made it your duty to administer the fund. In the case of State vs. Matthews, 60 N. E., 605, the following rule is announced:

"The statute under which the securities were deposited with the superintendent of insurance provides: 'The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of and as security for the policyholders of such corporation, their legal representatives and beneficiaries.' There is no provision in this statute for turning the securities over to an assignee or receiver in case of insolvency. On the contrary, the securities are required to be held by the superintendent in trust for the benefit and protection of, and as security for, the policyholders. This evidently means that the policyholders are to be protected and secured by the superintendent himself, and not through an assignee or receiver. The duty of the superintendent to secure and protect the policyholders in their rights is, by this statute, made a part of his official duties, and he must discharge that duty himself, and cannot shift it upon an assignee or receiver. The appointment of an assignee or receiver by a court cannot have the effect to relieve the superintendent of insurance of a part of his official duties. He is a trustee of the securities for the policyholders, and as such trustee obtained possession of the fund, and holds the same in his official trust capacity, and the appointment of an assignee—another—cannot authorize such later appointee to compel the earlier trustee to surrender such trust fund. The trust adheres to the office of the superintendent of insurance, and its proper administration is a part of the official duties of the office made so by the general assembly, and a court cannot change those duties, and relieve the superintendent of duties which the general assembly has imposed upon him. The following cases are more or less in point: Ruggles vs. Chapman, 59 N. Y., 163; People vs. Same, 64 N. Y., 557; Cooke vs. Warner, 56 Conn., 234, 14 Atl., 798; Beach, Ins., par. 82; Joyce, Ins., par. 3593."

We think it is clear from the above case and the other authorities cited in the note to Vandiver vs. Poe, Ann. Cases 1914D, page 439; 46 L. R. A., 187, that it is your official duty to act and perform the trust, and that the appointment of a receiver cannot have the effect of relieving you of a part of the official duties of your office. This right, duty and power to perform and administer the trust is vested exclusively in you to the exclusion of every other State agency, and no court has the right or authority to *compel* you to surrender the physical possession of the securities in question, although after all claims have been finally adjudicated a court of equity may order the distribution of the funds or securities either through you or its receiver.

In Ruling Case Law, Vol. 23, p. 50, par. 53, it is said:

"On the insolvency or dissolution of a corporation, the disposition of securities theretofore deposited by it was the State authorities must necessarily depend on the construction of the various statutes governing such matters. But the decisions seem to indicate a disposition, if not a settled rule, on the part of the courts, to hold that the State official cannot be compelled to turn the deposit over to the receiver, unless the statute either, in plain words or by implication, so directs. The reason underlying such rule is that the State officer has been by law made trustee of the fund for a special use, and in the absence of fraud on the part of the trustee the court has no power to hinder him from performing his trust. If this is true with regard to insolvent corporations, with far greater reason must it be true in the case of a solvent corporation."

As a matter of fact, in the case of the United Home Builders of

America the Sixty-eighth District Court has not proceeded to an adjudication of the claims of all parties interested in the fund, and until it does so it has no authority over you for any purpose.

Having reached the conclusion that it is your duty to administer the fund, we think the fact that the statute expressly named you as trustee gives you full power to do any and all things necessary to carry out the purposes of the trust. We think that, under the general powers conferred upon you as trustee, you have the full right and authority to institute and defend suits arising on account of or by virtue of the securities, and that under the general rule that a trustee must do any and all things necessary to protect the trust estate you would have full power to collect from the payors of the notes (the securities in question) any and all sums due thereon, and, if necessary in the protection of the trust estate, to expend some of the money so collected. In so advising you in the instant case, we have particularly in mind that you cannot adequately perform the duties of trustee without some actual and necessary expense connected therewith, and we think it elementary that, whenever it becomes necessary, you have the right to expend a part of the money of the trust estate for its protection.

We have only recently been advised that certain fire insurance policies upon property, which represents the basis of the securities, have been permitted to lapse by the payors of the notes. With reference to this situation, we advise you as follows:

First. You should at once make a demand upon the receiver that he pay same out of other funds in his hands and thereby preserve the corpus of the property. This demand would be made upon the theory that, to this extent, the receiver stands in the shoes of and represents the original company, but it should be borne in mind that the receiver is primarily an agent of the court, representing the court and all other parties interested; that is to say, he is as much a representative of the creditors and the contract holders as he is a representative of the company or the court. As a matter of fact, he represents no particular party or parties, but stands indifferent as between all parties, and for the benefit of all parties, that is, the company, its creditors and its stockholders (contract holders in the present case), he must conserve and protect the estate. 34 Cyc., pp. 236, 238, 239; Vol. 23 R. C. L., p. 7. Upon a proper application by you to the court, in the event the receiver refused to comply with your request, the court should order the receiver to renew the fire insurance policies in question and to pay the costs thereof out of other moneys in his hands. Certainly it would be the duty of the receiver to do this, and that of the court to order him to do so, pending a final determination of the rights of all parties in and to all the property, including the securities in question, for it is the duty both of the court and its agent, the receiver, to protect the property for the benefit of those ultimately entitled thereto, and this upon the theory that the appointment of the receiver was, and is, for the benefit of all parties interested. Upon the refusal of the receiver to comply with your demand, you could apply to the court, as stated, for an order to compel him to do so, or you could proceed as follows:

Second. Doubtless the notes of the payor or the deed of trust executed by him provide that the payor shall keep the property fully insured and upon failure to do so the notes shall become due. If so, you

could demand of the payor of the note that he immediately renew the insurance at his own expense, advising him at the same time that upon his failure to do so you would proceed to a foreclosure of the note by suit, or demand of the trustee in the deed of trust that he sell the property as provided therein.

Third. If for any reason you did not care to proceed as above outlined, then you would have the power to use a part of the funds which you will have collected as a result of payments having been made on notes in your possession in the payment of such insurance policies, and this for the reason that it is elementary that the trustee, by virtue of his appointment, as a general rule, has full power to expend moneys in his possession for the protection of the estate or trust funds. We think that after you have renewed the insurance the payor of the note, the mortgagor, would be liable to you for the sum so paid and that you could recover it in a suit instituted for that purpose. The authorities, however, are in conflict upon this proposition. Certainly upon full payment of the note by the payor you could refuse to execute a release or deliver the note to him until the amount due you for insurance had been paid to you by him.

The courts of this State having held that the district court has no power prior to a final adjudication of the rights of all parties to *compel* you as trustee of the fund in question to deliver the securities into the hands of the receiver, and it being necessary for the protection of the trust property that every step be taken to protect the interest of the beneficiaries of the trust fund, the Texas contract holders, we think it evident that the receiver has no control whatsoever of the securities, since they are not in and cannot be placed in his possession, and therefore upon the final payment by any payor of a note, you will have full authority to execute a release to the payor and to surrender to him the note marked paid.

We desire to direct your attention again to the fact that it is your duty, under the authority of *State vs. Matthews*, 60 N. E., 605, to administer the trust fund, but we wish to say that there is no case directly in point decided by the courts of Texas that you have not the authority to deliver the securities in question to the receiver *prior* to the adjudication of the rights of the various claimants by the courts. The case of *Phillips vs. Peru*, 229 S. W., 849, on the other hand, while not directly passing upon the question as to whether or not the State Treasurer could voluntarily surrender the securities, nevertheless held that, after the claimants' rights had been finally adjudicated and the Treasurer had voluntarily tendered the securities into court, it was proper for a court of equity to administer the fund and to disburse it. The language of Chief Justice Phillips in the decision of that case was as follows:

"We think it clear that the District Court of Walker County, under the circumstances shown, had the power to appoint a receiver of the fund, and also to disburse it through its receiver rather than through the State Treasurer. The law makes no provision for the Treasurer's converting the deposit into money, or for its distribution in the case of numerous claimants. To make an equitable distribution under such conditions was peculiarly within the province of a court of equity. The appointment of the receiver was but in aid of the efficient exercise of its powers. The court had the authority to appoint a receiver of its own selection, and we can see no objection to its ordering the disbursement of the fund by him, rather than through the Treasurer. Having the power to

appoint the receiver in the first place, that would be a proper function for the receiver to perform. There is nothing in the law that under the circumstances here present would require the court to disburse the fund through the Treasurer to the exclusion of its receiver.

"The Treasurer appeared in the case and asked to be relieved of the trust. No question arises, therefore, as to his being improperly ousted."

In an opinion of this Department dated June 7, 1917, written by Chief Justice C. M. Cureton, then Assistant Attorney General, with reference to a similar situation, it was said:

"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."

In view of the decisions of the courts of the State of Texas, particularly in the case of *Ex parte Stephens*, 94 S. W., 327, we think it is absolutely your duty to administer the fund until all of the claims of the various parties at interest have been finally adjudicated, and that after the claims have been finally adjudicated by the District Court for the Sixty-eighth Judicial District of Texas, you would be fully authorized, if you so desired, without liability on your part, to tender the securities or funds in your possession into the registry of the court, provided the tender is made by you strictly for the benefit of the Texas contract holders.

In conclusion, as between you and the receiver appointed by the District Court for the Sixty-eighth Judicial District of Texas, you are advised as follows:

First. That prior to the adjudication of the rights of all claimants in and to the securities by a court of competent jurisdiction, it is your duty to administer the trust fund.

Second. That in the administration of such trust fund you have full power to take any steps for the protection of such trust fund, including the collection of any amounts of money due by the payors of the notes in question, and to expend a part of such money when necessary to the protection of the trust estate.

Third. That no State court can deprive you of the right to administer the fund or take it from your possession prior to an adjudication of the rights of the various claimants. (*Ex parte Stephens*, 94 S. W., 327.)

Fourth. That prior to the adjudication of all the claimants' rights you have no authority to voluntarily tender the trust fund into court, since to do so would be in effect to relieve you of a part of your official duties. (*State vs. Matthews*, 60 N. E., 605.)

Fifth. After an adjudication of the rights of the various claimants, if you so desire, you may, without responsibility, tender the trust fund or securities into the registry of the court. (*Phillips vs. Peru*, 229 S. W., 849.)

The above advice has been given you upon the basis that the State receiver will successfully resist any attempt upon the part of either of the bankruptcy courts to take possession of the property of the company. Our views, however, in this respect are as follows:

It appears that after the appointment of the State receiver, but within four months thereof, a petition was filed in the Federal District Court at Dallas, Texas, seeking to have the company adjudicated a

bankrupt. While this petition was on file in the Dallas court, another petition was filed against the company in the Federal District Court at St. Louis. The filing of the petition in the Dallas court conferred upon that court full jurisdiction over the matter. As said in Collier on Bankruptcy, Vol. 1, p. 36:

“As between two bankruptcy courts, the one in which the petition is first filed ought to be accorded exclusive jurisdiction over the case.”

As between the Federal District Court at Dallas and the Federal District Court at St. Louis, the rule of convenience should be applied; that is to say, if the Dallas court should determine that it would be more convenient for the parties concerned, considering the amount of property within the district, the amount of claims, etc., to have the matter adjudicated in that court, the proper procedure would be for the creditors, the trustee or the receiver to apply for an order to have the entire matter transferred to the Federal District Court at Dallas. Since the Federal District Court at Dallas has the power to determine the rule of convenience, the application for this order should be made to it, upon the authority of the case of *In re Sterne and Levi*, 190 Fed., 70. *In re Tybo Mining & Reduction Company*, 132 Fed., 697.

The proceeding at St. Louis, however, could be treated as an ancillary proceeding in aid of the District Court at Dallas. *Fidelity Trust Co. vs. Gaskell*, 195 Fed., 865; *In re Patterson Lumber Co.*, 247 Fed., 579.

We understand that the grounds of bankruptcy set out in the respective petitions filed in the Dallas Federal District Court and the St. Louis Federal District Court were, among others, that of insolvency and the appointment of the receiver by the Texas court for the company. The receiver of the State court was appointed on or about January 23rd, 1923. We are further advised that the order appointing him recited insolvency of the company as one of the grounds for his appointment. If so, the jurisdiction of the Federal District Court in Bankruptcy at Dallas is exclusive, since the application for bankruptcy was filed within four months of the appointment of the receiver by the State court. *In re Knight*, 125 Fed., 35; U. S. Compiled Statutes, 1916, Vol. 9, p. 11088, and authorities cited; Collier on Bankruptcy, Vol. 1, p. 528.

Thus in the case of *In re Knight*, 125 Fed., 43, it is said:

“If, within four months after its commission, creditors avail themselves of the provisions of the law respecting an act of bankruptcy, the bankruptcy proceedings must draw to itself the whole power, and override everything done in the meantime, though as to things done in other courts in actions brought more than four months before the act of bankruptcy was committed the doctrine of comity, and of cases like *Peck vs. Jenness*, and *Metcalf vs. Barker*, 187 U. S., 165, 23 Sup. Ct., 67, 47 L. Ed., 122, will apply. In short, under the statute, as construed by the courts, the line of demarcation is plain, and the established rule is this: Whenever, in a suit in a State court, the property of a debtor has come into the custody of that court, its right to control and administer it for the purposes of that suit is superior to that of the bankruptcy court, provided such suit was commenced and the seizure made before the beginning of the four-months period referred to; but, if the suit was begun and the seizure made within that period, the right of the bankruptcy court over the property is not only superior, but after the adjudication is exclusive, regardless of what has been done in the State court, whose jurisdiction in such cases is divested by the bankruptcy proceedings. By this rule we must test the case now before us, and the result is obvious.”

As between you and the trustee in bankruptcy of either court, you are

advised that it will be your duty to refuse to deliver the securities to either trustee upon his demand therefor, for the reason that your position should be that of an adverse claimant. If your position is that of an adverse claimant, then it will be the duty of the trustee to sue you in a court of competent jurisdiction for the possession of the funds. U. S. Compiled Statutes, 1916, p. 11324, par. 18, and authorities cited; p. 11326, par. 19, and authorities cited; *In re Sage*, 224 Fed., 525, exact page 529; *Collier on Bankruptcy*, Vol. 1, p. 524 et seq.; *In re Diamond's Estate*, 259 Fed., exact page 74.

If in such suit the trustee should be successful, your delivery of the securities to him then would relieve you from all responsibility in the matter, and you personally would be fully protected.

In the meantime, however, you should proceed to the administration of the trust fund by collecting the moneys due, and protecting the trust property as heretofore pointed out in this opinion.

Yours very truly,

W. W. MEACHUM, JR.,  
Assistant Attorney General.

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Op. No. 2530, Bk. 59, P. 217.

WORKMEN'S COMPENSATION LAW—STATE INSURANCE COMMISSION—  
CONSTITUTIONAL LAW.

Chapter 182, General Laws of the Thirty-eighth Legislature, requiring the State Insurance Commission to make classification of rates and premiums under Workmen's Compensation Law, etc., is not unconstitutional on the ground that it does not expressly provide for judicial review, that right being presumed by its silence.

The enactment of an Employers' Liability Act is a proper exercise of police power of a State and is not interfered with by the Fourteenth Amendment to the Federal Constitution, neither is it limited by the constitutional prohibition against impairing obligation of contracts.

A business affected with a public interest is subject to regulation and control under the police power, and the only limitation upon the police power is that police regulation must not be unreasonable or purely arbitrary.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 27, 1923.

*Honorable Jno. M. Scott, Commissioner of Insurance, Capitol.*

DEAR SIR: This Department is in receipt of your letter inquiring as to this Department's opinion on the constitutionality of Chapter 182, General Laws of Texas, Thirty-eighth Legislature, Regular Session. We have read, with a great deal of interest, the contention set forth by Judge Phillips, but we do not think that the cases relied upon by him are sufficient to show the acts in question unconstitutional.

The act does not attempt to delegate judicial powers or legislative powers, but merely prescribes a convenient and appropriate State agency as a part of a general system with reference to workmen's compensation insurance, and is a valid exercise of the State's police power; and it has been expressly held that the Legislature may delegate its power and jurisdiction to courts, municipalities, board or committees to adopt police measures.

Cyc., Constitutional Law, Vol. 8, p. 866. (All corporations hold property and

engage in business subject to police power of the State.) *Insurance Co. vs. Welch*, 1918E, L. R. A., 471.

The State has a right to regulate the business of insurance.

8 Cyc., p. 972—citing insurance cases.

See also page 974.

*Insurance Co. vs. Welch*, Ann. Cases, 1918E, 471.

The State may limit the right of contract in the exercise of its police power.

*Coppage vs. Kansas*, 236 U. S., 1, L. R. A., 1915C, 960.

R. C. L. Supplement, Vol. 2, page 87.

The form of contract may be regulated.

L. R. A., 1916B, 412.

The State may regulate contracts relating to insurance, 233 U. S., 389, L. R. A., 1915C, 1189. See R. C. L. Supplement, Vol. 2, p. 86.

On the right of the State to fix the rate, see *Budd vs. New York*, 143 U. S., 546. This case explains the decision of the Supreme Court in the case of *Chicago, etc., Railway Company vs. Minn.*, 134 U. S., 418, which is cited and relied on by Judge Phillips.

With reference to the contention that the severity of the penalties provided by the act renders the entire act unconstitutional, the cases cited in *L. & N. R. R. Co. vs. Garrett*, hold that the provision for the penalties may be treated as separable and the remainder of the act be left unimpaired.

See also:

217 U. S., 443.

213 U. S., exact page 417, holding the penalties to be separable and none sought to be recovered.

Upon the subject of notice and hearing,—242 U. S., 260.

That it is not necessary for the act to specifically provide for a judicial review, see *L. N. R. R. Co. vs. Garrett*, 231 U. S., 311. This is the leading case in our favor.

The questions of fact in the hearing before the Commission would not become judicial questions to be inquired into by the courts, the question would be whether the Commission attempted within the authority duly conferred by the Legislature and also whether the rate fixed is reasonable and not confiscatory. 231 U. S., 313.

The Legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. 231 U. S., 305, and authorities cited; Ann. Cases, 1916E, 282.

On the right of a court to inquire into facts as to a rate, see 231 U. S., 313, and authorities cited.

The following authorities, upon a casual examination thereof, seem to be against our position and against the position taken by the Supreme Court of the United States in the case of *Railway Co. vs. Garrett*, 231 U. S., but an examination of such cases will show that they are cases in which the State Supreme Court had construed the act as making the orders of the Commission final and expressly denying the right of a judicial review either by injunction or otherwise:

*Ohio Valley Co. vs. Ben Avon Borough*, 253 U. S., 287.

*Missouri Pacific Ry. Co. vs. Tucker*, 230 U. S., 340.

*Oklahoma Operating Co. vs. Love*, 253 U. S., 332. (This case particularly holds that, regardless of the sufficiency of the rates, if the penalty provisions



are so great as to prevent a resort to the courts, the penalty provisions are void. Exact page 337.)

Indeed, it would seem that pending a determination of the character of the rates, in an action brought in absolute good faith, upon reasonable grounds, for the purpose of determining the character thereof, whether reasonable or unreasonable, no penalties could accrue. Thus, if upon a hearing in injunction proceedings it should be determined that the rates fixed by the Commission were confiscatory or unreasonable, a permanent injunction against the enforcement thereof by penalties or otherwise might be, and should properly be, entered. If the court should determine that the rates were not confiscatory a permanent injunction should nevertheless issue to restrain the enforcement of the penalties accruing pending the determination of the suit. This right would be dependent upon whether or not the action to test the character of the rates was brought in good faith and upon reasonable grounds. This latter proposition would be an appropriate matter for the court to inquire into before granting the injunction against the enforcement of the penalties accruing prior to and during the pendency of the suit. *Oklahoma Operating Co. vs. Love*, 252 U. S., exact pages 337-338. Without expressing an opinion thereon, it may be doubted whether, where litigation, in good faith, upon reasonable grounds, is promptly instituted, the penalties would not be sustained or at least would not be applicable to the litigant. *Railway Co. vs. Conley and Avis*, 67 W. Va., 129, exact pages 166-171. This case was in effect approved by the Supreme Court of the United States in *Wadley Southern Ry. vs. Georgia*, 235 U. S., exact page 668.

We have heretofore pointed out that the complaining company has the right to go into a court of equity, State or Federal, and by injunction proceedings determine the validity of the rate fixed by the Commission. Such company therefore has a safe, adequate and available remedy, and if after notice of the order, as provided for by the act, it failed to resort to such remedy promptly and at once, but should wait to attack the order when the penalties are sought to be enforced, it would doubtless be liable for the penalties in the event its defense should prove unavailing and the order should be decreed valid. *Wadley Southern Railway Co. vs. Georgia*, above cited. True, in the case of *Wadley Southern Railway Co. vs. Georgia*, it was found that the Georgia court expressly provided for a judicial review, and it was expressly held that if the complaining company had promptly availed itself of that right and such order had been found to be void, no penalties could have been imposed for past or future violations, and if found to be valid it would thereafter have been subject to penalties for future violations, but not for such violations prior to the adjudication. In our view, by its very silence, we think the Legislature clearly had in mind that the courts of the country, State and Federal, should be open to an aggrieved company. The expression to be found in the act that the Commission should never fix a confiscatory rate plainly shows an intention that the orders of the Commission should be open to judicial review by the injunction throughout, or otherwise, for certainly if it attempted to fix an unreasonable or confiscatory rate it would not be acting within its lawful powers, and would be subject to injunction. The act in question is final upon the right of judicial review. The right of judicial

review being protected and provided for by the State and Federal Constitutions, it ought not to be presumed by the courts that the Legislature intended to pass an act in violation thereof, nor should its silence upon the subject be so construed. Rather, it ought to be presumed, and the act should be so construed, that the Legislature did not deem it necessary to expressly provide therein for such a review, since that right was known by the Legislature to be guaranteed under the State and Federal Constitution. To construe the act as prohibiting a judicial review is to render it unconstitutional and is to charge the Legislature with a specific and designed intent to enact an unconstitutional law. To construe the act as permitting a judicial review is to give the Legislature credit for properly regarding the provisions of the State and Federal Constitutions. The case of *Railway Company vs. Conley and Avis*, 67 W. Va., 129-132, is thus summarized and approved, in *Wadley So. Ry. Co. vs. Georgia*, above cited, by the Supreme Court of the United States:

“*Coal & Coke Ry. vs. Conley*, 67 W. Va., 129, 132, contains a very full discussion of the subject. In that case the statute imposed a penalty for charging rates other than those prescribed in a legislative act, which, however, was altogether silent upon the subject of a judicial review as to the reasonableness of the rates. The court recognized that if that silence was to be construed into a denial of the right to a hearing in court the penalty provision would be void. It held, however, that the failure of the penalty statute to say anything about the right of review could not be construed into a denial of that right. The conclusion and the further holding that penalties could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a court of equity for that purpose, is specifically applicable here.”

The statute being silent upon the subject of judicial review, we think that its validity as against such objection is sustained by the Supreme Court of the United States in the case of *Louisville, etc., Ry. Co. vs. Garrett*, 231 U. S., exact pages 310-311. In short, it is not necessary for the statute to expressly provide for a judicial review, nor should its silence upon the subject be construed into a denial of that right.

We have heretofore pointed out that the statute merely confers upon the Commission the right to fix a reasonable flat rate, and therefore, in effect, prohibits the fixing of an unreasonable rate. The aggrieved company has the right to proceed in equity to enjoin any unauthorized rate or act of the Commission. The penalties provided by the act as to such litigant company are in effect sustained, or at least are not applicable to such litigant, during the pendency of the suit, and if the order be found invalid may be promptly enjoined both as to prior and future acts. If it be found valid the imposition of prior penalties may nevertheless be enjoined. The only limitation upon his right is that the aggrieved company, the litigant, must act promptly upon the promulgation of the rate order, or other act of the Commission, must have reasonable grounds for the suit, and must prosecute the action in good faith. Having these rights and being thus fully protected, we are of the opinion that the penalties are not so severe as to amount to a denial of the right of judicial review, nor do we think that the Legislature intended them to have such effect. We may add that if the penalties are so severe as to deny the right to have them tested, the proper remedy is by injunction. 275 Fed., p. 1.

If it be assumed that the penalties are such as to prohibit the right to a judicial review, nevertheless they are in a separate section of the act, are severable, and if declared void, the remainder of the act would stand unimpaired. *Railway Co. vs. Garrett*, 231 U. S., exact page 311.

*Grand Trunk Ry. vs. Mich. Ry. Co.*, 231 U. S., exact page 473.

*Wilcox vs. Consolidated Gas Co.*, 212 U. S., 19, 63.

*United States vs. Del. and Hudson Co.*, 213 U. S., 366, 417.

*Grenada Lbr. Co. vs. Mississippi*, 217 U. S., 433, 443.

*Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S., 280, 286.

*Wadley So. Ry. Co. vs. Georgia*, 235 U. S., 651, 662.

Nor do we regard it as an ascertained fact that the penalties in the act are so severe as to deter the company from testing the validity of any order of the Commission in the courts. Such is a question which only the courts can decide. It does not occur to us that the penalties in the act are as severe as those in the *Young* case, but, on the contrary, they are more nearly comparable to the penalties to be found in Section 6 of the act construed in *Railway Co. vs. Ohio Ind. Com.*, said:

"As to the objection because of the penalties, this is not a suit to enforce penalties; nor in view of the provisions of the statute can we say that the penalties are so great as to prevent a resort to the courts to ascertain the constitutionality of the law. *Wilcox vs. Consolidated Gas Co.*, 212 U. S., 19; *Grand Trunk Ry. vs. Michigan Railroad Commission*, 231 U. S., 457; *Ohio Tax Cases*, 232 U. S., 576."

We are, therefore, of the opinion that the law is constitutional and should be complied with in every detail.

We are greatly indebted to the late Assistant Attorney General, W. W. Meachum, Jr., who so thoroughly and laboriously briefed this subject. His indefatigable work and the thorough study he had given this matter, with a view to the preparation of an opinion, is to be highly commended. The greater part of the opinion is his exact language, copied from the brief found in his file pertaining to this subject.

Respectfully submitted,

RILEY STRICKLAND,  
Assistant Attorney General.

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Op. No. 2536, Bk. 59, P. 192.

STATE INSURANCE COMMISSION—UNIFORM FIRE POLICY—COMBINATION FIRE AND TORNADO POLICY—FILED RATES.

1. The State Insurance Commission has the power and duty (Acts Thirty-third Legislature, Chapter 106, p. 195, approved April 2, 1913; Articles 4876 to 4904, C. S., 1920) to make, promulgate and establish uniform policies of insurance against loss by fire only and is not authorized nor required to make, promulgate and establish a combination fire and tornado policy.

2. "Filed rates" on fire insurance contracts must be non-discriminatory. However, the factor of the locality of the risks may and should be considered in determining whether a proposed fileable rate is discriminatory.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 6, 1923.

*Mr. G. N. Holton, Secretary, State Fire Insurance Commission, Austin, Texas.*

DEAR SIR: The Attorney General is in receipt of your communi-

cation of November 20th, wherein you state that the Concordia Fire Insurance Company of Milwaukee, Wis., has submitted a combination fire, lightning and windstorm policy to your Department for approval and for subsequent use in this State. You decline to permit the use of the policy on the advice given to you on August 10, 1923, by this Department. You resubmit the question as to whether or not a fire insurance company should be permitted to write a combination fire and tornado policy under the approval of the State Insurance Commission.

In our communication of August 10th, advising you with respect to a combined fire and tornado policy, we pointed out the following objections:

1. That the State (Fire) Insurance Commission is not given authority to make rates or transact any business with reference to any other class of insurance than fire insurance. (Opinions of Attorney General, 1912-14, p. 477.)

2. That Article 4891, Revised Statutes, 1911, authorized the Commission to make and promulgate uniform policies.

3. That fire insurance companies should write fire insurance at rates provided by the Commission, and that Articles 4896 and 4897 prohibit the insurance company and the insured from accepting and receiving "any valuable consideration" not specified in the policy of insurance.

4. That the combined policy submitted was not separable as to consideration and conditions, rendering it difficult, if not impossible, to ascertain whether or not the insurance company was charging the rates prescribed by the Commission.

Upon these objections, we advised that the Commission rightfully refused to approve the policy form.

The combined policy now presented by the Concordia Insurance Company seeks to overcome some of the objections above recited, in that said contract, although designated as "Texas Standard Combined Policy, Fire, Lightning, Windstorms, Cyclones or Tornadoes," it provides to some degree a separation of the consideration, rate and some of the conditions applicable to each character of insurance. Ultimately the policy is "a combined policy." To be so designated and treated of necessity there must be an addition to the uniform fire policy prescribed by the Commission. It is more than the addition of clauses and conditions germane to the uniform fire policy, in that it is the uniting, to some degree at least, of otherwise separate and distinct contracts, the one fire insurance and the other lightning or windstorm or cyclone or tornado insurance.

We adhere to our former advice to you and add that the power and duty vested in the Commission solely and exclusively pertains to contracts of insurance against the hazards of fire. In respect to prescribing policies, Article 4891 provides: "It shall be the duty of the State Insurance Commission to make, promulgate and establish uniform policies of insurance applicable to the various risks of this State. \* \* \* That after such uniform policy shall have been established and promulgated, \* \* \* such company shall \* \* \* adopt and use said form or forms *and no other*. \* \* \* The said State Fire Insurance Commission shall also prescribe all standard forms,

clauses and endorsements used on or in connection with insurance policies. *All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the Commission.*"

The purpose and object of this statute in prescribing uniform policies is to have one form of policy for each and every company doing fire insurance business; to have done with difficult and ever increasing variations and to lend certainty to the obligation of the insurer. From the foregoing quotation from the statute it is plain that the use of uniform policy is compulsory and exclusive. (*Hronish vs. Home Insurance Company*, 146 N. W., 588.) However, the rigidity of the uniform policy is guarded against in that the Commission is authorized to prescribe "all standard forms, clauses and endorsements used on or in connection with insurance policies." (*Joyce on Insurance*, Second Edition, Vol. 1, p. 456.) The same effect was intended and accomplished in the provision requiring the approval of the Commission on "all other forms, clauses and endorsements placed upon insurance policies." The Commission, therefore, prescribes the uniform policy, standard endorsements, and in addition approves all other clauses and endorsements placed upon the policy.

A definition of what is meant by "all other forms, clauses and endorsements" may be found in the case of *McPherson vs. Candon Fire Insurance Company*, 222 S. W., 211.

The Commission having only power and duty to prescribe uniform fire insurance contracts, no other logical conclusion arises in interpreting the power given to the Commission to prescribe "standard endorsements" and approve "other forms, clauses and endorsements" placed thereon than that the prescribed standard endorsements and approved forms, clauses and endorsements apply and refer only to fire insurance contracts as such. These provisions of the statute do not enlarge the jurisdiction of the Commission so as to give it control or supervision over other character of insurance. They are wisely inserted in the statute to cover necessary variations from the standard and uniform contract. Therefore, the Commission having no power to promulgate and establish any standard or uniform policy except such policies as cover "the hazard of fire," it likewise has no correlative duty.

Since a fire insurance company may use "no other" contract than that prescribed by the Commission, and since the extent of the Commission's jurisdiction affects fire insurance contracts only, the necessary effect of the State Fire Insurance Commission Act is to inhibit the combination of a fire insurance contract with any other character of insurance. The limited power of the Commission effectually prevents any contract of insurance other than fire insurance from becoming a part of a uniform fire policy. Otherwise, the jurisdiction of the Commission is extended beyond the statutes.

The Commission has submitted to this Department the following facts upon which we are requested to advise you what application, if any, Article 4876a, C. S., 1920, has with respect thereto.

The Atlas Assurance Company, Limited, has filed two policies of insurance on the Humphries Pure Oil Company's tanks, which are located at points from Mexia to Beaumont and Port Arthur. The rates filed are less than the maximum promulgated by the Commission.

At this time the Atlas Assurance Company, Limited, seeks to file insurance policies on the Panhandle Refining Company's tanks located at Wichita Falls, Wichita County, Texas. The rates submitted on such policies are less than the rates filed on the first mentioned insurance. You state that the Commission will decline to approve the latter policy and file the same if the foregoing risks are "risks of the same character situated in the same community" under authority of Article 4876a, C. S., 1920. Therefore, an interpretation of the last quoted clause is required.

The State Insurance Commission Act (Acts Thirty-third Legislature, Chapter 106, page 195, approved April 2, 1913; Articles 4876 to 4904, C. S., 1920), vests in the Commission "sole and exclusive power and authority, and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State." This power includes authority "to alter or amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided." (Article 4879, C. S., 1920.) The rates thus fixed, promulgated and established by the Commission are maximum rates, "and no such fire insurance company shall, after this act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein determined in excess of the maximum rate as herein provided for, *but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all the risks of the same character situated in the same community.*" (Article 4876a.) It is further provided in Article 4886 that "where no rate of premium shall have been fixed and determined by the Commission for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company," provided that thereafter such rates are approved by the Commission. Articles 4896 and 4897 denounce unjust discrimination between individuals, classes, etc. The first article provides, "nor shall any such company knowingly write insurance at any lesser rate than the rates herein provided for, and it shall be unlawful for any company so to do unless it shall thereafter file an analysis of same with the Commission."

The act and the above provisions considered together define the policy of the law that fire insurance rates shall be uniform and non-discriminatory. The act provides for three characters of authorized rates: (1) promulgated rates, i. e., maximum rates established by the Commission; (2) filed rates, i. e., rates filed by individual companies less than the maximum prescribed by the Commission; (3) approved rates, i. e., rates filed with the Commission and approved on risks not classified and rates on risks not prescribed by the Commission. It is unlawful for an insurance company to charge any other rate than that prescribed by the Commission (Opinions, Atty. Gen., 1914-16, p. 363), unless the policy and rates and an analysis thereof are filed with the Commission.

Although the Commission does not fix and promulgate rates on fire policies merely filed with the Commission, notwithstanding when the

company once so fixes such a rate the statute provides "that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community." Thus again evidencing the purpose of the Legislature to require uniformity and to prohibit discrimination. The Legislature was not content in entering the field of regulating rates to merely fix maximum rates and thereby secure uniformity and prevent discrimination, but, while permitting insurance companies to fix rates less than the maximum, it did provide that such rates should be uniform and non-discriminatory. It occupied the field of rate regulation less than the maximum rates for the purpose of securing uniformity and the prevention of discrimination. This was accomplished by the declaration that when a company filed a lesser rate than the maximum rate, such rate "shall be applicable to all risks of the same character situated in the same community," and the language should be construed in the light of the intention of the Legislature.

The determination of whether or not the risk on the Panhandle Refining Company's tanks at Wichita Falls is the same character of risk and in the same community as the risk on the Humphries Pure Oil Company's tanks at and between Mexia and Beaumont, rests in the sound discretion vested by the act creating the Commission in the Commission. The classification of risks has been undertaken, as we understand it, by the Commission in its "General Basis Schedules." To some degree, if not entirely, petroleum oil tanks embrace a distinct classification of risks. The application of the schedule there stated produces a specific rate upon an individual risk. (General Basis Schedule, page 210.) It would seem, therefore, that the Commission has already passed upon the question as to whether or not oil tanks are "risks of the same character so far as 'promulgated rates' are concerned." Of course, the specific rates for an individual risk vary by reason of the application of the schedule prescribed.

The words "in the same community" should not be so construed as to allow unjust discrimination as between localities, nor, at the same time, should the term be defined so as to prevent the proper use of the factor of location, in arriving at uniform and non-discriminatory rates. The phrase has more particular application to mercantile, dwelling house, etc., risks and such as are capable of being and commonly associated so as to form some material relationship resulting in a unit in so far as fire risks are concerned. (Words and Phrases, Vol. 2, p. 1343.) Notwithstanding the difficulty of the application of the term to the peculiar character of risks under discussion, the object of the statute should be accomplished. (Lewis' Sutherland's Statutory Construction, Vol. 2, Par. 371.)

The Commission in its "Promulgated Rates" on the same character of risks has and rightfully does prescribe different basic rates based upon the difference in hazards in different communities, cities and towns. This difference of fire hazards in communities forms the basis of the key-rate system. Just so the Legislature has wisely provided that the Commission should take into consideration different localities in approving "filed rates"; that is, the same principle authorized to be applied in "promulgated rates" is directed to be applied as to "filed rates." (Riegel & Loman, Insurance Principles, p. 234.) This we

think is the proper interpretation of the proviso in Article 4876a here under discussion in so far as its application to oil tanks is concerned.

Although the Commission has considered the entire State a locality or community, in so far as oil tank risks are concerned, by providing that the key-rate system should not be applicable, yet we see no reason why the Commission might not "communitize" the State in order to produce uniformity of rates. The necessity for so doing rests in the judgment of the Commission as to whether or not there is sufficient differentiation in oil tank risks in, let us say, West Texas and East Texas, or North Texas and South Texas. Likewise, as to "filed rates." As "promulgated rates" so "filed rates" must be non-discriminatory. However, the factor of locality of the risks may and should be considered in determining whether a proposed "filed rate" is discriminatory.

Answering the question specifically, if, in the judgment of the Commission, the proposed rate on the Panhandle Refining Company's tanks at Wichita Falls discriminates as compared with the filed rates on the Humphries Pure Oil Company's tanks and such discrimination is not justifiable on the ground of difference of community of the risks, the policy and rates should not be approved. Whereas, if the differences in the proposed rates and the previously filed rates are justified and rendered non-discriminatory on the basis of difference in locality, then the Commission should approve the policy and rates.

Respectfully submitted,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2533, Bk. 59, P. 208.

WORKMEN'S COMPENSATION—POWERS AND DUTIES OF STATE INSURANCE  
COMMISSION.

1. The State Insurance Commission, under Chapter 182, page 408, Acts Regular Session, Thirty-eighth Legislature, 1923, has the power and duty (1) to establish and promulgate classification of hazards in employments affected by the Workmen's Compensation Act, (2) and to prescribe (uniform) standard policy forms and rates of premiums applicable to workmen's compensation insurance.

2. The State Insurance Commission has neither power nor duty to perform in respect to classification of hazards or prescribing uniform policy forms and rates of premium on insurance contracts in respect to employments not within the Workmen's Compensation Act.

3. In determining what employments are included within and are affected by the Workmen's Compensation Act—a remedial statute—liberal construction should be given to its terms. Statutory exceptions discussed.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 26, 1923.

*State Fire Insurance Commission, Austin, Texas.*

*Attention: Mr. G. N. Holton.*

GENTLEMEN: The Attorney General's Department is in receipt of your inquiries of October 29. They are as follows:

(1) An insurance company licensed to write workmen's compensation insurance in this State has submitted for approval an application for a policy de-



signed to afford insurance to a "farmer" by assuming the legal liability to pay for injuries suffered by his employees during the course of their work. The provisions of the policy are identical with the provisions of policies issued to an employer affected by the Workmen's Compensation Law. Can the Commission approve such a policy?

(2) An insurance company has issued, with the approval of this Commission, a workmen's compensation insurance policy covering an employer affected by the Compensation Law, and desires to endorse this policy so as to include in the coverage the legal liability of this employer raised by any employee who is injured while working in an employment which is *not* affected by the Workmen's Compensation Law. The endorsement is so worded the insurance company agrees to pay to such injured employee in the same amount and manner as payment would be made to an injured employee working for this employer in an industry affected by the Compensation Law. Can such an endorsement be attached to a workmen's compensation insurance policy? If so, has this Commission jurisdiction over the question of approval of such an endorsement?

(3) An insurance company requests approval of this Commission of a policy intended to be issued to an employer engaged in the business of carpentry, said employer will have no more than two men working at one time. The company wishes to issue a policy similar to that issued to cover employers affected by the Workmen's Compensation Law. Can this Commission approve such a policy?

(4) An insurance company has issued a workmen's compensation insurance policy to a general contractor engaged in the business of erecting buildings, digging ditches and other work which such a contractor might do. The company wishes to endorse this policy so as to include persons who will be specifically employed and engaged for the purpose of gathering pecans. Can such an endorsement be approved by this Commission?

(5) An insurance company licensed to write workmen's compensation insurance in Texas wishes the approval of the Commission for the issuance of a workmen's compensation policy covering an employer engaged solely in the business of gathering pecans. Is the business of gathering pecans an employment affected by the law?

The questions presented relate to the power and duty of the State Insurance Commission by reason of Chapter 182, page 408, Acts of the Regular Session of the Thirty-eighth Legislature, effective July, 1923. The scope of the questions require a general delineation of the powers and duties of the Commission relating to insurance contracts against loss or damage resulting from accident to or injury sustained by an employee or other person for which accident or injury the assured is liable.

Broadly speaking, casualty or employer's liability insurance may be classified as follows: (1) Casualty insurance written by stock or mutual insurance companies as such; (2) workmen's compensation insurance written by mutual or stock liability or accident companies, etc., authorized by the Workmen's Compensation Act (*Marshall Mill & Elevator Company vs. Scharnberg*, 190 S. W., 229); and (3) workmen's compensation insurance written by the Texas Employers Insurance Association.

Whether or not insurance corporations were authorized to be formed in Texas to insure employers against loss and liability for negligent acts resulting in injury to employees and others prior to 1911, is uncertain. (22 Opinion Attorney General, 221, Sept. 23, 1908. *Fidelity and Casualty Co. vs. Loan Oak Cotton Oil and Gin Company*, 80 S. W., 541.) But such companies were authorized to be incorporated at that time. (Chapter 117, Acts Regular Session, Thirty-second Legislature, 1911—Complete Statutes, Articles 4942a to 4942z. See also Articles

4941 to 4942 contained in the Act of 1909, Regular Session, Thirty-first Legislature, Chapter 108.) Mutual insurance companies authorized to write such insurance although theretofore not permitted (36 Opinion Attorney General, p. 22, March 12, 1914; 39 Opinion Attorney General, 51) were subsequent to the enactment of the Workmen's Compensation Law authorized to write such character of insurance. The Workmen's Compensation Act created the Texas Employers Insurance Association with exclusive power to pay workmen's compensation.

Texas compensation legislation has continuously possessed characteristics of a pure compensation act as well as an insurance act in that it was originally described as the "Employers Liability Act" and authorized any insurance company, including mutual and reciprocal companies transacting a liability or accident business, to insure the liability on the part of the employer to pay the compensation fixed therein. (Acts Thirty-third Legislature, Chapter 179, p. 429, 1913.) However, the reenactment of the legislation (Acts Regular Session, Thirty-fifth Legislature, Chapter 103, page 269,—1917) was designated as the "Workmen's Compensation Law." It likewise authorized described insurance companies to pay the compensation. The act now remains the law with amendments in 1923. (Acts Regular Session, Thirty-eighth Legislature, Chapter 177, page 384.)

The State Insurance Commission being a statutory governmental agency obtains its sole power and authority with the correlative duty and obligation from the legislative act delegating such power and authority and imposing such duties and obligations. The conferred power and imposed duty is described in Section 1 of Chapter 182 of the Acts of the Regular Session of the Thirty-eighth Legislature as follows:

"The said Commission shall hereafter make, establish and promulgate all classifications of hazards and rates of premium respectively applicable to each contemplated and provided for by Chapter 103 of the General Laws of the Thirty-fifth Legislature of the State of Texas passed at the Regular Session of the Thirty-fifth Legislature known as the 'Workmen's Compensation Law,' and shall prescribe standard policy forms to be used by all companies or associations writing *Workmen's Compensation Insurance in this State.*"

These duties are amplified in the further sections of the act. Section 8 provides that no company or association "shall thereafter use any other form in writing Workmen's Compensation Insurance in this State," with certain exceptions. The act shall not be construed to prohibit stock companies, mutual companies, reciprocal or inter-insurance exchange or Lloyds associations from writing the insurance, etc. The Commission is given the power to make rules and regulations to carry out the act. Hence, the State Insurance Commission has the power and duty only to establish and promulgate classifications of hazards and to prescribe insurance policies and rates thereon applicable to employments included within and affected by the Workmen's Compensation Act. It has no power or duty to perform with respect to other insurance protecting employers against loss and liability and negligent acts resulting in injury to employees or others. In this respect the extent and character of supervision is vested in the Commissioner of Insurance. Hence, in performing the duties imposed by the Thirty-eighth Legislature upon the State Insurance Commission, the commissioners should look to those employments (employers and employees) affected by the Workmen's Compensation Act.

The Workmen's Compensation Act in language excepts specified employments as follows:

"The provisions of this act shall not apply to actions to recover damages for the personal injury nor for death resulting from personal injury sustained (1) by domestic servants; (2) foreign laborers; (3) nor to employees of any firm, person or corporation having in his or their employ less than three employees; (4) nor to the employees of any person, firm, or corporation operating any steam, electric street or interurban railway as a common carrier." Article 5246-2.

Since the original enactment of the law in 1913 the excepted employments have been continuously reduced, as, for instance, the 1913 act excepted "laborers engaged in working for a cotton gin." It excepted employers having less than five employees. It excepted casual employment.

The 1917 act reduced the exceptions by including therein all employers having three or more employees. It struck out the exception as to gin employees. It excluded, however, "masters of or seamen on vessels engaged in interstate or foreign commerce and except one whose employment is not in the usual course of trade, etc., of such employer." It further provided that the president, vice president or vice presidents, secretary or other officers and directors of a corporation subscribing to the act shall not be held to be an employee. However, this section has been so construed that such officers in fact acting as employees as well as an official are not excluded from the benefits of the act. (Millers Mutual Casualty Co. vs. Hoover, 216 S. W., 475; idem vs. Cook, 229 S. W., 598.) But under Section 1a of the Compensation Act as amended by Chapter 177, Acts Regular Session, Thirty-eighth Legislature, the officers described are excluded from the act, "and this notwithstanding that they may hold other offices in the corporation and may perform other duties and render other services for which they receive a salary."

The act is elective. (Midleton vs. Texas Power and Light Co., 185 S. W., 556; 249 U. S., 153.) In the first place, all employments where the legal relationship of master and servant exists, with the exceptions specified, are governed by the Compensation Act. (Opinions Attorney General, 1914-1916, page 683.) The act has been construed to cover only legal employments. (Galloway vs. Lumberman's Indemnity Exchange, 238 S. W., 646.) The courts have held that a municipal corporation is an employer within the act (Dunnaway vs. Austin Street Railway Co., 195 S. W., 1157); have held that a foreman of a plant acting as peace officer is within the act. (Consolidated Underwriters vs. Free, 253 S. W., 941.) The exceptions are constitutional legislative classifications. (Supra.)

In construing the employments affected by the Compensation Act the courts have frequently stated that the statute being a remedial one must be construed with the utmost liberality of which it is capable in order to give effect to the intention of the Legislature. (Eastern Texas Electric Co. vs. Woods, 230 S. W., 498; Western Indemnity Co. vs. Leonard, 231 S. W., 1101; Lumberman's Reciprocal Association vs. Behnken, 226 S. W., 154; Corpus Juris Treatise, page 40.)

Having in mind the act granting power to the State Insurance Commission and fixing its duty and the rule applied by the courts in con-

struing the Compensation Act and the exceptions named in the act itself, the specific questions presented in the inquiry may be readily answered.

In substance, the first question is whether or not the Commission should approve a policy and fix rates and classify hazards on excepted employees. Categorically answered, the Commission has no such power and consequently no duty to perform in respect to insurance upon such employees.

The third question in substance asks whether or not the Commission should approve a policy, fix rates and classify hazards of employees engaged by an employer having less than three employees. The employers are not covered by the Compensation Act. Therefore no duty rests upon the Commission.

The fourth and fifth questions presented affect an employer who engages employees in erecting buildings and digging ditches who also employs persons to gather pecans; also employers who have employees engaged solely in gathering pecans. Assuming that the relationship of master and servant exists between the employer and pecan gatherer, ditch digger, etc., we see no reason why the Compensation Law does not apply. The employees are not within the exceptions to the statute.

The third question affects an employer who engages employees affected by the act and at the same time certain employees within the exceptions of the Compensation Act. The question also presents inquiry as to whether or not an insurance company may write a policy for an employer protecting him against loss for liability to employees where neither the employer nor the employee nor the employment comes within the Compensation Act in such manner as to give an employee the compensation prescribed in the Workmen's Compensation Act. As stated above, insurance companies may write such insurance in Texas. It is a matter of contract between the employer, insurance company and employee. The contract in such instance may include as its terms the provisions of the Compensation Act. (In re Keaney et al., 104 N. E., 438.) The court stated in this case:

"The act is a practicable measure designated for use among a practicable people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable."

However, the employment as well as the employer and employee not being within the Compensation Act, the State Insurance Board has no authority nor duty to perform in respect thereto.

Answering the first phase of the question, we are confronted with an employer engaged in more than one business, each separable from the other by classification and definition—where one employment comes within the act and another does not.

Although we have previously advised that an employer affected by the act cannot elect to come under its provisions as to a part of its employees and remain out as to others, that advice applied as to an employer engaged in a single business. (Opinion Attorney General, 1916-1918, page 321.) At that time it is intimated that an "employer might conduct two entirely separate and distinct business enterprises and entirely different classes of business and might place employees of one enterprise and class of business under the law without placing the

other one thereunder." But it was found unnecessary in determining the question there presented to make a specific holding on that question. Since that time the adjudicated cases justify the conclusion there intimated, and we so advise you, that there is no insuperable objection to an employer engaged in more than one business, separable from the others by classification and definition, from electing to come under the terms of the act as to one business and not as to the other. (Bayer vs. Bayer, 158 N. W., 109; In re Keaney, 104 N. E., 438; Eastern Texas Electric Co. vs. Woods, 230 S. W., 498; Cattle Co. vs. Pasterna, 217 S. W., 749; Gordon vs. Buster, 236 S. W., 803.) U. S. Fidelity & Guaranty Co. vs. Taylor, 104 Atl., 171; U. S. Fidelity & Guaranty Co. vs. Bullard, 254 S. W., 720. Therefore, where an employer is engaged in a business affected by the Compensation Act and at the same time is engaged in a business not affected by the act, the State Insurance Commission should approve policies, prescribe rates and classification of hazards as to the employments affected by the act. (Eastern Texas Electric Co. vs. Woods, supra; Cattle Co. vs. Pasterana, supra.) However, as to endorsements and policies affecting the excepted employees, the Commission has neither power granted nor duty to perform.

We trust that the foregoing satisfactorily answers the inquiries presented.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2532, Bk. 59, P. 201.

INSURANCE—AGENTS—CORPORATIONS.

1. A corporation may not act as an insurance agent in Texas inasmuch as license therefor cannot be granted by the Commissioner of Insurance.
2. Statutes construed: Act Regular Session, Thirty-sixth Legislature, 1919, Chapter 83, page 134; Articles 4955, 4969, 4965, 4967, 4963.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 14, 1923.

*Honorable John M. Scott, Commissioner of Insurance, Capitol.*

DEAR SIR: The Attorney General is in receipt of your communication of October 30, 1923, enclosing a brief and making inquiry as to whether or not a corporation organized under Acts of the Legislature of 1919, Chapter 83, Section 1, being Chapter 2a of Title 14, Revised Statutes, 1911, Articles 385a to 385b, is empowered and has the authority to act as an insurance agent as defined in Article 4961, Revised Statutes, 1911.

In your communication of November 6, 1923, you advise this Department that the Automobile Underwriters of America, a reciprocal insurance organization, is operating in the State of Texas under a permit. You further advise that said corporation has filed a charter with the Secretary of State and is incorporated under the name of Automobile Underwriters Company of Delaware pursuant to the provisions and with authority granted under Acts of the Thirty-seventh

Legislature, Chapter 136, being Section 81 of Article 1121, Revised Statutes, 1911. You further state that this latter corporation is acting as attorney-in-fact for the Automobile Underwriters of America. You desire to know whether or not the corporation organized under said last named act of the Legislature may act as attorney-in-fact for the Automobile Underwriters reciprocal insurance company.

As the questions presented are similar in character, we will answer them in this single communication.

It is argued that a corporation can be organized under Chapter 83, Acts of the Legislature, 1919, for the purpose of acting as an insurance agent for insurance companies other than life insurance companies, and that such corporation can perform the duties of an insurance agent described in Article 4961. It is true that Section 1 of the act authorizes corporations organized thereunder "to act \* \* \* as agent for the performance of any lawful act." Therefore, the question is narrowed to the determination of whether or not a corporation may legally become an insurance agent.

As early as May 2, 1874, the statutes of this State made it unlawful "for any person to act within this State as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever \* \* \* without first procuring a certificate of authority" for that purpose. Article 4960.

The definition of an insurance agent was written into our statutes in 1879 and has since been the law without change until the present time. Article 4961.

As early as May 13, 1904, the Attorney General was informed by the Commissioner of Insurance "that since the enactment of these articles of the statute the word 'person' or 'persons' when used therein has been accepted to mean individuals rather than firms, corporations or associations." The Commissioner at that time stated "that the construction referred to has been uniform and has been acquiesced in by all persons dealing with the Department." The Attorney General advised the Commissioner of Insurance at that time that he saw no reason why the construction given should not continue.

An examination of the statutes existing at that time and prior to 1909, Acts Regular Session, Thirty-first Legislature, Chapter 108, page 192, does not disclose any particular statutory inhibition against a corporation acting as an insurance agent, notwithstanding the construction given to the statutes as above stated.

In 1903, Articles 4963 to 4967 were enacted, further regulating the issuance of insurance contracts by agents, wherein, by reason of the language of such statutes, an implication arises that a corporation might act as a licensed agent. This, of course, was prior to the effective date of Article 4969, Revised Statutes, 1911, being Section 42 of the Acts of the Regular Session of the Thirty-first Legislature, Chapter 108, page 206. This article provides: "No corporation or trust company shall be licensed or granted a certificate of authority as the agent or representative of any life insurance company in soliciting, selling or in any manner placing life insurance policies or contracts in this State." Most certainly, this makes it unlawful for a corporation to act as a life insurance agent, but it is argued that such inhibition

does not apply to other character of insurance, as, for instance, fire, casualty, etc.

Article 4955, being in Chapter 15 of Title 71, and designated "General Provisions," provides: "All the provisions of the laws 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 specifically applicable thereto."

Our attention is directed to the case of National Surety Company vs. Murphy Walker Company, 174 S. W., 997, and Western Indemnity Company vs. Free and Accepted Masons, 198 S. W., 1092, decided by Courts of Civil Appeals in 1915, and 1917, respectively, holding Article 4955 unconstitutional on the ground that the subject matter in the article was not contained in the caption of the bill.

Article 4955 was Section 55 of the Acts of the Regular Session of the Thirty-first Legislature, Chapter 108, page 210. The same act of the Legislature contained Section 42, which is Article 4969, prohibiting corporations from acting as life insurance agents. Notwithstanding these judicial expressions, in the case of American Indemnity Company vs. City of Austin, 246 S. W., 1019, the Supreme Court held: "Though Section 55 of Chapter 108 of the Act of March 22, 1909 (Article 4955, Revised Statutes), was unconstitutional as originally enacted, because in violation of Article 3, Section 35 of the State Constitution, in that the subject of such section was not embraced in the title of the act, its re-enactment by the adoption of the Revised Statutes as Article 4955 thereof cured such unconstitutional defect and made it valid."

Since, by Article 4969, the Commissioner of Insurance may not grant a license to a corporation to act as a life insurance agent, and since the same law is applicable, by reason of Article 4955, as against other character of insurance companies, we would respectfully advise that there is no authority for issuing an agent's license to a corporation to act as an agent of any character of insurance companies. It being made unlawful, by Article 4960, for any person to write insurance in Texas or to act as an agent without such certificate from the Commissioner of Insurance, it is therefore unlawful for a corporation to act as such insurance agent. A corporation insurance agency is illegal. Therefore, corporations incorporated under Acts of 1919, Chapter 83, have not the authority to act as such insurance agents—it being an unlawful act.

In thus making effective Article 4955, and, hence, enlarging Article 4969, barring corporations from acting as insurance agents, we are doing less than was done in the American Indemnity Company case last cited (both articles are contained in the Act of 1909), for there it was held that Articles 4749 and 4764 (both of which were contained in the Acts of 1909) were applicable to corporations organized under Article 4942a, being an enactment of the Legislature in 1911.

The implications arising out of the language contained in Articles 4965 to 4967, which became the law in 1903, cannot become the basis of argument for a contrary holding when we take into consideration the enactment of Article 4969 in 1909.

Answering the second question presented, a reference to the above holding is sufficient. The Automobile Underwriters of America, a reciprocal insurance company conducting such business in the State of Texas, cannot constitute a corporation as its agent for the conduct of such business in that such agent is a corporation which is not entitled to receive a certificate to act as such insurance agent. It is stated by you in your inquiry that the subsidiary corporation is acting as attorney-in-fact. In the absence of restrictions, we assume that the agency thus created includes the power to act as an insurance agent for the company. The provisions of Articles 4969 are applicable to such a situation.

NOTE.—The right to act as an insurance agent proceeds from governmental license. The qualifications of the applicant govern the issuance of such a license. Criminal statutes restrain illegal action of such licensees. It has been treated in Texas as a privilege. Corporations authorized to perform any lawful act probably have not the power to exercise such privilege.

In re Co-operative Law Co., 92 N. E., 15.

People vs. Peoples Trust Co., 167 N. Y. Supp., 767.

People vs. Title Guaranty Trust Co., 168 N. Y. Supp., 278.

Eley vs. Miller, 34 N. E., 836.

Savings Bank vs. Ward, 100 U. S., 195.

Kerens vs. St. Louis Union Trust Co., 11 A. L. R., 288.

31 Harvard Law Review, 886-891.

24 H. L. R., 60.

In thus holding that a corporation may not act as an insurance agent in Texas, we are giving the same application to the statutes regulating the business of insurance that have been consistently and uninterruptedly applied in Texas. (Franklin Fire Insurance Company vs. Hall, 247 S. W., 822; Lyman vs. Ramey, Insurance Commissioner of Kentucky, 195 Ky., 233.)

The business of writing insurance has many of the characteristics of a profession. Those engaged therein must possess skill, a high degree of intelligence, and owe a stringent duty in carrying out the trust given them by the insurance company and confided to them by the insured. It may be that a legal fiction might possess these qualities in law, and perform the duties of an insurance agent through its own agents, but it is enough to say that it has not been so considered in Texas, and, having regard for such interpretation and the spirit of the statute, the conclusion above announced is reached.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2537, Bk. 59, P. 166.

INSURANCE—STATE FIRE INSURANCE COMMISSION—MUTUAL FIRE INSURANCE COMPANIES—LLOYDS PLAN FIRE INSURANCE.

1. All contracts or policies of insurance against loss by fire on property in Texas must be made and issued pursuant to the provisions of the State Insurance Commission Act (Acts Thirty-third Legislature, Chapter 106, page 195, approved April 2, 1913, as amended, Articles 4876 to 4904, C. S., 1920), except such contracts and policies issued by "purely mutual" or "purely profit-sharing" or "purely co-operative inter-insurance or reciprocal exchanges" fire insurance companies for protection of their own property and not for profit.



2. Mutual fire insurance companies incorporated under Chapter 180, page 392, Acts Regular Session of the Thirty-eighth Legislature, 1923, are subject to the laws regulating stock fire insurance companies with respect to annual reports, valued policies, policy forms, etc.

3. Individuals, partnerships, or associations writing fire insurance on the Lloyds Plan under the Act of the Thirty-seventh Legislature, Chapter 127, 1921, are not amenable to the State Insurance Commission Act.

4. Statutes construed: Uniform Mutual Insurance Company Act, 1923; Lloyd's Plan Fire Insurance Companies; State Insurance Commission Act, 1913.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 8, 1923.

*Honorable John M. Scott, Commissioner of Insurance, Capitol.*

DEAR SIR: The Attorney General is in receipt of your communication of November 6, 1923, in which you present the following inquiry:

"The question that I am submitting to you is as to whether or not, under the exemption set out in Article 4902, mutual insurance companies organized under the laws of this State, and under the laws of other States and doing business in this State, and carrying all lines of coverage, and doing a state-wide insurance business for profit, would be exempted from the provisions of the law covering the creation and operation of the State Insurance Commission. \* \* \* For your information I desire to state that there are a great number of mutual, reciprocal and Lloyd's organizations writing a very large amount of fire insurance over this State, that claim to be exempted from supervision of the State Insurance Commission, under Article 4902, and by reason of such exemption there is no supervision of such companies as to the manner, forms of policy, rates or regulations for their writing fire insurance business in this State. \* \* \* It is further stated by you that such companies are ignoring the rates promulgated by the State Fire Insurance Commission and are violating Articles 4896 and 4897 of the Revised Statutes, preventing rebating and discriminations."

A statement of the question immediately reveals its gravity and importance and necessitates a clear understanding of the insurance laws of the State affecting fire insurance and a determination of the extent to which the State has gone in undertaking to regulate and control such business.

The State of Texas is one among the few, if not the only State, which has assumed the regulation and control of fire insurance companies to the extent of prescribing policies and fixing the rates of premium to be charged by the insurance carriers. The Legislature of the State of Texas in 1909 (First Called Session, Thirty-first Legislature, Chapter 18, page 311) created what was known as the State Fire Rating Board. It provided that foreign and domestic fire insurance companies should be deemed to have accepted the provisions of the act in securing certificates of authority to transact such business. The Commission created only had authority to direct insurance carriers filing schedules of rates, to alter and amend pursuant to the determination of said Commission. All rates charged were required to be filed by the insurance company with the Commission and the charging of a different rate was inhibited.

Section 17 of the act referred to provided:

"This act shall not apply to mutual or profit-sharing fire insurance companies under the laws of this State nor to purely co-operative, inter-insurance and reciprocal exchanges, carried on by the members thereof solely for the protection of their own property and not for a profit."

In construing the section of this act thus quoted, the Attorney Gen-

eral on December 31, 1909, advised the Commissioner of Insurance and Banking that the statute creating the Fire Rating Board "applies to only such companies as insure against loss by fire only." (Opinions Attorney General, 1908-10, p. 303.) On March 4, 1910, the Attorney General advised the Commissioner of Insurance and Banking that:

"It is our opinion that the statute referred to by you, from its phraseology and from the general history of insurance statutes in Texas, would not include companies which do not do the usual and ordinary business carried on by fire insurance companies, but which, incidental to their well defined lines of insurance, write policies upon property, indemnifying any loss by fire, as one of many casualties insured against."

The opinion referred to there restricted the one previously written. (Opinions Attorney General, 1908-10, p. 316.)

The Legislature of 1910 (Fourth Called Session, Thirty-first Legislature, Chapter 8, page 125) repealed the 1909 act, re-enacting practically the same provisions, although somewhat broader in scope. Section 1 of this act reads as follows:

"Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign country, whether such company is organized under the laws of this State or under the laws of any other State, Territory or possession of the United States, or foreign country, or by authority of the Federal Government, now holding a certificate of authority to transact business in this State, or hereafter granted authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder upon condition that it consents to the terms and provisions of this act and that it agrees to transact business in this State subject thereto; *it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire.*" (Section 1, p. 125, Fourth Called Session.)

It will be observed from the above quoted provisions of the 1910 act that the Legislature changed the subject matter of the legislation in the 1909 act. That legislation was directed and applied to fire insurance companies, whereas in the 1910 act the Legislature dealt and legislated upon contracts and policies of fire insurance, by whomsoever written and issued, thus eliminating the difficulty of applying the former act.

It is every contract or policy of insurance, against the hazard of fire, that the Legislature directs shall be written according to the provisions of the enacted law. Incidentally it is to be noted that the Fire Rating Board was renamed as the State Insurance Board and said Board was given "the power and authority, and it shall be its duty to prescribe, fix, control and regulate rates on fire insurance."

Again, in Section 27 of the act, the Legislature exempted certain insurance contracts from the provisions of the act. The restriction, however, contained in Section 27, was less comprehensive than the exemptions in Section 17 of the 1909 act, above quoted. The same language was used, to be true, but the adjective "purely" preceded the

words "mutual" and "profit-sharing fire insurance companies" and also the word "unincorporated" was inserted.

The Legislature again in 1913 (Acts Regular Session, Thirty-third Legislature, Chapter 106, page 125, approved April 22, 1913) repealed the Act of September 6, 1910, above referred to—re-enacted substantially the same provisions. The sections are contained in Articles 4876 to 4904, Complete Statutes of 1920.

The State Fire Insurance Commission was authorized exclusively to fix maximum rates of insurance, in excess of which carriers could not charge for policies and contracts, but might charge a lesser rate.

The 1913 act, in Section 3 thereof, contained the identical language found in Section 1 of the 1910 act, above quoted. The section is Article 4876, Complete Statutes, 1920. The 1913 act also contained, in Section 28, the identical language contained in Section 27 of the 1910 act, which in turn was largely similar to Section 17 of the 1909 act. Section 28 is now Article 4902, Complete Statutes, 1920.

The Attorney General on March 14, 1914, advised the Commissioner of Insurance and Banking, pursuant to the changed condition of the statute directly operating upon fire insurance contracts rather than companies, "That all insurance written in this State against the hazard of fire is subject to the rates made by the State Fire Insurance Commission and that all insurance companies writing insurance of this character must comply with all the fire insurance laws of this State, the same as companies which write the ordinary fire policies on buildings and other property." (Opinions Attorney General, 1914, page 472.)

The law creating the State Insurance Commission and regulating insurance contracts as enacted in 1913 is now in force and effect, with slight amendments to Articles 4878, 4879, 4881, 4882 and 4908 on March 10, 1917, and Article 4903 as again amended in 1920.

While it is true that all insurance contracts and policies, by whomsoever written, must be authorized and issued in accordance with the State Insurance Commission Act, yet the act itself, in Article 4902, makes certain exceptions. These excepted contracts of fire insurance are such contracts as are written by companies described in Section 28 of the Acts of 1913, Article 4902, Complete Statutes of 1920, which reads as follows:

*"This act shall not apply to purely mutual or to purely profit-sharing fire insurance companies, incorporated or unincorporated under the laws of this State and carried on by the members thereof, solely for the protection of their property and not for profit, nor to purely co-operative inter-insurance and reciprocal exchanges carried on by the members thereof solely for the protection of their property and not for profit."*

You present the question as to what fire insurance contracts may be written in Texas which are not subject to the provisions of the State (Fire) Insurance Commission Act. The act is general in its nature and is applicable to all contracts of fire insurance by whomsoever written, limited and restricted by the exceptions contained in Article 4902, above quoted, and such other statutes regulating fire insurance companies that exempt such companies from the application of the State Fire Insurance Commission Act. We have, therefore, to determine what incorporated companies writing fire insurance in Texas must

comply with the act. It is therefore desirable and necessary to enumerate the different statutes authorizing the creation and incorporation of mutual fire insurance companies as well as co-operative inter-insurance and reciprocal exchange insurance.

The Revised Statutes and Code of 1879 contains in Article 566, Section 27 (General Corporation Title—XX), authority for the incorporation of companies for any "purpose intended for mutual profit or benefit." Mutual fire insurance companies could have incorporated under this act. (*State vs. Burgess*, 109 S. W., 922.) However, this section of the General Incorporation Act was repealed in March of 1885. (Regular Session, Nineteenth Legislature, Chapter 61, p. 59, Gammel's Laws of Texas, Vol. 9.) The corporation title of this code does not specifically authorize the creation of insurance companies. However, Title 53—Insurance—authorizes capital stock insurance companies, including life, fire, etc., and provides for the regulation thereof by the Commissioner of Insurance. This title of the code was formulated from the Insurance Laws of 1874, authorizing life and health companies, and the laws of 1875, authorizing fire and marine companies, and the laws of 1876, creating the Department of Insurance. (*State vs. Burgess*, supra; *American Indemnity Co. vs. City of Austin*, 246 S. W., 1019.)

The Revised Statutes and Code of 1895 contains in Article 642, Section 50 (General Corporation Title—XXI), authority for incorporation of "mutual fire associations without an authorized or subscribed capital stock." Neither the Code of 1879 nor of 1895 contain in the insurance title authority for the creation of mutual fire insurance companies. Nevertheless, mutual fire insurance companies, whether organized under the Code of 1879 or 1895, were subject to the insurance title of those codes and provisions thereof applicable to such character of company. (*State vs. Burgess*, supra; *Farmer et al. vs. State*, 7 S. W., 220.) Since those codes contain an exception which only exempted benevolent corporations which were in truth and fact benevolent and capable of being incorporated under the general corporation title. (Articles 3092, 3096 and 3096w, R. S., 1895; *State vs. Burgess*, supra; *Farmer vs. State*, supra; *Opinions Atty. Gen.*, 1920-22, p. 276.) Section 50, Article 642, in the general corporation title of Revised Statutes of 1895 was preserved in the Code of 1911 in Article 1121, Section 50, and now remains the law authorizing the creation of mutual fire insurance companies subject to the insurance title of the Code.

However, it is not all mutual companies which may incorporate under this authority, as will be understood by reference to the mutual fire insurance company act incorporated into the insurance title and the Code of 1903. (Acts Regular Session, Twenty-eighth Legislature, Chapter 109, page 166.) This latter act is the first authority contained in the insurance title authorizing mutual fire insurance companies. In Section 12 of the act it was provided that "every mutual insurance company heretofore organized under the laws of the State shall conform to the provisions of this act." However, the following companies were excepted, viz., "local mutual insurance companies organized or hereafter organized to transact business in only one county of the State" or "any mutual fire, storm or lightning insurance society or association that has heretofore been incorporated under the laws of the State or that may

hereafter be incorporated *under the provisions of this act*" that (a) does not solicit insurance through agents or pay commissions for procurement of insurance; (b) that conducts its business through chapters, counsels or solicits; (c) that makes election to membership subject to ballot; (d) that has a representative form of government; (e) whose contracts bind every policyholder to and makes him liable on every policy issued; (f) and that collects separate premiums or assessments to pay loss, operating expenses, etc.; and (g) preserves no reserve fund nor deposited securities. The act further provides that all other mutual insurance companies should within sixty days obtain a permit to conduct business under the act. Hence, such excepted mutual fire companies under the 1903 act obtained authority to organize under the section of the general corporation title hereinabove referred to. Mutual fire insurance companies heretofore incorporated under the general incorporation title of the statute not excepted in the 1903 act were compelled to thereafter conduct business pursuant to the act. (*Robins vs. Midkiff*, 102 S. W., 431.) Of course, the excepted companies were not affected by the act. This was the status of the law upon the codification of the Revised Statutes in 1911, and therefore the codifiers correctly included within the general incorporation title the section authorizing the creation of mutual fire companies without capital stock. The 1903 act became Articles 4905 to 4918 and Chapter 10, Title 71 of the Revised Statutes of 1911. This act, however, was repealed in 1913 (Acts Regular Session, Thirty-third Legislature, Chapter 29, p. 54), and the then mutual fire insurance law enacted has in it substantially the same provisions as were contained in the 1903 act. The act repealed Chapter 10, Title 71 of the Revised Statutes of 1911, being the 1903 act. However, substantially the same exceptions as were contained in the 1903 act were preserved, in that it was provided "nothing in this act shall be deemed to apply in any way to the present law governing county mutual insurance, or farmers' mutuals, now operating under lodge systems, or printers' mutuals, and such companies and associations shall not be subject to the provisions of this act, except that they will make annual reports to the Commissioner of Insurance and Banking of the State of Texas." Hence, mutual fire insurance companies possessing the characteristics described in the 1903 and 1913 mutual fire insurance company act may yet incorporate under the general incorporation title and conduct such business unrestricted by the requirements of the mutual fire insurance act of 1913, except the rendition of annual reports to the Commissioner of Insurance and Banking. This was the status of the law regulating mutual fire insurance companies until 1923. The Legislature (Acts Regular Session, Thirty-eighth Legislature, Chapter 180, page 392, effective June, 1923) passed what is called by insurance people the "uniform mutual insurance act." In Section 18 it repealed all laws or parts of laws in conflict, "provided that such repeals in the provisions of this act shall not apply to or affect any company or association, including county and farmers' mutual associations of this State now doing business." However, such described companies were authorized by resolution of its board of directors and filed with the Commissioner of Insurance to adopt and become subject to the provisions of the act. Undoubtedly the 1923 act was intended and did repeal Chapter 10 of Title 71, being the 1903 act, authorizing

the creation and regulation of mutual fire, storm and lightning insurance companies, however, still preserving the authority contained in the general corporation title, Article 1121, Section 50, authorizing the incorporation of mutual fire insurance companies without capital stock which are conducting such a business as is known as county and farmers' mutual associations doing business as such at the time of the enactment of the law (June, 1923).

Summarizing the foregoing we find that mutual fire insurance companies were authorized to be incorporated (1) under subdivision 27, Article 566, Revised Statutes of 1879, until March 27, 1885; (2) under Section 50, Article 642, Revised Statutes of 1895, until 1903; (3) both under Chapter 10, Title 71, Revised Statutes of 1911, and Section 50, Article 642, Revised Statutes of 1895, and Section 50, Article 1121, Revised Statutes of 1911, until 1913; (4) under Section 50, Article 1121, Revised Statutes of 1911, and under Chapter 10, Title 71, as amended in 1913, until June, 1923; (5) under Section 50, Article 1121, Revised Statutes of 1911, and Chapter 180, Acts Regular Session, 1903, to the present time. Corporations may now be created and operated under the latter two provisions of the statutes.

Again, fire insurance may be written in Texas under the Lloyd's plan. (1921-22, Acts Regular Session, Thirty-seventh Legislature, Chapter 127.) This act authorizes individuals, partnerships or associations of individuals to write insurance of any kind except life insurance. The Commissioner of Insurance has limited supervision over the affairs of such concern. Section 10 of the act (Article 4972½hh) provides "that all such underwriters and attorneys, agents and representatives transacting the business of insurance in this State on the Lloyd's plan shall be governed and regulated by the provisions of this act. \* \* \*" Section 11 (Article 4972½i) provides: "That except as herein provided no other insurance law of this State shall apply to insurance on the Lloyd's plan unless it is specifically so provided in such other law that the same shall be applicable."

Hence, at the present time, excluding stock fire insurance companies, there exists three statutes authorizing the creation, regulation and control of fire insurance companies hereafter incorporated, viz., corporations organized under Section 50, Article 1121, Revised Statutes of 1911, and doing what is termed as county or farmers' mutual fire insurance and as further described in the mutual fire insurance companies act of 1903, 1913 and 1923; corporations doing a mutual fire insurance business under Chapter 180, Acts Regular Session of the Thirty-eighth Legislature; corporations, individuals, partnerships, associations doing fire insurance business under the Lloyd's plan under the provisions of the Acts of the Regular Session of the Thirty-seventh Legislature, Chapter 127, enacted in 1921.

In answering the question as to what companies must comply with the State (Fire) Insurance Commission Act regulating and supervising fire insurance, we confine our reply exclusively to companies now authorized to be created and under the foregoing enumeration, without attempting to discuss the application of said act to fire insurance companies that may have heretofore been authorized to conduct a fire insurance business where the law authorizing, regulating and controlling

such companies are now repealed although carrying on such business for the term of the charter granted.

Article 4902, Revised Statutes of 1911, exempts from the State (Fire) Insurance Commission Act "purely profit sharing" incorporated or unincorporated concerns carried on by the members thereof "solely for the protection of their property and not for profit." The same is applicable to "purely co-operative inter-insurance and reciprocal exchanges."

### I.

As we have seen, mutual fire insurance corporations conducting business under Subdivision 50, Article 1121, are subject to the insurance title of the statutes and are consequently limited as to the character of business which it may do. The character of the business done and the corporation is defined as follows: It transacts business in one county or locality; it does not solicit insurance through agents; it pays no commissions or fees; it conducts its business through chapters, counsels or solicitors. Each member is elected by secret ballot and is bound upon each and every contract of insurance. Separate premiums are collected to pay losses, operating expenses and salaries. It is required to file annual reports with the Commissioner. Undoubtedly this is for the purpose of permitting the Commissioner to determine the true character of the company and further to determine whether or not it is exempted under the burdens imposed on other mutual insurance companies. (*Farmers vs. State*, 207 S. W., 220.) This character of company comes within the exception to the State Insurance Commission Act contained in Article 4902. In effect that exception defines purely mutual companies as those who conduct mutual fire business not for profit and for the protection of the property of the members only. So long, therefore, as such companies' acts are vires they are exempted from the State Insurance Commission Act. However, it is the duty of the Commissioner to determine the true character of such companies. This may be done in each instance by an examination of the application for membership and the contract of insurance entered into by the members with each other. (*Sargent vs. Goldsmith Dry Goods Co.*, 159 S. W., 1036.)

A mutual company is one where the members constitute both insurer and insured, where the members all contribute by a system of assessment to the creation of a fund from which all loss and liabilities are paid and wherein the profits are divided among themselves in proportion to their interests. The members have a voice in the management and in the distribution of funds by whatsoever method collected which are not used for the discharge of losses of the association. (*Joyce on Insurance*, Vol. 1, p. 829.) The business must not be conducted for profit as such, and, further, contracts must be issued only upon property belonging to the members. By these tests the Commissioner may determine the fact as to whether or not corporations incorporated under subdivision 50, Article 1121, are conducting a purely mutual business and may therefore determine whether such companies are within the exceptions contained in Article 4902.

## II.

Section 14 of Chapter 180, Acts Regular Session, Thirty-eighth Legislature, providing for organization and regulation of mutual fire insurance companies, specifically provides what general statutes were applicable to such companies. Hence, such section must be construed in connection with the exception contained in Article 4902. Section 14 prescribes: "Every such mutual insurance company, whether organized within or without this State, shall be subject, except as otherwise provided by law, to all general provisions of law applicable to stock insurance companies transacting the same kinds of business *which relate to* annual reports and renewals of licenses, investments, valued policies, policy forms, reciprocal or retaliatory laws, insolvency and liquidated, publication of defamatory statements, and shall make its annual report in such form and submit to such examinations and furnish such information as may be required by the Commission." This specific enumeration of particular adopted statutes prevails and controls the rules of construction of the act contained in Section 15, negating the possible construction that the general provisions of the General Laws of the State should not apply. (Lewis' Sutherland's Statutory Construction, pars. 405, 407 and 422.) Adoption of statutes by particular reference prevails over adoption of statutes by general references. By applying Article 4902 alone to the corporation created by the act, it may be subject to all or none of the provisions of the State Insurance Commission Act, depending on whether or not it is a mutual company defined in the exception. Whereas, by applying Section 14 of the act to such corporation, it is subject to the laws affecting stock insurance companies as is therein enumerated. These constructions are necessarily in conflict. Assuming that the Legislature proceeded with a knowledge of existing laws and that the Thirty-third Legislature in enacting the State Insurance Commission Act could not bind the Thirty-eighth Legislature in enacting Section 15 of the Mutual Insurance Act (Lewis' Sutherland's Statutory Construction, Vol. 2, par. 355), these two provisions must be construed in the light of each other. It is impossible to construe the exceptions together, for the reason that the one makes all or none of the provisions of the State Insurance Commission Act applicable to the company, whereas, the other in any event makes a portion of such provision applicable. The last statute is complete in itself. It is specific in language. It was subsequently enacted. It evidently intended to prescribe the identical insurance laws applicable to the company. Hence, we conclude that the latter legislation controls (Lewis' Sutherland's Statutory Construction, par. 447), and Section 14 exclusively controls what laws are applicable to the corporation there authorized, namely, the laws relating to annual reports; renewal of licenses, investments, valued policies, policy forms, reciprocal or retaliatory laws, insolvency and liquidation, etc. The enumeration is exclusive of others.

## III.

Fire insurance companies conducting the business on a large plan are directed by the Legislature "to be governed and regulated by the provisions of this act." (Acts Thirty-seventh Legislature, Chapter 127, Sec. 10.) Further, it is provided "that except as herein provided no



other insurance law of this State shall apply to insurance on the Lloyd's plan *unless it is specifically so provided in such other law that the same shall be applicable.*" The act evidences the intention of the Legislature to make it complete and absolute within itself, as indicated by the foregoing quoted language. It is subsequent to the State Insurance Commission Act; it negatives the application of all other insurance laws to the companies authorized there to do business. The exception is that where other laws specifically provide that they shall be applicable to the Lloyd's plan, they shall apply. The Lloyd's plan being unknown in the statutes until this enactment, virtually resulted in no exception to the provision that no other insurance law should apply. Since the enactment in 1921 authorizing the Lloyd's plan of insurance the Legislature has not modified or made specifically applicable the State Insurance Commission Act to the Lloyd's plan of insurance. Hence, we conclude that contracts of fire insurance written by such companies are not regulated or covered by the State Insurance Commission Act.

Our conclusion is that domestic corporations now authorized to do a fire insurance business (1) under subdivision 50, Article 1121, Revised Statutes of 1911, and in fact transacting such business not for profit and insuring the property of members of this association only, are not subject to the State Insurance Commission Act. (2) That corporations conducting a mutual fire insurance business under Chapter 180, Acts Regular Session of the Thirty-eighth Legislature, are subject to all the laws affecting stock insurance companies enumerated in Section 14 of the act. (3) That individuals or associations conducting a fire insurance business under the Lloyd's plan are not subject to the provisions of the State Insurance Commission Act.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2529, Bk. 59, P. 182.

FRATERNAL BENEFICIARY ASSOCIATIONS—THE FORT WORTH MUTUAL  
BENEVOLENT ASSOCIATION OF TEXAS—FUNDS—VALUATION  
OF CERTIFICATES.

1. Fraternal beneficiary associations, whether organized or incorporated, must comply with the Fraternal Beneficiary Association Act of 1913.

2. Associations or corporations writing fraternal beneficiary insurance prior to the Act of 1913 may collect their funds and discharge their beneficiary certificates upon the assessment plan.

3. Fraternal beneficiary associations, whether incorporated or not, must render their reports and comply with the maintenance of funds upon the valuation of certificates, as provided by the Act of 1913, Articles 4850, 4850a, R. S., 1911.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 27, 1923.

*Honorable John M. Scott, Commissioner of Insurance, Capitol.*

DEAR SIR: This Department has your letter of August 7th and the report of the actuary of your Department of June 22, 1923, with respect to the organization and character of the business conducted by

"The Fort Worth Mutual Benevolent Association of Texas." We also have communication from your Department dated October 19, 1923.

In the following discussion, we do not wish to be understood as passing upon any question other than those stated; we expressly do not decide that the company is conducting a fraternal benefit society with lodge system, representative form of government, etc. These fact questions are not for this Department to determine here, but must be ascertained by the Insurance Department, and to its satisfaction.

We understand from these communications that you desire to know whether or not said company should be permitted to continue operating its business under its license, or whether said license should be revoked. The sole grounds for revocation of said license, the sufficiency of which you submit to this Department for determination, are in substance as follows: The company operates upon the assessment plan as a method for raising the funds to defray its obligations upon benefit certificates. Second, the Department is without evidence that the society has or could comply with its order requiring said company to render its valuation report as required by the statute.

We shall undertake to consider these stated grounds and determine whether or not the Commissioner of Insurance should exercise the authority granted under Article 4851 and revoke the company's license to do business. Under this article it is provided, in substance, that when an examination discloses that a domestic society "has failed to comply with the provisions of this act, or is exceeding its powers, or is not carrying out its contract in good faith, or is transacting its business fraudulently, or whenever any domestic society, after an existence of one year or more, shall have a membership of less than four hundred, the Commissioner of Insurance may present the facts relating thereto to the Attorney General," who shall take such action as the circumstances warrant. We understand from the questions presented that there is no controversy concerning the carrying out of the contracts by the company or that it is transacting business fraudulently, or that its membership is less than four hundred, but the sole question is whether or not the company "is complying with the provisions of this act, or is exceeding its powers."

The Fort Worth Mutual Benevolent Association was incorporated November 7, 1908, as a fraternal benefit society, having originally filed its charter in the office of the Secretary of State, and thereafter, in December, 1921, amended the same by changing its original name to that of "The Mutual Benevolent Association of Tarrant County," and on the 25th day of February, 1922, it again amended its charter so that its name should be "The Fort Worth Mutual Benevolent Association of Texas"; the company was first licensed, as required by law, on February 3, 1922, and again on March 31, 1923, which license entitled the company to do business until March 21, 1924. The purpose clause of the corporation authorizes it to provide for the support, welfare and relief of the husband, wife, brothers, sisters and children of its members. It further provides that the corporation shall have no capital stock and shall have only such assets which may accrue to it by such fees, dues, fines and assessments as may be hereafter levied by said grand lodge. It is authorized to have subordinate branches, which shall be subject to the control of the grand lodge. It is incor-

porated for a term of fifty years. A typical policy issued by such company, designated as its "Class B," one thousand dollar policy, which is described as a certificate, provides that the certificate holder "agrees to pay all assessments levied by the directors of the Mutual Benevolent Association, as needed, of one dollar and ten cents upon the death of any member in this class within ten days from date of call for same and three dollars per year for annual dues." The association obligates itself to pay to the order of the certificate holder one dollar for each member in good standing at the time of his or her death, said amount not to exceed one thousand dollars. The certificate holder agrees to pay, upon the loss of an eye, hand or foot of any member of the association an assessment of fifty-five cents, and, should a member become permanently or totally disabled, such certificate holder agrees to pay one dollar and ten cents. The association obligates itself to pay fifty cents from each member in good standing, not to exceed five hundred dollars, to a certificate holder whenever such certificate holder sustains permanent or total loss of an eye, hand or foot, and, further, it binds itself to pay the sum of one dollar from each member, not to exceed one thousand dollars, to a certificate holder who has sustained total and permanent disability. The by-laws are those usually adopted by fraternal benefit associations. The files presented show very little, if any, information as to the total funds of the company on hand, values of its policies and the division and classification of its members, and so forth.

In order to determine whether or not the Fort Worth Mutual Benevolent Association is acting within its granted authority, it is necessary to briefly call attention to the pertinent provisions of the fraternal benefit society laws. The original first fraternal benefit association law in Texas was passed at the Regular Session of the Twenty-sixth Legislature in 1899, Chapter 115, page 195. This act defines fraternal beneficiary associations, authorizing the incorporation of same and requiring that said organization file reports with the Commissioner of Insurance. Said report, among other things, should contain the number of losses, the amount of assessments, whether or not the association has a reserve or emergency fund, description of classes of certificate holders, whether incorporated or not, and other detailed information. The organizing of some companies and the conduct of business defined without compliance with the act was made a criminal offense. Such companies were authorized to use their reserve funds, not necessary to pay death or disability benefits, by investments in securities. Certain exceptions were made as to such associations, as the Order of Railroad Conductors, etc. (*Supreme Lodge vs. Johnson*, 98 Texas, 1.) The act was amended at the Regular Session of the Twenty-seventh Legislature, 1901, which provides an additional feature—should such association refuse or neglect to make the report provided for in the act, it should be excluded from doing business in the State. (1901 act amended, Section 6 of the 1899 act.) Section 16 of the 1899 act was amended by Chapter 113, page 119, Acts of the Twenty-eighth Legislature, 1903, making additional exemptions, and, at the Regular Session of the Twenty-ninth Legislature, 1905, Chapter 106, page 206, other exceptions were added to Section 16. At the Regular Session of the Thirty-first Legislature, 1909, Chapter 36, page 357, all previ-

ous laws affecting fraternal beneficiary associations were repealed and an entire new act substituted. Section 9 provided in part: "Any association may create, maintain, disburse and apply a reserve emergency or surplus fund in accordance with its constitution and laws not inconsistent with this act. \* \* \* The funds from which benefits shall be paid and the funds from which the expenses of the association may be defrayed shall be derived from periodical or other payments by the members of the association and the accretions of said funds. \* \* \*"

It was provided that extra assessments may be levied. Section 4 of the act is the same as contained in Article 4830, R. S., 1911. Section 15 provided: "Any association now engaged in transacting business in this State may exercise, after the passage of this act, all of the powers conferred thereby and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of association, not inconsistent with this act; or it may be reincorporated hereunder, but no association already organized shall be required to reincorporate hereunder nor shall it be required to adopt the provisions prescribed herein for new associations," and so forth. (See Article 4840, R. S., 1911.)

At the Second Called Session of the Thirty-first Legislature, Chapter 22, page 443, amendment to Section 8 was provided, fixing the contract between the certificate holder and the company and authorizing amendments of said contract. Again in 1913, the fraternal beneficiary society law was completely rewritten, repealing former laws. The new act contained two principal features not theretofore effective. Section 9 (1913 act), Chapter 113, page 221, Acts Regular Session, Thirty-third Legislature) restated the language contained in the previous acts as to collection of funds and added a proviso thereto, the pertinent language being: "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 societies 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 period 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. \* \* \*"

Again in Section 13, pre-existing associations, as we understand that section, were authorized to accept the powers and privileges of the 1913 act and they might exercise all the powers and privileges under the previous act and the powers and privileges under the 1913 act where the former were not inconsistent with the latter. The latter act seems to be taken bodily from the Fraternal Beneficiary Association Act of the State of Minnesota, General Statutes, 1913, page 811.

We have set out these provisions to support the following conclusions: First, that the Fort Worth Mutual Benevolent Association as originally incorporated and amended, had authority to collect its funds for the payment of its benefit certificate holders on the assessment plan; second, such association may continue to exercise such power if not inconsistent with the act of 1913. We think there is no inconsistency, for the reason that Section 9 of that act authorizes the collec-

tion of funds "from periodical or other payments" from the members of the society. Third, the proviso in Section 9, requiring associations to provide for stated periodical contributions to maintain the valuation fixed by the National Fraternal Congress' Table of Mortality, is specifically made applicable to corporations or associations incorporated or organized after the enactment of the bill in 1913. We, therefore, conclude that the company in question, while required to comply with the Act of 1913, may collect its fund upon the assessment plan.

This Department has previously held that the Fraternal Beneficiary Society Law must be complied with by companies undertaking to do the business defined. (Opinion of Attorney General, Book 30, page 306.) The Fort Worth Mutual Benevolent Association must, therefore, comply with the section of the bill relative to rendering its annual reports. Section 23 provides that the legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress' Table of Mortality, as adopted August 23, 1899. Certainly Section 23, providing for a method of valuing certificates, would and does apply to fraternal benefit societies organized after the effective date of the 1913 act, as well as the provisions in Article 4839 (Section 12), which provide the method to be pursued by companies seeking to become incorporated. The conclusion is not to be reached, however, under the provisions of the statute, that this prescribed standard is exclusive, for the act itself states that the application of the standard shall not determine the solvency of the company. This Department has recognized the clause just mentioned, in holding that a foreign fraternal beneficiary association may be admitted to the State, although its funds in hand do not equal its policy valuations as tested by such standard. (Opinion of Attorney General, 1916-18, page 309.)

It further appears that Section 23a (Article 4850a, Complete Statutes, 1920) fixes a different standard to insure the future solvency of the company. Wide discretion in applying this standard is vested in the Commissioner. (Article 4850.) The dilemma is presented as to whether or not in thus providing two standards for valuing the company's certificates, the Legislature intended to provide alternatives. A thorough reading and examination of the statutes justify the conclusion that the Legislature intended to require all companies doing fraternal insurance business and organized after the 1913 act to maintain their certificates at a legal minimum valuation, measured by the National Fraternal Congress' Table of Mortality. While existing companies should be required to maintain a valuation of benefit certificates as measured by the standards prescribed in Section 23a (Article 4850a), there is no doubt but that all companies are required to file the report and maintain their reserves and funds sufficient to discharge benefit certificates. It is the duty of the Commissioner of Insurance to see that this is done. The Fort Worth Benevolent Association must comply with the statute requiring reports to be filed with the Commissioner of Insurance. These reports must be prepared and filed according to the provisions of the Act of 1913. This company, organized prior to the Act of 113 and having done business before the effective date of said act, must maintain its reserves and funds in such a manner as to discharge its benefit certificates. It is required to maintain

the standard of valuation of said certificates as is provided under Section 23a (Article 4850a, C. T. S., 1920) of the act.

We, therefore, advise that the license of said company should not be forfeited for the reason that it is collecting its funds on the assessment plan. However, said company should be required and should file its reports and maintain its reserves and funds based upon the standard fixed in Section 23a of the Act of 1913 (Article 4850a, C. S., 1920). Should the company fail to do so, it is subject to the penalties provided for by law.

Yours truly,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2527, Bk. 59, P. 225.

WORKMEN'S COMPENSATION LAW—CHAPTER 177, ACTS REGULAR SESSION THIRTY-EIGHTH LEGISLATURE—STATUTORY CONSTRUCTION.

1. The general rule of construction applied to compensation laws is that the law at the time of the injury is to be taken as the measure of the right of recovery.

2. Statutes are to be construed as having only a prospective operation unless the purpose and intent of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used.

3. When a right has arisen on a contract or a transaction in the nature of a contract authorized by statute so perfected as nothing remains to be done by the party asserting the right, the repeal of the statute will not affect it.

4. Statutes construed: Articles 5246-18, 5246-19, 5246-21, 5246-87 of Vernon's Complete Statutes of 1920, as amended by Section B, Chapter 177, Acts Regular Session, Thirty-eighth Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 24, 1923.

*Honorable John W. Hornsby, County Attorney, Austin, Texas.*

DEAR SIR: The Attorney General's Department is in receipt of your letter of August 7th in which you call our attention to Chapter 177, Acts Regular Session of the Thirty-eighth Legislature, which act constitutes an amendment of the Workmen's Compensation Law. You submit brief of attorneys in connection therewith, in which brief the question you desire to be answered is propounded. It is stated as follows:

"The question now recurs upon the proposition: Are those claimants whose cause of action arose prior to the 13th day of June, 1923, the date upon which the present amendment went into effect, entitled to have this increased compensation although their injuries occurred long prior to the enactment of the present amendment?"

In order to have a more complete understanding of the particular question propounded, it must be noted that House Bill No. 95, being Chapter 177, Acts of the Regular Session of the Thirty-eighth Legislature, was passed and approved April 3, 1923, effective ninety days after adjournment, and in the enacting clause it is provided, among other things, "that Sections 3, 8, 10, 11, 12 and 15a of Part I of Chapter 103 of the General Laws of the Regular Session of the Thirty-fifth

Legislature shall be and are hereby amended so as to hereafter read as follows."

Without quoting the language of the amendment, we find that Sections 8, 10, 11 and 12, with immaterial exceptions, contain the same wording as similar sections in the Acts of 1917, Chapter 103, contained in Vernon's Sayles' Complete Texas Statutes of 1920, Articles 5246-14, 5246-18, 5246-19 and 5246-21, except that the 1917 act provides that the association shall pay the beneficiaries of the deceased employe a weekly payment equal to sixty per cent of his average weekly wages, but not more than \$15 nor less than \$5.00 for a period of three hundred and sixty weeks, while the amended act raises the maximum and minimum to \$20 nor less than \$7.00, respectively. The same changes are made as to the amount of compensation for total incapacity resulting from injury and likewise as to partial incapacity. For enumerated injuries (Section 12) the Act of 1917 placed a limit of not less than \$5.00 per week nor to exceed \$15 per week, while the act in question provided for not less than \$7.00 per week nor to exceed \$20.

Generally speaking, the effect in each instance is to increase the compensation to which an injured employe is entitled. It is provided that all laws and parts of law in conflict are repealed.

The single question is presented as to whether or not employes injured prior to the effective date of the amending act, yet unpaid in whole or in part, are entitled to the compensation provided under the 1917 act or under the 1923 act. It is insisted that although the contract of insurance was obtained, and although the 1917 act remains in effect until the amendment became effective, and although the injuries occurred prior to the effective date thereof, yet such injured employe is now entitled to the measure of compensation fixed by the latter act. To this construction of the statute and amendment we cannot assent.

At the outset it must be conceded that it is a rule of statutory construction that all statutes are to be construed as having only a prospective operation unless the purpose and intent of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language. It is further the rule that in case of doubt the doubt must be solved against the retrospective effect. (36 Cyc., 1205.) All the more reason exists in Texas for such a statutory construction because of the express provision of the Texas Constitution contained in Article 1, Section 16, which reads as follows:

"No bill of attainder, ex post facto law, retroactive law or any other law impairing the obligation of contracts shall be made."

This rule has been so consistently applied to the original enactment and subsequent amendment of compensation laws that the consequent corollary has been deduced, viz.: that the general rule of construction applied to compensation laws is that the law at the time of the injury is to be taken as the measure of the right of recovery.

In the case of *Holmberg vs. City of Oakland*, 203 Pac., 167, plaintiff sustained injuries October 3, 1914, and suffered therefrom until March 6, 1920, at which time he underwent surgical operations and then sued to recover expenses incurred thereby. The statute authorizing compensation for such expenses did not exist at the time of the injuries but became effective January 18, 1919. Defendant resisted the claim on the ground that the act was not retroactive so as to apply

to injuries sustained prior to the effective date of said act. Defendant's contention was sustained by the court, which used the following language:

"This conclusion is further enforced by the construction which has been quite uniformly applied to compensation laws, which is to the effect that the state of the law at the time of the injury is to be taken as the measure of the right of recovery of the injured person. It was so held by our Supreme Court in the case of Hyman Bros. B. & L. Co. vs. Industrial Accident Comm., 180 Cal., 423, 181 Pac., 784, and the rule therein stated follows in the line of the general authority in other jurisdictions. (Arizona, Etc., Co. vs. Clark, 207 Fed., 817, 125 C. C. A., 305; Soderstrom vs. Curry, 143 Minn., 154, 173 N. W., 649; Schmidt vs. O. K. Bak. Co., 90 Conn., 217; 96 Atl., 963; Baur vs. Court of Com. Pleas, 88 N. J. Law, 128, 95 Atl., 627; Diebeikis vs. Link Belt Co., 104 N. E., 211.)"

In the case of Gauthier vs. Penobscot Chemical Fiber Co. et al., 113 Atl., 28, the facts show that Gauthier suffered a broken leg on April 23, 1918, his condition growing worse, his leg was amputated January 19, 1920. The petition for compensation was filed May 21, 1920, and under decree of October 13, 1920, compensation for total incapacity of \$11.15 per week from October 2, 1919, to January 19, 1920, was allowed. The weekly allowance conformed to the act of 1919. Appeal was taken and the decree resisted because the chairman of the Accident Board erroneously applied the law of 1919, thereby allowing larger compensation than was provided by the law in force when the accident occurred. It was held that the 1919 act could not be made applicable. The court used the following language:

"If such be the intention of the act, it cannot under the plain provisions of both the Federal and State Constitution be given that effect so far as concerns rights and obligations which accrued before its passage. Our Workmen's Compensation Law is elective. Rights and obligations under it are contractual. Mailman's case, 118 Me., 175, 106 Atl., 606.

"Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would clearly be to impair the obligation of contracts.

"The procedure may be changed if a substantially equivalent remedy remains; but contractual rights that have become but vested remain unaffected by the repeal of an old or the enactment of a new statute.

\* \* \* \* \*

"To the point that the repeal of a statute does not destroy or impair, but preserves and protects vested contractual rights based upon it, see Steamship Co. vs. Joliffe, 2 Wall., 450, 17 L. Ed., 805; State vs. Bank, 68 Me., 515; Swan vs. Kemp, 97 Md., 686, 55 Atl., 441; K. of A. vs. Logsdon, 183 Ind., 108 N. E., 592.

"In the following cases arising under Workmen's Compensation Laws the principle has been applied to facts in effect parallel to those in the case at bar. Schmidt vs. Baking Co., 90 Conn., 217, 96 Atl., 963; Collwell vs. Bedford Co. (Ind. App.), 126 N. E., 439; Baur vs. Court of Common Pleas, 88 N. J. Law, 128, 95 Atl., 627."

While we think that the above cases correctly announce the principle applicable to the immediate question, nevertheless, we call attention to the following authorities which directly answer the same question in the same manner as is answered above:

Thornton on "The Employers' Liability and Safety Appliance Acts," page 139, and ten or more Federal cases cited in a note to the text. Boyd's "Workmen's Compensation," paragraph 228, citing the case of Gorgries vs. Falk County, 133 N. W., 209. A very illuminating dis-



cussion of the power of the Legislature to apply the Compensation Act to existing contracts between employer and employe appears in Bradberry's "Workmen's Compensation," third edition, page 1006. The author calls attention to the case of *Baur vs. Court of Common Pleas*, 95 Atl., 627, in which it was held that the 1913 amendment to the New Jersey act allowing consecutive payments for partial and permanent disability does not apply to accidents which happened before the amendment became effective. The same author, at page 176, calls attention to the cases of *State vs. District Court of Hennepin County*, 154 N. W., 661; *Greenhill vs. The Daily Record, Glasgow*, 46 Scotch L. R., 483; and also the decision of the Federal court holding that the Compensation Act of Arizona did not apply to injuries occurring prior to the passage of the act. *Arizona & N. M. R. R. Co. vs. Clark*, 207 Fed., 817.

Furthermore, if the above construction of the statute were not well established and we were without judicial instructions with respect to the amendments in question, it would be our duty to apply the universal principle that all acts should be so construed, if possible, to avoid conflict with the Constitution. (Sutherland's *Statutory Construction*, par. 83.) The rule is stated that retrospective operation should not be given to a statute where the effect would alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration. *Rockwall County vs. Kaufman County*, 67 Texas, 172. This rule was applied in the case of *Erie Railroad Company vs. Callaway* in interpreting the Compensation Act of New Jersey, 102 Atl., 6.

As stated in the case of *Gauthier vs. Penobscot Chemical Fiber Company*, supra:

"Upon the happening of an industrial accident the right to receive compensation becomes vested and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would clearly be to impair the obligation of contracts."

So we think that the obligation upon the association to pay compensation within the maximum and minimum prescribed by the 1917 act is fixed when the injury occurred and notice thereof received. The right is fixed as to the employe for his compensation and likewise the obligation of the association is fixed. Undoubtedly the right to compensation as fixed by the 1917 act and the exemption from greater liability thereon in favor of the association is vested within the meaning of the term "vested right" as that term is defined. Such a right must have become a title legal or equitable to the present or future enforcement of a demand or a legal exemption from a demand made by another. *Cooley on Constitutional Limitation*, page 508. Nor is the rule changed by reason of the fact that the compensation to which the injured employe is entitled is fixed by statute. It is stated by Mr. Justice Feld in the case of *Steamship Co. vs. Joliffe*, 2 Wall., 457, that:

"When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute."

It must therefore be apparent that should a retroactive effect be

given to an amendment it would of necessity deprive the association of a lawful exemption already vested and accrued. Therefore, it is our duty to avoid such a construction, as has been so universally done in the cited cases.

The prospective construction of the amendment does no violence to its language. It is true that the Legislature provided that the previous act "shall be and is hereby amended so as to hereafter read as follows." This language precedes the amendatory provisions, which contain a repetition of the language of the amended act as well as other and additional clauses. In such instance the word "hereafter" means as to provisions within the original statute, subsequent to the passage of the original act. As to the additional included provisions, it means subsequent to the time of the amendment. It expresses futurity. It indicates absence of retrospective. (Sutherland's Statutory Construction, Section 237.)

But should it be contended that the amendment should be regarded as if it were contained in the original enactment, then we are confronted with an application of Article 5246-87, being Section 3b of the 1917 act, to such amendment. In substance this section provides that no inchoate, vested, matured, existing, or other rights, duties, or authority shall be in any way affected by the amendment made to the original law, but such shall be in force as under the original law as if the amendment had never made and to that extent only is the original act repealed.

Conceding, therefore, that the amendment should be considered as if contained in the Act of 1917, then we must give full effect to the section above stated. The rule is that all consistent statutes which can stand together, though enacted at different times, being statutes in *pari materia*, are treated prospectively and construed together as one act. The amendment thus construed as part of the original statute necessarily brings into effective operation thereon Article 5246-87, which specifically provides for the continuation and enforcement of the repealed law as to vested and even inchoate rights. *Farrell vs. State*, 24 Atl., 725. Therefore, whether we chose to consider the amendment as originally part of the 1917 act, or whether we give it operation only since its effective date, the conclusion is the same.

But it is insisted that if the amendment applies only to claims arising subsequent to its effective date, then a serious injustice is done, for the reason that such amendment repeals the former law and employes who have not received or have only received partial compensation are deprived of all rights and remedies and the compensation provided. As supporting this proposition, we are cited to the case of *State vs. Andrews*, 20 Texas, 230. It is sufficient to say in respect to this decision that the petition in error there applied for was filed subsequent to the effective date of the repealing clause of the statute on which it was based. No right, either inchoate or vested, had been established under the repealed law, and furthermore the court was dealing with a statute governing judicial remedy which is universally held to be subject to repeal at any time where such repeal does not constitute a complete deprivation.

It is the general rule that when an act of the Legislature is repealed without a saving clause, such act is considered, except as to transac-

tions which are past and closed, as though it had never existed. The Legislature may provide by a saving clause, restrictions on the effect of a repeal. But the general principle has substantial limitation. Another principle curtails the effect of the rule that the repealed law is considered as never having had existence. Common logic states the same truth that the successful repudiation of the hypothesis lets fall the dependent conclusions. This must be the extent of the legal principle—that the destruction of the statutes, likewise lets fall the dependent rights, duties and obligations. But is it not common that imperfect and unperfected rights and obligations by natural growth reach completeness and perfection so far as the successful assertion of them is concerned.

Just as a youth by reaching his majority perfects his civil rights, so rights and obligations dependent upon the continued existence of a statute may become emancipated and embrace independence. This is to say, the continued existence of the statute is unnecessary to the assertion of the matured and independent right or exemption.

The rule is that when a right has arisen on a contract or a transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not effect it. (Sutherland's Statutory Construction, Par. 284; Michie's Digest, Vol. 4, p. 446.) The principle is so often enunciated and so consistently adhered to under the Texas decisions that it would be unnecessary to give the facts and holdings of the cases referred to in the above citation. Having concluded that the right of the injured employe to compensation as provided by the 1917 act is vested by reason of the injury occurring during the existence of that law, the necessary characteristic of such right is that it is independent of the statute and the subsequent repeal has no reaction upon such vested right.

The interpretation we have given can result in no hiatus, because the repealed statute fixing the amount of compensation is effective until the repealing statute becomes effective. The death of the former is the birth of the latter. Persons injured during the existence of the former are entitled to the measure of compensation allowed by such statute, and persons injured after the effective date of the amendment are entitled to the compensation therein provided, and you are so advised.

Respectfully,

WALACE HAWKINS,  
Assistant Attorney General.

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Op. No. 2515, Bk. 59, P. 151.

**ELECTION—COUNTY SEAT REMOVAL—PETITION OR APPLICATION.**

Where a county seat has been established for a longer term than forty years, only those shown by the last approved tax rolls of the county to be freeholders and qualified voters of the county should be counted or considered in determining the sufficiency of an application for an election on the question of the removal of such county seat, and this irrespective of whether such persons are men or women, or are married or unmarried.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 21, 1923.

*Honorable P. C. Matthews, County Attorney, Liberty, Texas.*

DEAR SIR: The Attorney General is in receipt of your inquiry of recent date, which is as follows:

"Article 1390 of Vernon's Sayles' Civil Statutes, 1914, relating to removal of county seat, where said county seat has been established for a period of over forty years, provides that petition to call an election for the removal of county seat shall be signed by a majority of the freeholders and qualified voters of said county, to be ascertained by the county judge and in his absence or inability to act, by two of the county commissioners of the county, from the assessment rolls thereof; but since the enactment of statutes woman suffrage has been granted, thereby conferring the right to vote on women, in view of which, where they are community holders of real estate, shall majority requisite for petition include married women owners of community property and qualified voters under laws of the State?"

"Article herein referred to states that majority of freeholders and qualified voters is to be ascertained from the assessment roll, but as community property is invariably assessed against the husband, names do not appear on assessment roll, hence, necessity to clarify question."

Although not stated in your letter, we understand that this inquiry is with reference to a county seat that has been established for a longer term than forty years and are answering accordingly.

The only constitutional provision we have on this question is Section 2 of Article 9 of our State Constitution, which reads as follows:

"The Legislature shall pass laws regulating the manner of removing county seats, but no county seat situated within five miles of the geographical center of the county shall be removed, except by a vote of two-thirds of all the electors voting on the subject. A majority of such electors, however, voting at such election, may remove a county seat from a point more than five miles from the geographical center of the county to a point within five miles of such center, in either case the center to be determined by a certificate from the Commissioner of the General Land Office."

The only statutory provisions in point is Article 1390 of the Revised Civil Statutes of 1911, as amended by Chapter 29, page 77, General Laws, First and Second Called Sessions, Thirty-sixth Legislature. This article reads as follows:

"Proceedings for Removal of County Seat.—When it becomes desirable to remove the county seat of any county, it shall be the duty of the county judge of said county, or, in case of his failure or inability to act, then two of the county commissioners of said county, upon the written application of not less than one hundred freeholders and qualified voters, who are resident citizens of said county thereof, to make an order in writing upon the minutes of said commissioners court for the holding of an election at various voting precincts in said county on a day therein named, which shall not be less than thirty days nor more than sixty days from date of order, for the purpose of submitting the question to the electors of said county; provided, that, when a county seat has been established for a longer term than ten years, it shall require two hundred freeholders and qualified voters to make said application; provided, further, that in counties having less than three hundred and fifty legal voters, to be determined by the number of votes cast at the last preceding election for the State and county officers, such application may be made by one hundred resident freeholders and qualified voters of said county; and *provided, further, that, when a county seat has been established for a longer term than forty years, it shall require a majority of the freeholders and qualified voters of said county to make the application, said majority of freeholders and qualified voters to be ascertained by the county judge, or, in case of his refusal or inability to act, then by any two of the county commissioners of said county, from the assess-*

*ment rolls thereof*; and provided, further, that in counties having not more than 150 qualified voters, such application shall be held sufficient when it shall have been signed by a majority of the resident freeholders and qualified voters of said county, said majority of freeholders and qualified voters to be ascertained by the county judge, or in case of his refusal or inability to act, then by any two of the county commissioners of said county, from the assessment rolls thereof."

We do not find where either our courts or the Attorney General has ever passed on this exact question, but find certain cases where efforts have been made to contest various elections ordered under similar provisions on the ground that the petition for the election did not bear the requisite number of signatures of those entitled to be counted or considered in such cases. What appears to be the original and leading case in this State involving this question is that of Scarborough vs. Eubank, 93 Texas, 106 (53 S. W., 573). This case establishes the doctrine that after a county seat election has been held and the result declared in favor of the removal the result cannot be attacked (in the absence of fraud or willful disregard of law or facts) on the ground that certain of those counted or considered in determining the sufficiency of the application were not eligible to be so counted or considered. This was followed by one of our Courts of Civil Appeals in the case of Martin vs. Abernethy, 136 S. W., 827, in which a writ of error was denied by the Supreme Court. In the former case the Supreme Court, quoting in part from Currie vs. Paulson, 45 Minn., 411, says:

"Without passing upon the correctness of any of the premises assumed by contestants, or deciding for what causes, occurring before the election itself, an election may on contest be held void, we are clear that (at least in the absence of fraud) the certificate of the county board as to what signatures, if any, are improperly on the petition, is final and conclusive; and that if from that certificate, as made and filed, it appears that there remain on the petition the required number of names, it is the duty of the county auditor to make his order for the election, and that an election held in pursuance thereof will be valid, notwithstanding any mistake or error committed by the board as to the facts submitted to their determination regarding the names improperly on the petition. In the very nature of things, the determination of the board on this matter must be final and conclusive.' And again: 'There are manifest reasons why the determination of the board of commissioners as to these facts should be final. It is the vote of the electors at the election, and not the signatures to the petition, which determines the location of the county seat. The main, if not sole, purpose of requiring the petition in favor of a change before ordering an election is to save the public from expense, loss of time, and excitement incident to such an election, unless there is a reasonable probability that the required majority of electors will vote for the change. To go back of the action of the county board and reverse their determination as to these facts after the election is passed and the change carried by the popular vote, would certainly subserve no good purpose.' See also Baker vs. The Board, 40 Iowa, 226; Bennett vs. Hetherington, 41 Iowa, 142; The Board vs. Lewis, 61 Ind., 75; State vs. Nelson, 21 Neb., 572. Speaking of an election ordered by a county judge upon a petition of taxpayers, the Supreme Court of the United States say: 'The county judge unquestionably had jurisdiction to decide upon the application made by the taxpayers.' Town of Lyons vs. Munson, 99 U. S., 684. The remark was made in a bond case and probably was not necessary to its decision. It tends, however, to show the opinion of the judges then composing that high tribunal upon the question before us."

We also have the case of City of Fort Worth vs. Davis, 57 Texas, 225. When this case was decided Articles 3786, 3785 and 3787 of the then Revised Civil Statutes, authorized cities and towns that had assumed control of the public schools within their corporate limits to levy a

school tax upon the affirmative vote of two-thirds of the resident qualified voters who were property taxpayers "as shown by the last assessment rolls." Section 10 of Article 11 of our State Constitution then provided, as it does now, that such cities and towns having a charter so authorizing might levy a tax for the support and maintenance (as it has been construed by the courts) of the public schools within their corporate limits "if at an election held for that purpose two-thirds of the taxpayers of such city or town shall vote for such tax," but does not contain the "tax roll" provision. Under these provisions an election was held in the City of Fort Worth, at which a two-thirds majority of the votes polled were in favor of the levying of a tax for school purposes. An injunction was granted by the trial court against the collection of the tax on the ground that the two-thirds majority of the votes cast in favor of the tax was not a two-thirds majority of those "shown by the last assessment rolls" to be property taxpayers and qualified voters. In affirming this action by the trial court our Supreme Court, among other things, said:

"But the Constitution prescribes no means of ascertaining the number of taxpaying qualified voters in the city. The duty of doing this, and the consequent right of selecting such means and mode of doing it as they may deem best, having reference to practicability and convenience, must devolve on the Legislature. This is the express provision of the Constitution in the section authorizing counties and cities on the coast to levy a tax for the construction of sea walls and breakwaters, 'upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law).' Art. XI, Sec. 7. From the necessity of the case, a like provision must be implied in the clause we are considering. A reference to the last assessment roll would obviously be open to objection as inaccurate. Some who were taxpayers when the roll was made may have died or removed, or ceased to be taxpayers. Other taxpayers may have moved in, or have been casually omitted. Absolute accuracy in ascertaining the number of property taxpayers who were also qualified voters is manifestly not obtainable. The Legislature have assumed that on a question of taxation, affecting his purse, every taxpayer would be desirous of voting, and that the best test of the number of taxpaying voters on the day of election is the number of votes cast. Practically this may prove a bad test. So may any other that can be suggested. The Legislature have adopted this as under all the circumstances the best test, and there are numerous cases which seem to support their authority to do so. See *County of Cass vs. Johnston*, supra; *St. Joseph Township vs. Rogers*, 16 Wall., 644; 1 Sneed, 638-691; *Taylor vs. Taylor*, 10 Minn., 107; *State vs. Mayor of St. Joseph*, 37 Mo., 270; *Anderson Co. vs. H. & G. N. R. R.*, 52 Texas, 239."

Section 3 of Article 6 of our State Constitution provides that in all elections in any city or corporate town to determine expenditures of money or assumption of debt, "only those shall be qualified to vote who pay taxes on property in said city or incorporated town," but does not contain the "tax roll" provision. Article 1079 of the Revised Civil Statutes of 1911, in prescribing who may vote in an election to abolish the corporate existence of certain cities and towns, among other qualifications, provides that only those who are resident property taxpayers in the city or town "as shown by the last assessment rolls of such city or town" shall be entitled to vote. Under these provisions, basing its holding largely on *City of Fort Worth vs. Davis*, supra, our Galveston Court of Civil Appeals, in the case of *Bonham vs. Fuchs*, 228 S. W., 1112, held the "tax roll" provision of this statute valid and that one not shown by the tax rolls to be a resident property taxpayer of such city or town was not entitled to vote at an election on the question of abol-

ishing the corporate existence of such city or town, and this notwithstanding such person might be in fact a qualified voter and taxpayer. The court says:

"We are, however, of opinion that the provision requiring the names of the voters to appear on the assessment roll is not invalid. This was expressly decided by our Supreme Court in the case of *City of Fort Worth vs. Davis*, 57 Texas, 225, construing a like provision in the statute authorizing of an election for a school tax. \* \* \*

"This decision seems to us to be conclusive of this question. The cases of *Savage vs. Umphries*, 118 S. W., 893, and of *Solon vs. State*, 54 Texas Cr., 261, 114 S. W., 349, also support this view of the law."

In an opinion rendered by the Attorney General to Hon. S. A. Lindsey, County Judge, Tyler, Texas, under date of September 20, 1905, concerning said Article 1079, it was held:

"The qualification is that the party must be a resident property taxpayer in the city, as shown by the last assessment roll of said city. And unless a party's name appears on the last approved assessment roll of the city as a property taxpayer of the city, he is not entitled to vote, although he might be otherwise qualified. The words 'as shown by the last assessment roll of such city' should be construed to mean the 'last approved assessment roll.' (Report and Opinions of Attorney General, 1906-1908.)"

Other cases concerning the qualification of voters at elections under other statutes, some of which contain the "tax roll" provision and some of which do not, but in which case the "tax roll" provision is discussed, are:

*Hendrick vs. Culberson* (Ct. Civ. App.), 56 S. W., 616.  
*Hillsman vs. Faison* (Ct. Civ. App.), 57 S. W., 920.  
*Warener vs. Iambrecht* (Ct. Civ. App.), 146 S. W., 633.  
*Clark vs. Willrich* (Ct. Civ. App.), 146 S. W., 947.  
*Lane vs. Herring* (Ct. Civ. App.), 190 S. W., 778.  
*Robertson vs. Hayner* (Ct. Civ. App.), 190 S. W., 735.

Since these statutes are thus construed with respect to those who may vote at an election which must be decisive of the question at issue, there can be no reason for holding otherwise concerning those who may be considered in determining the sufficiency of an application or petition under similar constitutional and statutory provisions for the holding of an election.

While our statutes contemplate and provide that real property should be rendered and assessed for taxes in the name of the owner, it can hardly be said that these requirements are strictly complied with, and principally for this reason, as stated by our Supreme Court in the case of *City of Fort Worth vs. Davis*, supra, the tax rolls may not be, and in fact are not, entirely satisfactory as a guide as to who are freeholders and qualified voters of a county, but when we consider the difficulties that would confront us in determining these questions as they pertain to the population of an entire county otherwise than by reference to the tax rolls, questions that in many instances have been found determinable only by our courts of last resort and after long drawn out litigation, we are inclined to the view that the Legislature, not only on the ground of its authority, but on the basis of expediency as well, has laid down for us in this statute a practical and at least a reasonably satisfactory rule.

It is our opinion, therefore, that where a county seat has been estab-

lished at a given place for a longer period of time than forty years the last preceding approved tax rolls of the county should govern in determining the sufficiency of an application for an election on the question of the removal of same; that is, that those shown by such rolls to be freeholders and qualified voters of the county should be ascertained from an inspection of such tax rolls and that a petition signed by a majority of such persons would be such a petition as is contemplated by our statutes on this subject. That this rule applies alike to men and women, and whether married or unmarried, is evident. In such matters there is "neither male or female," "marrying nor giving in marriage."

Therefore, although a person may own real property subject to taxation in the county, and may be a qualified voter in the county, if this may not be ascertained from the last approved tax rolls of the county, such person should not be considered in determining the sufficiency of an application for a county seat removal election under this provision of this statute. Likewise, and for the same reasons, although the wife may own real property subject to taxation in the county, and whether community or separate property is immaterial, and may be a qualified voter of the county, if this may not be ascertained from the tax rolls of the county, she should not be considered in determining the sufficiency of an application for a county seat removal election under this provision of the statute. It is not that a different rule is applied to married women, but that the same rule is applied to them as is applied to others.

Where real property, therefore, is shown by the tax rolls to be assessed in the name of "John and Mary Doe," or "Mr. and Mrs. John Doe," it is our opinion that this would sufficiently show that John Doe and Mary Doe, whether husband and wife or not, were freeholders within the meaning of this provision of this statute, and that they should both be considered in determining the sufficiency of a petition such as we here have under consideration, if it further appears from such tax rolls that they are qualified voters of the county. On the other hand, where the tax rolls show real property assessed only as "John Doe," although he may be a married man and such land may be community property of himself and wife, and even if the land is in fact the separate property of the wife, such an assessment would not show that the wife of John Doe was a freeholder, and such wife, although a qualified voter, if she is not otherwise shown by the tax rolls to be a freeholder and qualified voter, should not be considered or counted in determining the sufficiency of such an application or petition.

It is true that subdivision 4 of Article 7509, of the Revised Civil Statutes of 1911, provides that the property of the wife shall be listed or rendered for taxation by the husband, if he is of sound mind, otherwise by herself, but it does not follow from this that the wife's property should be rendered or assessed in the husband's name; in other words, since our statutes contemplate that all property subject to taxation shall be rendered or assessed in the name of the owner, it is not only permissible but proper and advisable that community property be rendered and assessed in the names of both husband and wife. A rendition and assessment of such property, however, in the name of the husband only,



or in the name of the wife only, as far as the rendition and assessment and liability for taxes are concerned, would not be illegal or invalid.

It will be understood that we are not passing on this question except as it pertains to the removal of a county seat that has been established at a certain place for a period of more than forty years.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2552 $\frac{1}{2}$ , Bk. —, P. —.

ELECTIONS—PRESIDING OFFICER—EFFECT OF DISQUALIFICATION.

The fact that a member of the county board of school trustees, contrary to the provisions of Article 2922, Revised Statutes, 1920, acted as presiding officer in an election held in a common school district for the purpose of determining whether or not the district desired to increase its maintenance tax rate, will not, *of itself*, render void such election.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 20, 1924.

*Honorable Tom Gambrell, County Attorney, Lockhart, Texas.*

DEAR SIR: Your letter of June 17th has been received by this Department and referred to me for attention.

You write as follows:

"In our Common School District No. 7 of Caldwell County, Texas, on the 7th of this month, there was held an election to determine whether the maintenance tax for school purposes should be increased from 50 cents to 75 cents as provided under Article 2827 of the 1922 Supplement of Vernon's Texas Civil Statutes, and at said election such increase was voted by a vote of 77 for increase and 28 against increase.

"The county judge, in appointing the judge of said election, inadvertently appointed a county trustee to act as presiding officer, and said presiding officer appointed two judges and two clerks, two of whom were in favor of the increase and two of whom were against same. This was done to show fairness to both sides.

"The question is, is the election illegal because of the appointment of said county trustee as the presiding officer of said election, admitting that all other proceedings of the election are proper and regular?"

Article 2922 of the Revised Statutes of 1920 reads as follows:

"No one who holds an office of profit or trust under the United States or this State, or in any city or town in this State or within thirty days after resigning or being dismissed from any such office, except a notary public, or who is a candidate for office, or who has not paid his poll tax, shall act as judge, clerk or supervisor of any election, nor shall anyone act as chairman or as member of any executive committee of a political party, either for the State or any district, county or city, who has not paid his poll tax, or who is a candidate for office, or who holds any office of profit or trust under either the United States or this State, or in any city or town in this State; or anyone who may be enjoying gratuitous passage on street cars or on other public service corporations, by reason of his appointment as a special policeman, or anyone who has any connection, whatever, with the city, whereby the city is justified in issuing to any such person free transportation on the street cars, or franks entitling him to the free use of public service corporations, or any person who is regularly employed in any capacity by the city, for whose services a salary or wages is paid, except a notary public."

A person who is a member of the county board of school trustees holds an office of trust and profit under the laws of this State and is not qualified to act as a judge at any election.

The clearest expression of our courts as to the effect of a person disqualified under this section of our statute acting as judge of an election is found in *Savage vs. Umphries*, 118 S. W., 893. In that case the validity of an election was attacked on the ground (among other things) that a city alderman had acted as a judge of such election contrary to the provisions of Article 2922, Revised Statutes of 1920. The court so fully and ably discussed this question that I am setting forth the entire expression of the court relative thereto.

"To appellants' trial amendment of the fifth ground of contest, the purport of which is shown in our statement of the case, the appellee interposes the exceptions that it contains no allegation of fraud or wrongful acts upon the part of Shaughnessy, the judge of the election, such as in law would justify holding the election void on account of his being at the time an alderman of the city of Amarillo, and, further, that it appears from contestants' pleadings that Shaughnessy acted as a judge in holding the election and became a de facto officer or judge thereof. These exceptions were sustained by the trial court, and such ruling is the subject of the fourth assignment of error. Section 60 of the election law of 1905 provides 'that no one who holds any office of profit or trust under the United States or this State, or any city or town of this State, except notary public, \* \* \* shall act as judge, clerk or supervisor of any election.' From this it is clear that Shaughnessy, if he was, as alleged by appellants, an alderman of the city of Amarillo, and acted as a judge of the election, was prohibited from holding such office and was incompetent, by reason of the statute referred to, to perform its duties or functions. The question to be determined is whether the provision of the statute just quoted is mandatory or directory.

"The general rule is that statutory provisions regulating the conducting of public elections, if not made mandatory by the express terms of the law, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about when the departure from the prescribed method was not so great as to throw a substantial doubt on the result, and where it is not shown that there was any obstacle to a fair and free expression of the will of the electors. Black on Interpretation of Laws, p. 353. It is said that: 'There is nothing better settled than that the acts of election officers de facto, who are in under color of election or appointment, are as valid, as to third parties and the public, as those of officers de jure. The doctrine that electors may be disfranchised because one or more of the judges or inspectors of election did not possess all the qualifications required by law finds no support in the decisions of any judicial tribunal.' 15 Cyc., 311. But here, if the allegations in appellants' trial amendment be true, Shaughnessy was absolutely prohibited by the statute from acting as judge of the election. This inhibition did not go to his ineligibility or disqualification, but is an absolute denial of his right to act at all as judge in the election, and, in view of the statute, he could no more have acted as an officer de facto than he could de jure, for the law absolutely prohibits him from acting at all in any capacity. But it does not follow from this that, because he, in violation of the law, acted as a judge of the election, it should be declared null and void as to that precinct. It seems to us that the question as to the validity or invalidity of the election should be determined as though he had not acted at all in the absence of any allegation that he did anything that would tend to change the result. In this view the election in that precinct should be regarded as having been presided over by only one judge, for the county commissioners court was required in voting precincts, where there were less than 100 voters who had paid their poll tax and received their certificates of exemption, to appoint two reputable men, who were qualified voters, as judges of the election, and it will be presumed that it performed this duty. We are not prepared, therefore, to hold that, because one of the parties appointed as judge was prohibited by the law from acting as such, would vitiate, so as to render null, the election as to such precinct, presided over by the other judge, who, in the absence of an

allegation to the contrary, must be presumed as competent to act; for to so hold would be to disfranchise all the qualified electors who voted at said precinct, without it appearing that the election was in any way affected by being presided over by one judge, instead of two as required by the statute. We therefore overrule the assignment."

You are advised, therefore, that the fact that a member of the county board of trustees acted as presiding officer in an election held in a common school district for the purpose of determining whether or not the district desired to increase its maintenance tax rate, will not, of *itself*, render void such election.

You understand that this Department is not in position to pass upon any questions of fact arising in connection therewith.

Very truly yours,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2545, Bk. 59, P. 147.

ELECTIONS—SUFFRAGE—EXEMPTION CERTIFICATES.

The obtaining of exemption certificates by those residing elsewhere than in cities or towns of ten thousand inhabitants or more is not required as a prerequisite to voting, and the issuance of same is neither required nor authorized.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 3, 1924.

*Honorable H. Grady Chandler, County Attorney, McKinney, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 29th ult., requesting his opinion upon the question of the obtaining of exemption certificates as a prerequisite to voting by those not subject to the payment of a poll tax and who reside elsewhere than in a city or town of ten thousand inhabitants or more.

There seems to be a general impression that exemption certificates are required of all otherwise qualified voters who are not subject to the payment of a poll tax, or that such certificates are required of all such persons who are not exempt by statute from obtaining such certificates, but such is not the case.

Our State Constitution requires as a prerequisite to voting that all persons subject to the payment of a poll tax for the year next preceding any year in which an election is held, must have paid such poll tax before the first day of February next preceding such election, but it contains no provision that any person exempt from the payment of a poll tax for such year shall obtain an exemption certificate or other evidence of such exemption.

Exemption certificates are only necessary, therefore, as a prerequisite to voting, in so far as required by legislative enactment, and when we turn to the statutes we find only Articles 2939, 2953 and 2954 on this subject.

Article 2939, amended by Chapter 149, page 318, General Laws, Regular Session, Thirty-eighth Legislature, in so far as this question is concerned, provides that "if said voter is exempt from paying a poll tax and resides in a city of 10,000 inhabitants or more, he or she must

procure a certificate showing his or her exemption, as required by this title," and Article 2953 requires that:

"Every person who is exempted by law from the payment of a poll tax and who is in other respects a qualified voter, who resides in a city of ten thousand inhabitants or more, shall, after the first day of October and before the first day of February following, before he offers to vote, obtain from the tax collector of the county of his residence a certificate showing his exemption from the payment of a poll tax."

It is quite evident that these statutes are applicable only to cities and towns of 10,000 inhabitants or more, and that certificates of exemption are required of all those coming within their provisions.

The only other statute we have on this subject is Article 2954. As amended by Chapter 17, page 45, General Laws, Second Called Session, Thirty-eighth Legislature, this article reads as follows:

"Every person who will reach the age of twenty-one years after the first day of February and before the day of a following election at which he or she wishes to vote, and who possesses all the other qualifications of a voter under the Constitution and laws of Texas shall be entitled to vote at such election, and it shall not be necessary for such person to have paid a poll tax or to have obtained a certificate of exemption in order to entitle such person to vote at such election. Provided, that in any case where the right of such person to vote is challenged on the ground of non-age, if such person shall make affidavit that he or she, as the case may be, has attained the full age of twenty-one years on the day of such election such person shall be entitled to vote at such election upon filing such affidavit with the judge of election. Provided, that this law shall not apply to cities having a population of 5000 or more according to the last Federal census."

Prior to its amendment this article required exemption certificates of only one class of persons, that is, of those "who will reach the age of twenty-one years after the first day of February and before the day of a following election at which he offers to vote, and who possesses all the other qualifications of a voter," but we are not now concerned with what this statute formerly required. That this article as it now stands does not require exemption certificates of anyone is quite clear. On the contrary, it is only to the effect that the only class of persons not residents of a city or town of ten thousand inhabitants or more theretofore required to obtain exemption certificates as a prerequisite to voting shall not now be required to obtain such certificates. In short, in view of our statutes on this subject as they are at present, this article as amended, with all its circumlocution and cumbersome verbiage, puts our statutes on this subject exactly as they would have been if this article had been simply repealed instead of being amended as it was.

It is true that this article contains the proviso that it "shall not apply to cities having a population of 5,000 or more," but this proviso can have no practical application in the present state of our statutes on this subject. Granting, as we must, that this article has no application to those residing in a city or town having a population of 5,000 or more, then what statute does apply to such cities and towns? There is none; that is, the only other statutes we have on this subject are Articles 2939 and 2953, and these, by their express terms, as we have seen, apply only to cities and towns of 10,000 inhabitants or more. We cannot say, of course, that this article, whether by reason of this proviso or otherwise, has the effect of requiring exemption certificates of any of those who reside in cities having a population of 5,000 or more. If

so, of whom does it require them? Neither this, nor any other statute answers this question as to cities and towns of 5,000 or more and less than 10,000 inhabitants. In other words, there is no statute requiring exemption certificates of anyone who resides in a city or town of more than 5,000 and less than 10,000 inhabitants. This being true, such certificates cannot be required of any person residing in such a city or town. The only statutes we now have, therefore, requiring exemption certificates as a prerequisite to voting, are Articles 2939 and 2953 hereinbefore referred to.

You are therefore advised that the obtaining of exemption certificates by those residing elsewhere than in cities and towns of 10,000 inhabitants or more is not required as a prerequisite to voting, and that the issuance of same is neither required nor authorized.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2463, Bk. 58, P. 263.

CITIZENSHIP—MARRIED WOMEN—SUFFRAGE.

1. Citizenship and right of married women to vote, they being otherwise qualified, who were aliens when married, and who are still the wives of such marriage, but whose husbands are citizens of the United States by naturalization.

2. Citizenship and right of married women to vote, they being otherwise qualified, who were citizens when married, and who are still the wives of such marriage, but whose citizenship may or may not be affected by reason of being such wives.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 3, 1922.

*Honorable W. H. Bouldin, County Attorney, Brenham, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 28th ultimo, requesting his opinion upon the following question:

"Are married women who are of foreign birth and whose husbands are naturalized American citizens and who are otherwise qualified voters, entitled to vote in the coming general election?"

You make no statement of facts otherwise than as included in this question.

The recent Act of the Sixty-seventh Congress, approved September 22, 1922, made material changes in the law pertaining to the citizenship of married women, particularly those who have married since September 22, 1922, or who may have married before that time but whose husbands may have become citizens by naturalization after that time.

You do not state sufficient facts to enable us to say whether the women you refer to are citizens of the United States or not, and the general election is now so near at hand that we have not the time to write you fully on the question of the citizenship of women who are now or may have heretofore been married, but we will here state the law on this question as it pertains to the most general and ordinary circumstances and facts, and trust that by so doing you will thereby be enabled to determine whether or not the women you refer to are citizens of the United States.

We are also availing ourselves of your inquiry to state the law governing the citizenship of women who were citizens of the United States when married, but whose husbands may not have been citizens of the United States at that time, in so far as such question relates to the most general and ordinary circumstances and facts.

Bearing in mind the foregoing, you are advised as follows:

(1) A woman, not otherwise a citizen of the United States, who is the wife of a man who became a citizen of the United States by naturalization before September 22, 1922, and who became such wife before September 22, 1922, if she and her husband have remained residents of the United States since the naturalization of her husband, and if she is eligible to become a citizen of the United States by naturalization, is a citizen of the United States and as such is entitled to vote at any election in this State, if otherwise qualified.

(2) A woman, not otherwise a citizen of the United States, who is the wife of a man who became a citizen of the United States by naturalization after September 22, 1922, irrespective of when she became such wife, and who has not herself become a citizen by naturalization, is not a citizen of the United States and is not entitled to vote at any election in this State.

(3) A woman, not otherwise a citizen of the United States, who is the wife of a man who is a citizen of the United States by naturalization, irrespective of when he so became such citizen, and even though he may be otherwise a citizen of the United States, and who became such wife after September 22, 1922, and who has not herself become a citizen by naturalization, is not a citizen of the United States and is not entitled to vote at any election in this State.

(4) A woman, otherwise a citizen of the United States, who is the wife of a man not a citizen of the United States, and who became such wife after September 22, 1922, remains a citizen of the United States irrespective of the citizenship of her husband:

(a) Unless, after she became such wife, she has made a formal renunciation of her citizenship before a court having jurisdiction over the naturalization of aliens, in which case she thereby ceased to be a citizen of the United States; or,

(b) Unless her husband, because of his race or for other reason, is ineligible to become a citizen of the United States by naturalization, in which case she ceased to be a citizen of the United States when she became such wife and cannot again be such citizen so long as she remains such wife; or,

(c) Unless, while such wife, she has resided continuously for two years in the foreign country of which her husband is a citizen, or for five years continuously outside of the United States, in which case her status as a citizen of the United States shall be presumed to have ceased, such presumption to be overcome only by presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State of the United States may prescribe.

(5) A woman, otherwise a citizen of the United States, who is the wife of a man not a citizen of the United States, and who became such wife before September 22, 1922, ceased to be a citizen of the

United States upon becoming such wife, and she remains not a citizen of the United States, irrespective of the citizenship of her husband.

(a) Unless, before September 22, 1922, her husband became and is now a citizen by naturalization, in which case such wife, by virtue of the naturalization of her husband, again became a citizen of the United States; or,

(b) Unless she, herself, has been naturalized after September 22, 1922, in which case she thereby, again, became a citizen of the United States, irrespective of the citizenship of her husband.

(6) A woman, not otherwise a citizen of the United States, who is the wife of a man who is a citizen of the United States, and who became such wife after September 22, 1922, or who is the wife of a man not otherwise a citizen but who became such after September 22, 1922, irrespective of when she became such wife, unless she or her husband, because of her or his race or for other reason, is ineligible to become a citizen of the United States by naturalization, may become a citizen of the United States by complying, and only by complying, with all the requirements of the naturalization laws of the United States, except:

(a) No declaration of intention is required of her; and,

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court to which she applies for naturalization is held, she is only required to have resided continuously in the United States, Hawaii, Alaska or Porto Rico for at least one year immediately preceding the filing of her petition for naturalization.

(7) A woman, otherwise a citizen of the United States, who is the wife of a man not a citizen of the United States, or whose husband became a citizen by naturalization after September 22, 1922, and who became such wife before September 22, 1922, and who by reason of being such wife ceased to be a citizen of the United States, may again become a citizen of the United States by complying, and only complying, with all the requirements of the naturalization laws of the United States, except:

(a) No declaration of intention is required of her; and,

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court to which she applies for naturalization is held, she is only required to have resided continuously in the United States, Hawaii, Alaska or Porto Rico for at least one year immediately preceding the filing of her petition for naturalization;

(c) No certificate of arrival is required to be filed with her petition for naturalization, if during the time she has been such wife she shall have resided within the United States.

(8) A woman, who because of her race or for other reason is not eligible to become a citizen of the United States by naturalization, even though she is the wife of a man who is a citizen of the United States, and irrespective of whether her husband is a citizen of the United States by birth or by naturalization, and irrespective of when she became such wife, or a woman who is the wife of a man who because of his race or for other reason is not eligible to become a citizen of the United States, by naturalization, and who is not otherwise

a citizen of the United States, cannot herself become a citizen of the United States by naturalization.

Trusting you will find in the foregoing an answer to your inquiry, I am,

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2555, Bk. —, P. —.

ELECTIONS—PRIMARY ELECTIONS—WITHDRAWAL OF CANDIDACY.

Appointment by Governor to fill vacancy in office of Railroad Commissioner is until next general election, necessitating an election to fill out the remainder of the unexpired term.

State Democratic Executive Committee is not authorized to designate a person whose name shall be printed on the primary ballot in lieu of the name of a person withdrawing his candidacy.

The probable purpose of statute requiring primary candidates to file applications by a certain time, stated.

The State Democratic Executive Committee would have authority after the primary to fill a vacancy caused by the resignation of a party nominee for Railroad Commissioner.

A person who filed his application on time and is a candidate in the primary election has a right to withdraw his candidacy and have his name omitted from the ballots if it is feasible to do so.

In case of withdrawal of the only candidate for Railroad Commissioner, the only method of nomination is to write names of candidates on ballots, which method is lawful in our opinion, though no Texas court decisions have been found so holding.

Difficulties of having name removed from ballots already printed, stated.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 9, 1924.

*Honorable W. M. W. Splawn, Railroad Commissioner, Capitol.*

MY DEAR DR. SPLAWN: Since you have been tendered and have expressed your willingness to accept the presidency of the University of Texas, you desire to be advised in reference to the situation arising out of the fact that you made application to have your name printed upon the ballot in the primary election as a candidate for the Democratic nomination for the office of Railroad Commissioner. You seek information so that you may determine whether to take any action at this time looking to a withdrawal of your name as a candidate in the primary, or whether, on the other hand, you should allow your name to remain upon the printed ballots and withdraw after the primary in order that there may be an available method of filling the vacancy.

You were appointed Railroad Commissioner by Governor Neff to fill the vacancy caused by the resignation of Honorable Earle B. Mayfield in 1923, the latter having been elected at the general election in 1920 for a full six-year term. Under the Constitution your appointment by the Governor was until the next general election after the appointment, which, in this instance, will be in November, 1924, at which time there must be an election for the remainder of the unexpired term of Senator Mayfield. *Nicks vs. Curl*, 86 S. W., 368. Moreover, if you should resign your office now and the Governor should make an appoint-



ment to fill the vacancy, the appointment would be only until the general election in November of this year. (Const., Art. 16, Sec. 30.) Therefore, whether you resign now or not, an election for the unexpired term of Senator Mayfield is necessary in November.

The matter of withdrawing your name from consideration in the primary election presents some difficulty. While the placing of your name on the ballot is not a nomination, it is a right acquired by you by filing your application with the proper authority within the time prescribed by statute. It appears that no one else has applied to have his name printed on the ballot in the primary election, and as the time has expired for filing, the question is presented whether the State Democratic Executive Committee would be authorized to designate someone to take your place on the ballot if you should withdraw. This question is answered in the negative. The statutes of our State do not confer upon the State committee any authority of this kind. Neither has a party rule been adopted purporting to give the committee this authority.

The only power of nomination conferred by statute upon the State Executive Committee is to nominate a candidate to supply the vacancy occasioned by declination of a nomination or death of the nominee, and you are not a nominee. The statute expressly provides that "no executive committee shall ever have any power of nomination except where a nominee has died or declined the nomination." (Arts. 3172, 3173, R. C. S.) The Texas Supreme Court, in the case of *Gilmore vs. Waples*, 18 S. W., 1037, held that the State Democratic Executive Committee was without power to make nominations for the party in all other instances save those specified by the statute. Mr. Williams had died between the date of the primary election and that of the general election, creating a vacancy in the office. No nomination was or could have been made at the primary election. Under these circumstances the Supreme Court held that the committee had no authority to nominate a candidate to be placed on the official ballot at the next general election as the party candidate.

The right to have your name printed on the ticket not being a party nomination, it may be that this express inhibition against the committee making nominations does not apply to this situation. Even so, we do not think the committee has the power to select a man to have his name printed on the ticket. To so hold would be contrary to the intention of the law in requiring applications to be filed within a prescribed time in order to have one's name printed upon the official ballot in the primary. A statutory provision of this kind is mandatory. 9 R. C. L., 1081; 20 C. J., 116. The controlling purpose of such a requirement would seem to be to establish a uniform rule throughout the State in respect to the time limit of filing applications in order to afford a reasonable time to prepare and distribute the ballots and to estimate the amount of the assessments against candidates for expenses of holding the primary election. If there were no uniform rule in this regard, in one county the authorities might accept an application say five days before the election, while in another county a twenty-day rule might prevail, and thus, as to the State candidates, much confusion would result. It may have been thought also that the filing of applications prior to a fixed date would give the people an oppor-

tunity to inform themselves as to the various candidates. We state these probable reasons for the law requiring candidates to file applications by a certain time, in response to your special request for such a statement. We have found no court decisions or textbooks discussing the purpose and intent of such a statutory provision.

Particularly, as it appears to us, is there no presumption in favor of the committee's authority to make such a selection at this time, since the ballots have already been printed or at least should have been printed. The difficulty and expense of reprinting or changing the printed ballots is to be taken into account in this connection.

On the other hand, the State Democratic Executive Committee would have authority after the primary election to fill the vacancy should you allow your name to remain on the printed ballots and receive the nomination at the hands of the voters and then withdraw. This is expressly provided by statute, as above indicated. Art. 3172, R. C. S.

We are of the opinion that you have a right to withdraw at this time and have your name omitted from the printed ballots if it is feasible to do so. In the event you should accomplish this, the only method of selecting a candidate at the primary election would be for voters to write on the ballot the name of any eligible person for whom they desire to vote for the Democratic nomination. Our statutes do not expressly provide that voters may do this in primary elections, and we do not find any court decision in this State passing upon the validity of a party nomination made in this manner, but we are inclined to the opinion that the courts would hold that votes so written on the ballot are valid and should be counted. Such a holding would be in keeping with the idea that the purpose of our primary is to ascertain and give effect to the will of the voters in the selection of candidates. A contrary holding would have the effect of shutting off the right of the people to select a nominee in preference to those who offer themselves by filing their application in time, however undesirable the people might find such applicants to be after investigation.

While it is our opinion that voters may vote for candidates by writing their names on the ballot, still it may be proper to state that it is not beyond possibility that the right of a nominee so selected to have his name printed on the official ballot in the general election as a party nominee would be contested.

Complying with your request for full information, we call your attention to the fact that by this time it is to be presumed that the primary ballots have been printed. Election supplies, including the printed ballots, are in various stages of preparation and distribution throughout the State. The omitting of your name would require a reprinting of the ballots or an erasure of your name from the ballots already printed. A reprinting would, of course, involve expense and an erasure would require the co-operation of all election officials having authority to prepare primary ballots, a very difficult thing to secure. It is doubtful whether any one would have authority to make this change on the ballots except those charged with the duty of preparing the ballots, and in many instances the ballots have probably now passed out of their hands.

In the event you should make an attempt to have your name removed from the ballots and should only partially succeed, you might receive

enough votes to give you the nomination if such votes were counted, notwithstanding your attempt to withdraw your name. A serious legal question would be presented in that event as to the right of any other candidate voted on in the primary to be declared the nominee. It might be contended that votes should not be counted for a candidate who had withdrawn from the race, and a man who had received a lesser number of primary votes might claim the nomination. It would be a doubtful question as to whether such a candidate could claim the nomination in any event. It would, of course, be improper for us to attempt to anticipate and solve these legal difficulties. We simply state them for your information.

The situation therefore appears to be this: If you take no action in an effort to withdraw your name from the ballots you will, in all probability, be the nominee; in which case you could resign and the State committee would then select some person to fill the vacancy and the latter would be the regular Democratic nominee to be placed on the official ballot in the general election as such. On the other hand, if you now withdraw and should succeed in having your name omitted from consideration in the primary altogether, the people would be given an opportunity to select the nominee in the primary election with the possibility that the right of such voters to write the names of candidates on the ballots would be contested, and if you were not successful in your attempt to have your name entirely eliminated, complications would result, as before mentioned. In the one case, the practical result would be that the State Executive Committee would probably select the nominee; in the other, the people would be given a chance to express their wishes, with the probable complications which we have suggested.

We have stated the situation as it appears to us without any desire to suggest a course for you to pursue. There is no rule of law that dictates a proper procedure as between the two alternatives confronting you, and since the minds of reasonable men might differ as to the expediency or propriety of one course or the other, we do not feel that it is proper for us to express to you our opinion as to whether you ought to continue as a candidate until after the primary or whether, on the contrary, you should now make an attempt to withdraw your name from consideration.

Very truly yours,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2456, Bk. 58, P. 270.

#### ELECTIONS—PRIMARY ELECTIONS—PARTY CONVENTIONS.

1. Certificate showing vacancy filled by party executive committee must be signed by majority and acknowledged.
2. Date of convention of parties of ten thousand to one hundred thousand voting strength controlled by Article 3159 to nominate candidates for State offices.
3. Republican party required to nominate by primary election, and a convention nomination is void, and Mr. Peddy, selected by Republican committee to fill vacancy caused by resignation of convention nominee, has no legal right to have name certified by Secretary of State.

4. Assuming Mr. Peddy voted in Democratic primary as stated by Secretary of State, he is not legally entitled to have name certified as Republican candidate, even if party convention nominations were authorized.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 26, 1922.

*Honorable S. L. Staples, Secretary of State, Austin, Texas.*

DEAR SIR: Attorney General W. A. Keeling has received your communication of September 21, 1922, reading as follows:

"As Secretary of State I have received from Hon. R. B. Creager, Republican State Chairman, the following instrument:

"DALLAS, TEXAS, September 19, 1922.

"*Hon. S. L. Staples, Secretary of State, Austin, Texas.*

"This is to certify that the Republican State Executive Committee of the State of Texas, at a meeting duly and legally called, and held in the City of Dallas on the 16th day of September, 1922, accepted the resignation and withdrawal of Dr. E. P. Wilmot of Austin, as Republican nominee for United States Senator.

"This is to further certify that by the unanimous vote of said committee, the Hon. Geo. E. B. Peddy of Houston, Harris County, Texas, was nominated in lieu and to take the place of Dr. E. P. Wilmot, withdrawn, as nominee of the Republican party for Texas for the office of United States Senator to be voted on at the approaching general election to be held in this State on the first Tuesday in November, 1922.

"Respectfully,

"R. B. CREAGER,

"Republican State Chairman.

"Attest:

"W. E. TALBOT, Acting Secretary, Executive Committee.'

"And I desire an opinion from your Department with reference to such instrument on the following questions:

"1. In view of the provisions of Article 3172 of the Revised Statutes of Texas, 1911, is the instrument herein quoted sufficient as a certificate of nomination of Hon. Geo. E. B. Peddy as Republican nominee for United States Senator? In other words, is it necessary that such certificate be signed by a majority of the members of such Republican Executive Committee of Texas, and acknowledged by them before some officer authorized under the laws of this State to take acknowledgments?

"2. In view of the provisions of Chapter 90 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature of the State of Texas, which fixes the time for the holding of all State conventions in this State on Tuesday after the second Monday after the fourth Saturday in August, and in view of the fact that the only Republican State meeting styling itself a State convention held in this State in the year 1922, assembled, according to all leading daily newspapers in the State, in the city of Fort Worth on the second Tuesday in August, 1922, and that no State convention has been held of the Republican party in this State at the time provided by the statute on that subject. Did the Republican State Executive Committee have the legal power and right to nominate the Hon. Geo. E. B. Peddy for an alleged vacancy in such nomination in such party occasioned by the withdrawal or declination of a person named, at a gathering of that party on a date not fixed by law?

"3. Articles 3174d and 3174e enacted by the Legislature of the State of Texas, 1913, read as follows:

"3174d. The name of no candidate for United States Senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless said candidate has been duly nominated and selected as herein provided.

"3174e. Each and every party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate or candidates for United States Senator at a general primary election to be held

throughout the State on the fourth Saturday in July next preceding such election for United States Senator.

"Is it necessary that a certificate of nomination for the office of United States Senator to be voted on, on the first Tuesday after the first Monday in November of this year, show that such nominee was nominated at the general primary election held throughout the State on the fourth Saturday of July, or at a continuation thereof in the run-off primary on the 26th day of August of this year?"

"May I, in this connection, call your attention also to the language of 3174c of the same act above referred to of 1913, which reads as follows:

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

"To put the last question in a somewhat different form and in order that your opinion may cover the question fully, I desire to further state that by the certificate on file in my Department I have been officially informed by Hon. R. B. Creager, Chairman of the Republican party of Texas, that the Republican party in this State did not hold a general or any other kind of primary election in this State this year on the fourth Saturday in July, or on any other date for the nomination of a candidate for United States Senator, and I request that in your opinion you advise me whether or not the claimed nomination of Dr. E. P. Wilmot, in a convention held in the city of Fort Worth, was legal and constituted a nomination under our laws, as well as whether the Executive Committee of the Republican party of Texas had the right to make a nomination in the place of and instead of Dr. Wilmot, withdrawn?"

"I have been reliably informed that Hon. Geo. E. B. Peddy participated in the Democratic primary held on July 22nd, 1922, and also in the run-off Democratic primary held on August 26th, 1922, and voted for one of the candidates in such Democratic primary for United States Senator; and I desire to inquire if he, after having participated and voted in such Democratic primary, is now legally entitled to have his name certified as the Republican nominee for United States Senator on the official ballot at the ensuing general election?"

In reply to your inquiries, you are respectfully advised as follows:

### I.

Your first question is as to the sufficiency of the certificate of the Republican chairman purporting to evidence the nomination of Mr. Peddy, in view of the fact that it is signed by the chairman only and is not acknowledged before an officer authorized to administer oaths.

While this question would seem unimportant in the light of our conclusions upon other questions submitted by you, we express it as our opinion that the certificate contemplated by Article 3172, Revised Civil Statutes of 1911, showing the filling of any vacancy dealt with by that article by a party executive committee, should be signed by at least a majority of the members of the committee and acknowledged by them before some officer having authority under State law to administer oaths. A certificate of this kind therefore, signed by the committee chairman only and unacknowledged, is insufficient. The statute referred to (Article 3172) is in the following language:

"A nominee may decline and annul his nomination by delivering to the officer with whom the certificate of his nomination is filed, ten days before the election, if it be for a city office, and twenty days in other cases, a declaration in writing, signed by him before some officer authorized to take acknowledgments. Upon such declination (or in case of death of a nominee), the executive committee of a party, or a majority of them for the State, district or county, as the officer to be nominated may require, may nominate a candidate to supply

the vacancy by filing with the Secretary of State in the case of State or district officers, or with the county judge in the case of county or precinct officers, a certificate duly signed and acknowledged by them, setting forth the cause of the vacancy, the name of the new nominee, the office for which he was nominated, and when and how he was nominated."

If this is a question only as to the form, it is a matter, of course, that can easily be cured.

## II.

Your second question, that is, as to the validity of the action of the Republican committee in attempting to fill a supposed vacancy in the Republican nomination of a candidate for United States Senator, which nomination was made at a convention held the second Tuesday in August, 1922, instead of the second Monday after the fourth Saturday in August as provided for by the Act of the Fourth Called Session of the Thirty-fifth Legislature with reference to certain party conventions, may be disposed of by stating that Chapter 90, General Laws of the Fourth Called Session, Thirty-fifth Legislature, has no application to political parties whose nominee for Governor in the last preceding general election received as many as ten thousand and less than one hundred thousand votes. The Republican party in this State is such a party according to the official report of the Secretary of State for 1920-1922, page 63. This report shows that the Republican nominee for Governor in the last general election, which was the election held in November, 1920, received 90,217 votes.

The Act of the Thirty-fifth Legislature just mentioned, it is true, provides that: "All party State conventions to announce a platform of principle and announce nominations for Governor and State offices shall, except as otherwise provided, meet at such places as may be determined by the parties respectively on the Tuesday after the second Monday after the fourth Saturday in August, 1918, and every two years thereafter," etc. But this language is found in Article 3140, Revised Civil Statutes, as amended by said Act of the Thirty-fifth Legislature, and Article 3140 applies only to political parties casting one hundred thousand votes or more at the last general election. It has never been true that this provision of Article 3140 applies to political parties polling as many as ten thousand and less than one hundred thousand votes for Governor in the preceding general election. If it did not apply to such parties prior to the amendment by the Thirty-fifth Legislature, it does not apply to them since the amendment. Said Article 3140 was amended so as to "hereafter read as follows," and for that reason we must place the article as amended back in the chapter in which it has always appeared in the Revised Civil Statutes. So placing it, we find that it clearly does not apply to the date of holding conventions of parties dealt with by Article 3159.

Article 3159 deals specifically with the date of holding State conventions for the nominations of "State offices" by political parties "whose nominee for Governor in the last preceding general election received as many as ten thousand and less than one hundred thousand votes." and the date fixed by this article for such conventions is the second Tuesday in August. Repeals by implication are not favored in law and it is our duty to construe together, and harmonize if possible, the provisions of the statutes dealing with parties "casting one

hundred thousand votes or more in the last general election" (Article 3084) and those authorizing holding of conventions by parties polling as many as ten thousand and less than one hundred thousand votes for Governor at the preceding general election (Article 3159). Having done this, the conclusion is inevitable that there was no legislative intent in amending Article 3140 to repeal the provisions of Article 3159, dealing with the date of holding conventions of parties of from ten thousand to one hundred thousand voting strength for Governor in the preceding general election. The provisions of Article 3159 may be given full effect and at the same time the purpose and intention of the Legislature in amending Article 3140 will not be interfered with. In other words, there is no necessary conflict, and it is only in case of conflict that a later statute will repeal a prior one by implication.

It follows that the proper date for holding the State convention of the Republican party, whose nominee for Governor in the general election held in 1920 received more than ten thousand and less than one hundred thousand votes, was the second Tuesday in August, 1922, in so far as the nomination for candidates for *State offices* is concerned.

Having been requested verbally to do so by the Secretary of State, we wish to make clear that it is the vote for Governor in the last preceding general election that determines whether the provisions of Article 3159 relative to the date of holding conventions are applicable to a political party and not the vote that may have been cast for President of the United States or other officers.

### III.

Your third inquiry raises squarely the question whether a nomination of the Republican party in this State for United States Senator must be by general primary election as distinguished from party convention.

It should not seriously be contended that the filling of the vacancy is valid unless the original nomination of Dr. Wilmot was valid. There could be no vacancy to fill in the absence of a valid nomination originally. Article 3172, Revised Civil Statutes, even if it be applicable to nominees for United States Senator, contemplates nominees lawfully made, because a nominee unlawfully made would be no nominee at all.

This statute says that a "nominee may decline and annul his nomination" and provides for the nomination of "a candidate to supply the vacancy." The serious question therefore, assuming that Article 3172 is applicable, is whether Dr. Wilmot was the nominee of the Republican party so as to authorize the filling of the vacancy caused by his declination or annulment of the supposed nomination.

Prior to May 31, 1913, United States Senators were elected by the Legislatures of the various States and not by direct vote of the people, and no provision was made by the election laws for State-wide nominations by political parties of candidates for United States Senator, although provision was made for a method of referendum. This referendum provision was to be found in Article 3097, Revised Civil Statutes, and was to the effect

"that the executive committee of the party for any county shall print on the primary ticket the names of all persons whose names, not less than thirty days

prior to the day of the primary, shall be requested to be printed thereon as candidates for United States Senator; and the executive committee shall forward to each nominee of the party for State Senator and Representative voted for by the voters of such county, a certified statement of the vote cast in the county for each such candidate."

We call attention to this provision to show that there was really no provision made for State-wide nomination, as that term is now understood, prior to the amendment of the Federal Constitution providing for election of United States Senators by direct vote of the people. Our election laws prior to the Federal amendment left out of consideration the nomination of candidates by political parties for United States Senator, and for this reason the Legislature deemed it necessary in 1913 to enact a law providing for the nomination of candidates for United States Senator and for their election at a general or special election. If we have any statutory law, therefore, authorizing nominations by the Republican party during 1922 of candidates for United States Senator by convention, it is to be found in the United States Senators' Act. This law was enacted by the Thirty-third Legislature at its First Called Session and is Chapter 39 of the General Laws of that session. It purports to be: "An act providing for the election of United States Senators from Texas to the Congress of the United States; providing for the appointment of United States Senators by the Governor under certain conditions, and providing for the selection and nomination of candidates therefor, defining violations of this act, fixing the punishment therefor, and limiting the campaign expenses of candidates for United States Senators, and declaring an emergency."

Section 4 of the act reads as follows:

"The name of no candidate for United States Senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless said candidate has been duly nominated and elected as herein provided."

Section 5 is in the following language:

"Each and every party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate or candidates for United States Senator at a general primary election to be held throughout the State on the fourth Saturday in July next preceding such election for United States Senator."

Section 10 is as follows:

"No person shall be declared the nominee of any political party for United States Senator unless he has complied with every requirement of this act and all other laws applicable hereto and has received a majority of all the votes cast at said primary election for all the candidates of that party for United States Senator. If at the first primary election no candidate receives a majority of the vote polled by his party for all the candidates for United States Senator before said party, the State executive committee or State chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election. Said second primary shall be held on the fourth Saturday in August, immediately after the first primary is held. At such second primary, only the two candidates in each party receiving the highest votes shall be voted upon."

The language of these three sections, standing alone, is clear and unambiguous, and, unless there is some provision in other portions of



the act to the contrary, it is clear that nominations of any political party whatsoever are required by this statute to be made at a general primary election held throughout the State.

So far from there being any such a contrary provision, an examination of the balance of the act will disclose that the Legislature seems to have made a special effort to emphasize and re-assert that the primary election is the only method permitted for selecting of party nominees for this office. Thus Section 8 provides:

"Any person affiliating with any political party who desires his name to appear on the general official primary ballot of said party as a candidate for the nomination of such party for United States Senator shall file with the State chairman of said party not later than the first Monday in June preceding such general primary his written request that his name shall be placed on the official ballot of said party as a candidate at the aforesaid general primary for the nomination as a candidate for United States Senator before the party with which he affiliates."

Also the following provision in Section 36 throws some light on the legislative intent:

"provided, further, that in no case shall the name of any person be placed upon the official ballot at any general election as a candidate for United States Senator as the nominee of any party unless he has been nominated under the provisions of this act and has complied with every provision of the laws of this State with reference to the nomination of candidates for United States Senators."

It is insisted that by reason of Section 3 of the act the provisions of the general laws providing for convention nominates by parties polling as many as ten thousand and less than one hundred thousand votes in the last general election for Governor, which includes the Republican party in 1922, are brought forward and made applicable to nominations for United States Senator, and that, therefore, the Republican party had authority to nominate a candidate for United States Senator by the convention method.

Section 3 of the Senators' Act contains the following provision:

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

It is at once apparent that in this connection we must determine two propositions: (a) whether this provision makes applicable any statutory provision other than those dealing with primaries as distinguished from conventions; (b) even if the word "primaries," as here used, is broad enough to contemplate statutory provisions dealing with party conventions, whether the provisions of Article 3159 authorizing convention nominates would be in conflict with the provisions of the Senatorial Act, in which event, of course, such provisions are not applicable.

These propositions have been carefully considered and will be discussed briefly in the order above mentioned. In the first place, this provision making applicable other laws, refers only to "elections" or "the holding of primaries in this State." The word "elections," as is well known, applies to general or governmental elections and not to the selection of candidates by political parties. *Koy vs. Schneider*, 110

Texas, 369, 221 S. W., 880. The act also makes applicable every law regulating or in any manner governing "the holding of primaries in this State." The word "primaries," as commonly understood, is insufficient to include party conventions. In considering this question, it is proper to consider the Senatorial Act as a whole, as well as all of our laws dealing with the subject of primary elections and nominating conventions. The Senatorial Act at no place speaks of nominating conventions; on the other hand, it deals exclusively with primary elections, special elections and general elections. Throughout the primary and general election laws of the State we find elections referred to as primary elections, special elections and general elections. Whenever conventions are mentioned, they are called conventions. At no place in our election laws do we find conventions spoken of as "primaries." For instance, Article 3085, Revised Civil Statutes, defines a primary election, as used in the chapter containing that article, as "an election held by the 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." Article 3159 distinguishes between "primary elections" and conventions and gives political parties of a certain voting strength the option of nominating for State officers by primary election or "State convention." Article 3169 authorized political parties not having a State organization to nominate candidates for county and precinct offices by "primary elections or by a county convention." The Woman Suffrage Act of 1918, in conferring upon women the privilege of voting, saw fit to expressly confer such privilege to vote "at any and all primary elections or nominating conventions."

The point here made is that wherever the Legislature has seen fit to deal with party conventions it has used the word "convention" and has never referred to conventions, in so far as we have been able to discover, as "primaries"; there is a clear distinction made throughout the statutes between the two.

But, even if it be contended that this interpretation of the word "primaries" is too narrow and technical, this proposition could be waived and still it would be clear that the United States Senators' Act does not permit nominations to be made by conventions. The provision in Section 3 authorizes the bringing forward of other applicable statutes in the event only that such statutes are not in conflict with the Senatorial Act. The statutory provisions authorizing party conventions would be in direct conflict with Section 5 of the act and for that reason alone would not be applicable. Section 5 provides in plain words that party nominations for United States Senator shall be made "at a general primary election to be held throughout the State on the fourth Saturday of July next preceding such election for United States Senator." This provision in the Senatorial Act is as plain in requiring nominations for United States Senator to be made by primary elections by all political parties as the statute requiring nominations to be made by primary elections by the Democratic party. It makes no exception in the case of parties of less than one hundred thousand strength as measured by the vote for Governor; it says "any political party." Section 10 is equally plain as to the run-off in event there is no majority in the first primary.

As stated, the act authorizes us to read into it only those general provisions not in conflict with it. The Senators' Act is plain and leaves no room for construction. A statute so plain should not mislead anyone as to the legislative intent. We have but to read it according to its plain provisions and give to the words used their ordinary and commonly understood signification, to arrive at the conclusion that according to the statutory law of this State the Republican party can lawfully nominate a candidate for United States Senator only at a general primary election. The language of this statute is mandatory. It is as clearly mandatory in its terms as the general primary election law which governs the holding of Democratic primaries, and no one has ever had the temerity to suggest that the convention system of nominating candidates has not been abolished, in so far as parties such as the Democratic party in this State are concerned.

The Act of 1913 brings forward other statutes, the Legislature evidently deeming it impracticable to incorporate in the act all statutory provisions regulating the holding of elections and primary elections, but, as before made plain, no provision is adopted which is in conflict with the act. We might grant that it is unusual and a presumption not to be lightly indulged that there should be a legislative intent to create a different method of choosing Senatorial candidates from that prescribed for selection of the State candidates; but we cannot arrive at the legislative intent by presumption as against the provisions of a statute so plainly expressed.

It is not practicable to discuss in detail all matters of argument that have been submitted in briefs filed, although they have been carefully considered by us; but we deem it proper here to note briefly the main contentions made by those filing briefs in behalf of Mr. Peddy's candidacy.

It is insisted that the provisions of Article 3174t compel the inference that the convention method of nomination is contemplated by the Senatorial Act, in that this article provides that:

"The name of no candidate for United States Senator chosen at a primary election or otherwise, shall be printed on the official ballot for the ensuing election, unless there has been filed \* \* \* the statements of accounts and expenses relating to the nominations of candidates for United States Senator required by this act."

It is argued that the use of the expression "or otherwise" shows an intention to recognize and permit convention nominations; that if this is not true, then the words "or otherwise" have no meaning whatever. This reasoning is erroneous. To adopt this view would be to convict the Legislature of permitting independent candidates to have their names on the official ballot without complying with the act as to filing expense accounts, for it is argued that the word "chosen" is not applicable to the selection of independent candidates, and that, therefore, the words "or otherwise" must refer to convention nominations. Reading the act as an entirety, it is evident that the intention was to require all candidates to comply with the act as to filing expense accounts, etc., and the word "chosen," as well as the words "or otherwise," clearly apply to independent candidates. Independent candidates are as much "chosen" as other candidates; they are chosen by petition containing signatures of at least ten per cent of the qualified voters.

We are unable to reach the conclusion that, by inference, we must read into the statute the provisions of Article 3159 authorizing convention nominations, simply by reason of this small circumstance, especially in view of the fact that we are able to harmonize it with the plain purpose and intent of the act in requiring nominations by primary elections. Inference will never be resorted to in order to ascertain the legislative intent, as against the clear legislative intent as gathered from the plain words of a statute.

The constitutionality of the Senators' Act is attacked if it be construed to compel a nomination by primary election. We frankly state that this Department would be very reluctant to hold the act unconstitutional and would not do so unless it were so flagrantly unconstitutional as to render such a conclusion unavoidable; but we need not do so on the grounds suggested. It is urged that the costs of a party primary would be prohibitive. We are not prepared to say, as a matter of law, that this is true in the case of the Republican party, which polled over one hundred thousand votes for President at the last general election.

As a general proposition, primary election laws have been upheld as to the constitutionality, although specific provisions have in certain instances been declared invalid. The legislative power and authority to prescribe the general primary election as an exclusive method of nominating party candidates has repeatedly been upheld. As said by Chief Justice Phillips, *Waples vs. Marrasar*, 184 S. W., 182:

"The authority of the Legislature to require the holding of a primary election by the political parties of the State for the purpose of enabling their members to vote their choice for party nominees for elective offices, whether State or National, and likewise express their preference in the selection of party delegates to party conventions, is undoubted."

To the same general effect are the following authorities:

*Hager vs. Robinson*, 157 S. W., 1138 (Ky.).  
*State vs. Dykeman*, 127 Pac., 218 (Wash.).  
*State vs. Board of Ballot Comrs.*, 96 S. E., 1050 (W. Va.).  
*Healy vs. Wipf*, 117 N. W., 521 (S. D.).  
*Heney vs. Jordan*, 175 Pac. (Cal.).

It is contended also that, even if the nomination of Dr. Wilmot was originally illegal, it became valid and incontestable at the time of resignation, since the statutes have provided a means of contesting nominations which has not been availed of. This view cannot be sustained, for the simple reason that our statutes, in providing a method of contesting party nominations, contemplate nominations provided for and authorized by law. Certainly the failure to institute a contest would not affirmatively confer legal authority on a party convention to nominate where the statute prohibits such a nomination, and under our view the exclusive method of nominating Senatorial candidates is by primary election. The power and authority of a convention to nominate under such circumstances could not be attacked anywhere and at any time simply because under the written law a convention is without authority to nominate. The situation is entirely analogous to that presented when the judgment of a court is attacked collaterally. The law is that such a judgment may be attacked even collaterally where the court was wholly without jurisdiction. So it is with a party convention. The statute requires nominations of candidates for United

States Senator by primary election, and therefore convention nominations are precluded, and the failure of a contest could not affirmatively amend the statute and confer upon the convention authority to nominate or give legality to its unlawful act. It would be wholly without jurisdiction and its action would be void and not voidable and could be attacked anywhere.

It is contended that the Legislature cannot prohibit nominations being made by a political party. This act does not seek to do this, it only provides how nominations may be made.

"The Legislature may make reasonable regulations as to how nominations may be made but cannot prohibit such nominations whether by a new party or an old one." (Morris vs. Mims, 224 S. W., 588.)

While the fact that nominations may have been made heretofore on one or two occasions by convention would be entitled to some weight in a doubtful case, still this consideration cannot be controlling in the interpretation of a statute which is plain and unambiguous.

#### IV.

The fourth and last question is whether, assuming that Mr. Peddy voted in the Democratic primary and voted for one of the candidates for the Democratic nomination for United States Senator, he is now legally entitled to have his name certified as the Republican nominee for United States Senator on the official ballot at the ensuing general election.

Assuming that Mr. Peddy voted, as stated, the situation comes squarely within the Westerman vs. Mims case (227 S. W., 178).

The situation here cannot be differentiated in principle from that in the Westerman vs. Mims case. The principle upon which the Supreme Court of Texas decided that case is that when a person votes in the primary election he obligates himself to support the nominees of the party, and that while this is only a moral obligation which he is required by statute to enter into before being permitted to vote, he cannot come into court and ask for a writ of mandamus to compel the Secretary of State to assist him in violating this moral obligation. Chief Justice Phillips thought that the obligation was a legal one to support the nominees and that, therefore, a person voting in the primary had no legal right to be a candidate against the nominee of the primary in the general election. But the majority of the court was "of the opinion that it cannot be properly said that the voter does become bound otherwise than morally to support primary nominations."

Mr. Justice Greenwood, in writing the opinion of the court, quoted from Turner vs. Fisher, 222 U. S., 209, as follows:

"Mandamus \* \* \* will not be granted in aid of those who do not come into court with clean hands, since the writ issues to remedy a wrong, not to promote one."

And further, he quoted from Prof. Pomeroy to the effect that:

"It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy."

And from the same authority the following:

"It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose foundation is good conscience."

Assuming, therefore, that the Republicans had authority to nominate by convention, Mr. Peddy would be without a remedy to compel the Secretary of State to certify his nomination, if he voted in the Democratic primary. Even though the statutes were complied with as to nominations, it would not follow that he could force the Secretary of State to certify his name as a candidate. The following language of Mr. Justice Greenwood is on the theory that even though the statutes prescribing formalities may have been strictly complied with, still it does not necessarily follow that the writ of mandamus will issue:

"It is not the law that the writ of mandamus must be granted in every case upon a showing by relators that Articles 3164, 3165 and 3166 of the Revised Statutes have been complied with. \* \* \* Manifestly one who seeks relief through this extraordinary proceeding must show himself entitled thereto under all applicable law, no matter where embodied."

In that case the statutes had been complied with as to formalities, but the writ would not issue to assist in doing wrong from a conscience and good faith standpoint.

In view of the decision of the Supreme Court in the *Westerman vs. Mims* case, it must be considered as settled that the obligation entered into in voting in the primary election to support the nominees is only a moral one. But the court did not hold that a person voting in a primary and taking the pledge has a legal right to be an opposing candidate and have his name certified as such.

The Supreme Court in the *Westerman vs. Mims* case held, in effect, that it was not the legal ministerial duty of the Secretary of State to certify the name of a person as an independent candidate when such person had entered into an obligation to support the nominees of the party, for if it had been his legal ministerial duty the writ would have issued. You are respectfully advised that it is not your legal ministerial duty to certify the name of Mr. Peddy as a candidate or nominee of the Republican party, if Mr. Peddy voted as stated in your inquiry.

We are not unmindful of the distinction between legal right and remedy. However, it is entirely possible for a person to be deprived of a primary right, substantially speaking, by reason of being deprived of his secondary right to have his remedy. The Supreme Court, as above indicated, did not hold that the candidate involved in that case had a legal right to have his name placed on the official ballot as an independent candidate, having voted in the party primary and agreed to support the nominees. What the court did hold is that the writ of mandamus would not issue to compel the Secretary of State to certify the name of the candidate under the circumstances. The court having held in effect that it was not the legal ministerial duty of the Secretary of State to act, it necessarily follows that the court recognized that it was within the discretion of the Secretary of State to refuse to certify the candidate's name.

This being the status, can it be said that Mr. Peddy has the legal

right to have his name placed on the official ballot as a Republican candidate if he voted in the Democratic primary as stated in your letter? We think not. A legal right is defined by Mr. Cooley as follows:

“A legal right is something which the law secures to its possessor by requiring others to observe it and to abstain from its violation.”

This writer quotes further from Lord Holt to the effect that:

“It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.”

We quote further from Mr. Cooley the following:

“The idea here conveyed is, that that only is a legal right which is capable of being legally defended; and that is no legal right, the enjoyment of which the law permits anyone with impunity to hinder or prevent. It is a legal paradox to say that one has a legal right to something, and yet that to deprive him of it is not a legal wrong. When the law thus declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that, in respect to the matter involved, no claim to legal rights can be advanced.”

The Supreme Court in the Westerman case has made it plain that there is no remedy to compel the Secretary of State to certify the name of a candidate under such circumstances as we have before us. Unless there is some other remedy, therefore, for a violation of Mr. Peddy's supposed right to have his name certified, then there is no remedy at all, and there being no remedy under Mr. Cooley's definition, there is no right. A suit for damages would not lie against the Secretary of State for refusing to certify, because a public officer is not liable to persons for damages resulting from the exercise of authorized discretion.

Cooley on Torts, 3rd Edition, page 752.  
23 A. & E. Ency. of Law, page 375.  
29 Cyc., 1443.  
22 R. C. L., 485.

As said at page 375 of 23 A. & E. Ency. of Law:

“Public officers who are entrusted by law with the exercise of judgment and discretion, and who are for this reason sometimes denominated quasi-judicial officers are certainly not liable to a person injured as the result of the exercise of their judicial or discretionary powers if the acts complained of are done within the scope of their jurisdiction and authority and without willfulness, malice or corruption.”

When the remedy fails, a legal right is bound to be reduced to a moral one. Under the circumstances, it is only in an academic sense, if at all, that it could be argued that Mr. Peddy has any legal right to be a candidate of the Republican party for the office of United States Senator, assuming, of course, that he voted in the Democratic primary as suggested in your communication. We are of the opinion that where a person is deprived of a remedy for a violation of a legal right he is deprived of the legal right itself, for, as said by Judge Cooley, “that only is a legal right which is capable of being legally defended,” and when the law declines to interfere between the claimant and his disturber in respect to the matter involved, no claim to legal rights can be advanced.

You are, therefore, respectfully advised that, even if the Republican party had the authority to nominate by convention, Mr. Peddy is not

now legally entitled to have his name certified as the Republican nominee for United States Senator on the official ballot at the ensuing general election, if he voted in the Democratic primary election as suggested by you.

Several objections have been made against the view that the principle in the *Westerman vs. Mims* case is applicable to the instant case. One is that the Constitution of the United States exclusively prescribes the qualifications of United States Senators (and this cannot be gainsaid), and that, therefore, to refuse a person a place upon the official ballot because he participated in the primary and obligated himself to support the nominees of the party would be tantamount to attaching an additional qualification to the office of United States Senator. This is not sound, for the reason that there is quite a difference between prescribing qualifications of an officer and prescribing regulations of primary and general elections and enacting rules and regulations for the holding of elections and getting names of candidates upon the official ballot.

It is intimated that rights of voters to participate in elections for United States Senator have their origin in, and are protected by, the Federal Constitution and laws. This, in a sense, is true. But whatever may be the power of Congress in connection with elections of United States Senators, it is a fact that up to this time Congress has not enacted any law purporting to regulate the holding of elections for Senators other than a temporary measure that was enacted soon after the adoption of the Seventeenth Amendment, and this temporary measure was only designed to provide for elections in the States until the State Legislature could enact election laws relative to United States Senators. This temporary measure expired by its own terms at the end of three years from the date of its approval. At this time it is within the power of the States to enact primary laws and election laws with reference to the office of United States Senator. We know of no provision in the Federal Constitution that would prevent the State from enacting any reasonable law regulating the conduct of elections, including rules and regulations necessary to be complied with and steps to be taken to get the names of candidates upon the official ballot. The Senatorial Act provides a method, to wit, by primary election, and we do not believe the proposition is sustainable that the voters have been or will be unduly deprived of the right to vote for a particular candidate who does not comply with the statutes, or where the political party has not complied with the statutes in making nominations, and, as we have seen, the Legislature has power to require nominations by primary elections. Nor can it be said that voters are deprived of the right to vote in violation of the Federal Constitution, because a particular alleged candidate of one party will be refused a place on the official ballot on account of the pledge he took in the primary of another party to support the nominees of the primary. Such a pledge is a reasonable one and has been sustained by the courts.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.



Op. No. 2465, Bk. 58, P. 315.

SHERIFFS AND CONSTABLES—FEES AND EXAMINING TRIALS.

Article 1117a, Code of Criminal Procedure, 1920 Texas Complete Statutes, prescribes the maximum amount of compensation which sheriffs and constables may receive for all services rendered in examining trials, in any one case.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 17, 1922.

*Honorable Lon A. Smith, Comptroller, Capitol.*

DEAR SIR: Your letter of the 27th ultimo, together with a letter addressed to you by Honorable W. P. Leslie, Judge, Thirty-second Judicial District, has been received. Judge Leslie's letter reads:

"Where a complaint is filed against a defendant charging a felony and a warrant is issued by the justice of the peace for his arrest and the sheriff has him arrested in some other county and goes after him and brings him back on said warrant to the county in which the complaint is filed and the defendant is bound over to await the action of the grand jury and the first grand jury thereafter returns a bill of indictment against the defendant for the very offense charged in the complaint, would the sheriff be allowed his mileage and transportation for himself and defendant? And if so, what form of fee bill should the same be presented with?"

The question submitted is whether a sheriff may collect the mileage fees provided for under subdivision 5 of Article 1122, or Article 1130, Code of Criminal Procedure, "for removing or conveying prisoners" when the prisoner has been charged with an offense of the grade of felony before a county judge or justice of the peace sitting as a magistrate, or whether the fees prescribed in Article 1117a, Code of Criminal Procedure, 1920 Complete Texas Statutes, is the maximum that said officers may receive for all services rendered in connection with an examining trial.

The pertinent part of Article 1117a, Code of Criminal Procedure, 1920 Complete Texas Statutes, was carried in the Code of Criminal Procedure of the Revised Statutes of 1895 as subdivision 3 of Article 1092. This subdivision read then as it does now, and is as follows:

"The sheriffs and constables serving process and attending any examining court in the examination of any felony case, shall be entitled to such fees as are fixed by law for similar services in misdemeanor cases, to be paid by the State, not to exceed four dollars in any one case."

The Twenty-eighth Legislature (Chapter 142) amended this subdivision by adding to it the following provision:

"Provided, that should the sheriff or constable be required to remove the prisoner to and from another county before indictment and the prisoner is afterwards indicted for a felony on same charge, the sheriff or constable shall be entitled to the same fees as though the removal was made after the indictment."

At the First Called Session of the Thirtieth Legislature (Chapter 14) this section was again amended and the amendment added by the Twenty-eighth Legislature was eliminated. This is the last amendment had to this subdivision and the subdivision now reads as it did prior to the amendment of 1903.

Articles 1122 and 1130 of the Code of Criminal Procedure are general statutes fixing the fees for sheriffs and constables in criminal cases where the costs are paid by the State. Subdivision 5 of each of

these articles relates to the fees which said officers may legally collect "for conveying or removing prisoners." The provisions of Section 5 of each article are very similar.

Article 1122 relates to fees allowed sheriffs and constables in "over-counties," while Article 1130 relates to fees allowed in "under-counties." These articles were in existence at the time of the amendment of Article 1117a in 1903 and in 1907. They may have been amended since that time, but at the time of these amendments they carried substantially the provisions of Section 5 of each article; that is, a provision was made for the payment of sheriffs and constables "for conveying or removing prisoners." The Legislatures of 1903 and of 1907 were charged with the knowledge of their provisions. These statutes are general statutes prescribing the fees to be paid by the State to sheriffs and constables for services rendered in felony cases.

Article 1117a, Code of Criminal Procedure, 1920 Complete Texas Statutes, is a special statute prescribing the fees allowed sheriffs, constables and other officers in examining trials; fixing the maximum amount said officers may retain for services rendered in any one case. These fees are paid by the State only after indictment has been had. Statutes of the character of those under consideration are to be strictly construed.

Taking into consideration the fact that Articles 1122 and 1130 are general statutes and that Article 1117a is a special statute dealing with fees in a particular class of cases, and further taking into consideration the amendment of 1903 and its subsequent repeal in 1907, we have reached the conclusion, and you are so advised, that it is the opinion of this Department that the Legislature intended that the fees prescribed in Article 1117a for sheriffs and constables to be the maximum such officers may receive for all services rendered in connection with any one case in examining trials, including making arrests, mileage in going to place of arrest, and "conveying or removing prisoners," serving subpoenas, attending court, and all other services of whatsoever nature.

Any opinions heretofore rendered by this Department which are susceptible of being construed as expressing a contrary view to that expressed herein are hereby withdrawn.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2459, Bk. 58, P. 319.

#### FEES OF OFFICE—COUNTY AND PRECINCT OFFICERS.

Under the provisions of Chapter 45, General Laws, passed at the Regular Session of the Thirty-seventh Legislature, and under Section 17, Article 16, of the Constitution of the State of Texas, all county and precinct officers, now in office, will continue in office until January 1, 1923, and thereafter until their successor shall have qualified. Such officers as are affected by the "fee bill" should make an annual report on December 1, 1922, as required by Article 3896, Revised Statutes, 1911, and another report, when they go out of office, covering that part of the fiscal year, served by them, beginning December 1, 1922.

The amount of fees a county or other officer whose fees are affected by the "fee bill" may retain for services rendered as such officer between December 1,

1922, and the time his successor qualifies can not be determined until the close of the fiscal year ending November 30, 1923.

All county officers, as well as all justices of the peace and constables serving in cities of more than twenty thousand inhabitants, will be entitled to receive as compensation for official services rendered for that part of the fiscal year beginning December 1, 1922, and ending when their successor shall have qualified, such proportional part of the fees accruing to the office for the fiscal year beginning December 1, 1922, as the time of their service bears to the entire year.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 9, 1922.

*Hon. H. G. Hamrick, County Auditor, Amarillo, Texas.*

DEAR SIR: Your letter of recent date, addressed to the Attorney General, has been received. It reads:

"The Legislature of Texas, during the Regular Session of the Thirty-seventh Legislature, passed a law which fixes the date for the qualification of newly elected county and precinct officers on January 1st after the general election. The fiscal year for all county officers has heretofore ended on November 30th of each year.

"Will you please advise me what fees and compensation the different officers will be allowed to retain for the month of December, 1922?

"Some of our local officers believe that they will be allowed to retain all fees of every kind earned by their respective offices during the month of December of this year, unless the fees for this one month exceed the maximum allowed such officer for one year under the fee bill.

"I am sure that this question has been, or will be raised by the officers over the State, and we would like to be advised just how we are going to handle the reports of officers of fees earned during the month of December, 1922."

In reply to the same, beg to call your attention to certain provisions of our State Constitution and statutes which are pertinent to your inquiry.

Articles 3881 to 3903, Revised Civil Statutes, 1911, together with all amendments thereto, compose what is commonly known and usually referred to as the "fee bill." These articles fix the maximum amount of fees which county officers, and justices of the peace and constables holding office in cities of more than twenty thousand inhabitants, may retain for services rendered in their official capacity in any fiscal year.

Article 3896 defines a "fiscal year" within the meaning of the "fee bill" as beginning on December 1st of each year. This article reads:

"A fiscal year, within the meaning of this chapter, shall begin on December 1 of each year; and each officer named in Articles 3881 to 3886, and also the sheriff, shall file the reports and make the settlement required in this chapter on December 1 of each year. Whenever such officer serves for a fractional part of a fiscal year, he shall nevertheless file his report and make a settlement for such part of a year as he serves, and shall be entitled to such proportional part of the maximum allowed as the time of his services bears to the entire year. However, an incoming officer elected at the general election, who qualifies prior to December 1 next following, shall not be required to file any report or make any settlement before December 1 of the following year; but his report and settlement shall embrace the entire period dated from his qualification."

In 1921 the Legislature passed an act (Chapter 45, Thirty-seventh Legislature) fixing a uniform date on which county and precinct officers were to qualify and assume the duties of the respective offices to which they had been elected. Section 1 of this act reads:

"That after each general election in this State, those who are elected to the various county and precinct offices in the State, shall qualify by taking the oath of office and entering upon and assuming the duties of their respective

offices, as prescribed by law, on the first day of January, following the last general election, or as soon thereafter as possible. And all those officers holding offices at the time of such general election shall surrender their offices to their successors accordingly on such date, or as soon after such date, as their said successors shall have qualified, and be ready to assume the duties thereof."

Prior to the passage of this act the Legislature had not fixed a uniform date on which county and precinct officers were required to qualify and assume the duties of the respective offices. However, by general custom most county and precinct officers qualify on December 1st, after their election in November. This custom was brought about because that date was the beginning of a fiscal year. By the act of 1921 all county and precinct officers are required to take the oath of office of January 1st after their election in November, or as soon thereafter as possible. Section 17 of Article 16 of our State Constitution reads:

"All officers within this State shall continue to perform the duties of their offices until their successors shall have duly qualified."

All county officers and precinct officers are elected for two years. If these officers qualify on December 1, 1920, their terms of office will expire November 30, 1922, but they will be required to serve until their successors have duly qualified, and under the act of 1921, their successors cannot qualify before January 1, 1923. Article 3895 requires all of the officers whose fees of office are affected by the "fee bill" to make a report at the end of each "fiscal year." This article reads:

"Each officer mentioned in Articles 3881 to 3886, and also the sheriff, shall, at the close of each fiscal year, make to the district court of the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected, and by whom due, and the number of deputies and assistants employed by him during the year, and the amount paid, or to be paid each."

It is from this report that the information is acquired whereby the amount of fees each officer is permitted to retain for his services for the fiscal year is ascertained and determined.

The act of 1921, while fixing January 1st as a uniform date on which all county and precinct officers are to qualify, did not change the date of beginning of the fiscal year as fixed by Article 3896, so as to make the beginning of the fiscal year conform to the date on which all county and precinct officers are required to qualify. The failure of the Legislature to make this change has occasioned your inquiry. The question before us for determination is, therefore, what disposition is to be made of the funds collected by any officer mentioned in Articles 3881 to 3886 during the month of December as fees of office?

The answer to your inquiry is not altogether free of difficulty, but after careful consideration of the same we are of the opinion that the correct answer is to be found in Article 3896, quoted above. A part of said article reads:

"Whenever such officer serves for a fractional part of a fiscal year, he shall nevertheless file his report and make a settlement for such part of a year as he serves, and shall be entitled to such proportional part of the maximum allowed as the time of his services bears to the entire year."

The officer whose term of office expires November 30, 1922, will continue to serve until January 1, 1923, and until his successor shall have

qualified. Such an officer has served one-twelfth of a fiscal year. He will make his report for the month of December. His successor will file his report for the eleven remaining months of the fiscal year ending November 30, 1923. These two reports taken together cover the fiscal year beginning December 1, 1922, and ending November 30, 1923. From these two reports, and from them only, can be calculated the amount due each of these officers for services rendered during the respective fractional parts of the fiscal year for which they served. The two officers are not entitled to any more compensation than if one of them had served the entire time. To illustrate: A county clerk in a county of less than twenty-five thousand inhabitants is permitted by Article 3881 to retain all fees collected until he reaches a maximum of \$2250. In addition to this amount, under Article 3889, he may retain one-fourth of the excess fees accruing to the office not to exceed \$1200. The most he may retain of the fees of his office in any event is \$3450. If there should accrue to his office during the month of December, 1922, fees amounting to \$400, after all legal deductions have been made, he could not retain this entire amount, because it would be greater than one-twelfth of the total amount such officer may legally retain for an entire year's service. Again, there may only accrue to the office during the remaining eleven months of the fiscal year under his successor not more than \$1800, after all legal deductions have been made. There would be no excess fees in an event of this kind. The total fees of the office would amount to \$2200, after all legal deductions had been made. The officer who served one month would be entitled to one-twelfth of said amount and his successor the balance. If during the month of December there only accrued to the office \$100, after all legal deductions had been made, and during the remaining eleven months of the fiscal year, \$2100, after all legal deductions had been made, accrued to the office, the division would be made on the same basis. The object and policy of the law being to fix a maximum compensation to these officers for one year's service as well as to prevent some officer, for instance, a tax collector or county treasurer, who usually collect most of their fees of office within two or three months, from collecting the full amount of fees within a short period of time and then resigning his office and leaving his successor to fill out his unexpired term without receiving a fair compensation for his services.

Article 3896 seems to contemplate that where an officer serves only a part of a fiscal year that he shall make his reports for such portion of the year as he shall have served and make settlement with the county, but we do not understand how a full settlement could be made before the end of the fiscal year, because it cannot be sooner determined just what his "proportional part of the maximum allowed" is.

We, therefore, conclude, and you are so advised, that the retiring officer should make his annual report at the close of the fiscal year as provided for by Article 3896. When his successor qualifies on January 1, 1923, or soon thereafter, he should make another report to cover the time he served between November 30th, the end of the fiscal year, and the date he went out of office, as is so directed by Article 3896. He should pay his deputies out of the fees collected during such period. If such fees are not sufficient, then it would become the duty of the new officer to pay the balance as soon as funds had accrued to the

office sufficient for such purpose. Should there be a balance left in the hands of the retiring officer after all legal deductions have been made, such funds may be turned over to his successor in office and his receipt taken therefor and attached to his report to the county. At the end of the fiscal year a settlement may be had between the two officers who served for that period, each receiving his pro rata part of the amount permitted under the law, as shown by the combined reports of such officers, to be retained by them. However, we think it would be permissible where, from past experience, a conservative estimate of the amount of fees which will accrue to the office can be made for the retiring officer to retain, if he has sufficient funds in his possession, after he has paid his deputies and made all legal deductions, his proportional part of said fees, not to exceed his proportional part of the maximum amount of "compensation and excess fees" that may be retained by such officer in one fiscal year. For example: If the maximum of "compensation and excess fees" an officer is permitted to retain in any one fiscal year is \$2250 "compensation" and \$1200 "excess fees," making a grand total of \$3450, an officer who served the month of December could retain one-twelfth of said amount. If at the end of the fiscal year it were determined that he had retained more than his proportional part, he would be obligated to pay the excessive amount over to his successor.

The policy and purpose of the law in dealing with the compensation of such officers makes the "fiscal year" the unit of time for which such officers are to be paid. Each officer is to be paid in accordance with the time he served, and each officer is entitled to receive his proportional part of the annual earnings and that regardless of the amount earned during his tenure of office for such fractional part of the year.

We hope we have made ourselves clear as to our construction of the statutes under consideration, and that we have given you the information desired.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

Op. No. 2488, Bk. 58, P. 294.

SHERIFFS—FEES—LUNACY CASES.

Sheriffs' fees in lunacy cases are controlled by the provisions of Article 1173, Code of Criminal Procedure.

Sheriffs are entitled to fifty cents as a fee for summoning a jury in each lunacy case where a conviction is had, to be paid by the county unless it can be collected out of the estate of the lunatic.

Sections 3 of Articles 1122 and 1130 of the Code of Criminal Procedure do not apply in lunacy cases.

When a sheriff is entitled to collect from the county a fee of fifty cents for summoning a jury in a lunacy case, it is immaterial whether he receives from the county ex-officio compensation under the provisions of Article 3866 of the Revised Civil Statutes as amended by Chapter 43, General Laws, passed at the Third Called Session of the Thirty-sixth Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 15, 1923.

*Honorable Chas. M. McKim, County Auditor, Kountze, Texas.*

DEAR SIR: In a letter of recent date addressed to this Department,

you state that "the sheriff here has presented a claim for two dollars for summoning a jury in each lunacy case tried since his tenure of office in 1919, claiming these fees under Article 1122 of the Code of Criminal Procedure."

You desire to know if you may legally allow this claim, or if the question is in any way controlled by whether the county has paid the sheriff an ex-officio salary under the provisions of Article 3866, Revised Civil Statutes, as amended by Chapter 43, General Laws, passed at the Third Called Session of the Thirty-sixth Legislature, as compensation for such services.

By Chapter 163, General Laws, passed at the Regular Session of the Thirty-third Legislature, Articles 150 to 165 of Chapter 1, Title 10 of the Revised Civil Statutes of 1911, were amended.

In the case of *White vs. White*, 196 S. W., 508, the Supreme Court of this State held the entire Act of 1913 void. The effect of this decision was to supplant the amended articles above mentioned by the original articles as they were prior to said void amendment, as these articles are now set out in Vernon's Texas Civil and Criminal Statutes, 1922 Supplement. These articles deal with the question of judicial proceedings in cases of lunacy. Article 165 prescribes the fees which said officers are permitted to retain in lunacy cases. A pertinent part of said article reads:

"In judicial proceedings in cases of lunacy, as prescribed in this chapter, in each case the sheriff and county clerk shall be allowed the same fees as are now allowed said officers for similar services in misdemeanor cases. The county attorney shall be allowed a fee of five dollars, provided, that such fees shall be allowed only when a conviction is obtained; said costs to be paid out of the estate of the defendant, if he shall have an estate sufficient thereof, otherwise said costs shall be paid out of the county treasury; and the jurors in such cases shall be allowed fifty cents each, to be paid out of the county treasury."

This article fixes the fees of the sheriff for services rendered in lunacy cases the same as those fees which are now allowed him for similar services in misdemeanor criminal cases. In order to ascertain what fees sheriffs were permitted to retain in misdemeanor cases at the time this statute was enacted in 1903, we must look to the Code of Criminal Procedure.

Article 1173 of that Code prescribes the fees allowed the sheriff in misdemeanor cases.

Section 6 of said article provides that the jury fee in each case actually tried by jury is fifty cents.

This article was amended by Chapter 19, General Laws, passed at the Regular Session of the Thirty-seventh Legislature, and the fee was increased from fifty cents to one dollar by said amendment. However, this amendment does not apply to lunacy cases, because, by the specific provisions of Article 165, the sheriff is limited to the collection of the fee which was at that time fixed by law.

It is therefore clear that a sheriff is entitled to a fee of fifty cents for summoning a jury in a lunacy case where the case is actually tried and the defendant convicted, said fee to be paid by the county when it cannot be collected out of the estate of the defendant.

This brings us to a discussion of the provisions of Articles 1122 and 1130 of the Code of Criminal Procedure, the former article dealing with "over-counties" and the latter dealing with "under-counties."

These articles fix the fees allowed sheriffs and constables in this State which are paid by the State. Section 3 of both articles reads alike and is as follows:

“For summoning a jury in each case, where a jury is actually sworn in, \$2.00.”

The above quoted section does not apply to lunacy cases, because these articles deal exclusively with the fees paid by the State to sheriffs and constables in felony cases. It is a general statute, while Article 165 is a special statute dealing exclusively with the fees allowed public officers in lunacy cases.

Article 3866 as amended by Chapter 43, General Laws, passed at the Third Called Session of the Thirty-sixth Legislature, providing for compensation for ex-officio services rendered by sheriffs, reads:

“For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads, and doing all other public business not otherwise provided for, the sheriffs may receive annually not exceeding one thousand dollars to be fixed by the commissioners court at the same time other ex-officio salaries are fixed, to be paid out of the general funds of the court on the order of the commissioners court. Provided, however, that no ex-officio salary shall be allowed to any sheriff who had received the maximum salary allowed by law.”

This is also a general statute, and while it provides that the ex-officio compensation which may be allowed sheriffs by the commissioners court is “for summoning jurors in district and county courts,” it does not repeal that provision in Article 165 which fixes the compensation of sheriffs for summoning jurors at the same fee allowed sheriffs for summoning a jury in misdemeanor cases, which we have heretofore seen is fixed at fifty cents for each jury summoned, where the case is actually tried by jury.

We have above been referring to the fee allowed a sheriff under Section 6 of Article 1173 as a fee for summoning a jury. This is not technically correct, because the fee allowed there is but an arbitrary allowance made to the sheriff in each case where the trial is by jury. There is no specific provision in Article 1173 for paying a sheriff for summoning a jury. However, it is under this section that a sheriff is entitled to a fee of fifty cents in lunacy cases, under the conditions heretofore stated.

We therefore conclude that in construing all of these articles together that there can be no question but what sheriffs are entitled to a fee of fifty cents for summoning a jury in a lunacy case, and that the fee must be paid by the county, if the defendant is convicted, and the same cannot be collected out of the estate of the defendant, and that the payment of this fee cannot be made to depend upon whether the sheriff receives ex-officio compensation from the county, or not.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2470, Bk. 58, P. 309.

DELINQUENT CHILDREN—PUBLIC OFFICIALS—COSTS.

That portion of Article 1118, Code of Criminal Procedure, 1911, which provides for a fee of \$12 to be paid the district or county attorney in all convictions



of felony where the verdict and judgment is confinement in the State Institution for the Training of Juveniles is superseded and repealed by the provisions of Article 1207, Code of Criminal Procedure, 1911, as amended by Section 12 of Chapter 112, General Laws, passed at the Regular Session of the Thirty-third Legislature.

County and district attorneys are not entitled to any fee for representing the State in a juvenile court.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 13, 1922.

*Honorable Lon A. Smith, State Comptroller of Public Accounts, Capitol.*

DEAR SIR: You have requested this Department to give you a construction of Article 1207, Vernon's Sayles' Code of Criminal Procedure, which reads, in part, as follows:

"This act should be liberally construed, \* \* \* provided that no cost or expenses incurred in the enforcement of this act shall be paid by the State."

You desire to know if county or district attorneys are entitled to any fee for obtaining a conviction in juvenile cases. You call our attention to a portion of Article 1118 of the Code of Criminal Procedure, which provides:

"For all convictions of felony when the defendant does not appeal or dies, or escapes after appealing and before final judgment of the Court of Criminal Appeals, or, when upon appeal, the judgment is affirmed, the sum of twenty-four dollars; *provided, that in all convictions of felonies where judgment or verdict is confinement in the State Institution for the Training of Juveniles, the fees of the district or county attorney shall be twelve dollars.*"

Article 1118 was passed at the First Called Session of the Twenty-sixth Legislature, and at that time there was no juvenile act, but the statute then in force provided for the confinement of children not more than sixteen years of age in the House of Correction and Reformatory, where upon the verdict of the jury the defendant was found to be not more than sixteen years of age and the penalty assessed did not exceed five years, and the jury so directed. This was the Act of April 2, 1889, known as "An Act to provide for the more efficient government and maintenance of the House of Correction and Reformatory at Gatesville." Section 12 of said act provided:

"When upon the trial and conviction of any person in this State of a felony it is found by the verdict of the jury that the defendant is not more than sixteen years of age, and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the House of Correction and Reformatory instead of the penitentiary, for the term of his sentence, and that such defendant be conveyed to the House of Correction and Reformatory by the proper authority, and there confined for the period of his sentence; and for such service such officer shall be paid the same fees he would be allowed for carrying such convicts to the penitentiary; providing, the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary."

This section became Article 1145 of the Code of Criminal Procedure of 1895. Said Article 1145 was amended by Chapter 68 of the Acts of the Twenty-fourth Legislature (1895), but the only change made by such amendment was to add a provision inhibiting the attorney representing the State from admitting the age of the defendant and requiring that the defendant's age be proved by a full and sufficient evidence. The next amendment to Article 1145 was by Chapter 54, General Laws, passed at the Regular Session of the Thirty-first Legisla-

ture (1909). The article was by said amendment made to read as follows:

"When an indictment is returned by a grand jury of any county charging any male juvenile under the age of sixteen years with a felony, the parent, guardian, attorney or next friend of said juvenile or said juvenile himself, may file a sworn statement in court setting forth the age of such juvenile at any time before an announcing of ready for trial is made in the case. When such statement is filed, the judge of said court shall hear evidence on the question of the age of the defendant, and if he be satisfied from the evidence that said juvenile is less than sixteen years of age, said judge shall have authority to order such prosecution dismissed and to order such juvenile turned over to the juvenile court of said county, if there be any such court in such county in which cases arising under the juvenile court laws are tried, through agreement of the judges of the district and county courts of said county and be tried in said juvenile court in the manner prescribed by law for the trial of such juveniles in such cases, or the judge of the district court may, in his discretion, proceed to try said cause as provided by law. If said juvenile be convicted and the verdict for conviction is confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the State Institution for the Training of Juveniles instead of the penitentiary for the term of his sentence, and that such defendant be conveyed to the State Institution for the Training of Juveniles by the sheriff or any peace officer designated by the court and there confined for the period of his sentence; provided, that such conviction and serving of sentence shall not deprive such defendant of any of his rights of citizenship when he shall become of legal age. If the verdict of the jury be for confinement for a longer period than five years, the defendant shall be confined in the penitentiary as now provided by law for persons convicted of a felony."

The article as quoted above was carried into the Code of Criminal Procedure as Article 1195, which article was amended by Chapter 112, General Laws, passed at the Regular Session of the Thirty-third Legislature (1913). There have been no later amendments and the article now reads:

"When an indictment is returned by the grand jury of any county charging any male juvenile under the age of seventeen years with a felony, the parent, guardian, attorney or next friend of said juvenile, or said juvenile himself, may file a sworn statement in court, setting forth the age of such juvenile, at any time before announcement of ready for trial is made in the case. When such statement is filed, the judge of said court shall hear evidence on the question of the age of the defendant; and, if he be satisfied from the evidence that said juvenile is less than seventeen years of age, said judge shall dismiss such prosecution and proceed to try the juvenile as a delinquent, under the provisions of this act. If said juvenile be found to be delinquent, and sentence be not suspended, as provided in the laws of this State in cases of felony on first offense, the defendant shall be committed to the State Industrial School for Boys upon an indeterminate sentence; provided, that such defendant shall not be detained in said school after he has reached the age of twenty-one years. Such defendant shall be conveyed to the said school by the probation officer, sheriff or any peace officer designated by the court; provided, that such conviction and detention in said school shall not deprive defendant of any of his rights of citizenship when he shall become of legal age; and provided, further, that the age of the defendant shall not be admitted by the attorney representing the State, but shall be proved to the satisfaction of the court by full and sufficient evidence that the defendant is less than seventeen years of age, before the judgment of commitment to said institution shall be entered. The officer conveying any defendant to said school shall be paid by the county in which conviction is rendered the actual traveling expenses of said officer and defendant; provided, further, that nothing in this act shall be held to affect, modify or vitiate any judgment heretofore entered confining any defendant to the State Institution for the Training of Juveniles; but the unexpired portion of any such judgment shall be fulfilled by the confinement of any such defendant in the State Industrial School for Boys."

Article 1207, Vernon's Sayles' Code of Criminal Procedure, is the same as Section 12 of said act and Article 1195 is the same as Section 1 of said act.

Article 1197, Vernon's Sayles' Code of Criminal Procedure, 1922 Supplement, defines the words "delinquent child" to include "any male child under seventeen years of age, or any female child under eighteen years of age, who violates any law of this State. \* \* \*"

This article, also, contains the following provision:

"When an indictment is returned by the grand jury of any county charging any female juvenile under the age of eighteen years with a felony, the parent, guardian, attorney or next friend of such juvenile, or said juvenile herself, may file a sworn statement in court at any time before announcement of ready for trial is made in the case. When such statement is filed the judge of said court shall hear evidence on the question of the age of the defendant, and if he is satisfied from the evidence that said juvenile is less than eighteen years of age, said judge shall dismiss such prosecution and proceed to try the juvenile as a delinquent child, under the provisions of this act."

I have quoted the provisions of these articles for the purpose of showing that when Article 1118, Code of Criminal Procedure, was enacted that it was the duty of the district judge to try all felony cases against male juveniles under the age of sixteen years, and if a conviction was had with a punishment assessed at confinement for a longer period than five years, then the defendant was sent to the penitentiary. If for a period of five years or less, then the defendant was sent to the House of Correction and Reformatory, if the jury by its verdict so directed. Now, under the provisions of Article 1145, the district judge no longer tries a male juvenile under the age of seventeen years, or a female juvenile under the age of eighteen years, but transfers the case to the juvenile court, when the sworn statement provided for in Article 1195, Code of Criminal Procedure, as amended by the Act of 1913, is filed before announcement of ready for trial and the judge is of the opinion from the evidence submitted, that the defendant, if a male, is under seventeen years of age, and if a female, is under eighteen years at the time of the trial. But under the provisions of Article 1207, supra, the State pays no costs in juvenile courts.

It is, therefore, the opinion of this Department, and you are so advised, that the fee provided for district and county attorneys for securing a verdict and judgment confining the defendant in the State Institution for the Training of Juveniles, as provided for in Article 1118, Code of Criminal Procedure, has been superseded and repealed by Article 1207, Code of Criminal Procedure, Vernon's Criminal Statutes, 1916, and that no costs or expenses incurred in the enforcement of the juvenile act can be paid by the State.

Very truly yours,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2480, Bk. 58, P. 424.

RIVER BEDS—INCLUDED IN GRANTS—TITLE REMAINS IN STATE.

A grant of land made by the State since December 14, 1837, that embraces within its boundaries the bed of a stream maintaining an average width of

thirty feet or more, whether navigable in fact or not, did not pass to the grantee title to the bed of such stream, and in such case the bed of the stream remains the property of the State and is subject to the provisions of Chapter 83, page 158, General Laws, Regular Session, Thirty-fifth Legislature, effective June 19, 1917, pertaining to prospecting for, developing and mining oil and gas on river beds and channels, and the granting of permits therefor.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 7, 1923.

*Honorable J. T. Robison, Commissioner of the General Land Office,  
Austin, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 2nd instant, from which we quote the following:

"In Mitchell County various railroad surveys cross the Colorado River, some are individual and some are school surveys. Many of these were made as early as 1873. Oil and gas applications have been filed, as required by law, on the river bed and channel. The surveyor reports this stream to be in the narrowest place perhaps 43 varas wide and ranging considerably more than double that. Where these surveys cross the river, should the oil and gas permits be issued?"

It is our opinion that a grant of land made by the State since December 14, 1837, that embraces within its boundaries the bed of a stream maintaining an average width of thirty feet or more, whether navigable in fact or not, did not carry with it the title to the bed of such stream, and that in such case the bed of such stream within the boundaries of such grant is subject to the provisions of Chapter 83, page 158, General Laws, Regular Session, Thirty-fifth Legislature, effective June 19, 1917, pertaining to prospecting for, developing and mining oil and gas on river beds and channels, and the granting of permits therefor.

Article 5338 of our Revised Civil Statutes of 1911, taken from the Act of December 14, 1837, reads as follows:

"All lands surveyed for individuals, lying on navigable watercourses, shall front one-half of the square on the watercourse and the line running at right angles with the general course of the stream, if circumstances of lines previously surveyed under the laws will permit; and all streams, so far as they retain an average width of thirty feet, shall be considered navigable streams within the meaning hereof, and they shall not be crossed by the lines of any survey."

Aside from and independent of this article, the title to a grant of land calling for a stream, or for the margin of a stream, navigable in fact for one of its lines carries only to the usual or normal water line. Title to the bed or channel of such stream remained in the State.

Another rule is that a grant calling for a stream not navigable in fact for one of its lines carries to the middle or thread of the stream, and in such case the title to the bed of such stream passed out of the State with the grants on opposite side of the stream. This rule, however, as to streams not navigable in fact and that maintain an average width of thirty feet was changed by this act. On this point our Supreme Court, in discussing this act, in the case of *City of Austin vs. Hall*, 93 Texas, 597 (57 S. W., 563), he said:

"The statute places all of these streams which have an average width of thirty feet on equality, whether they are actually navigable or not, and does not undertake to change the rule that limits the title of the grantee when the stream is navigable, but, in effect, applies that rule to the stream or that portion of the stream, which, being within the statutory requirement, would not be navigable except for its provisions. The grant of a tract of land upon the

margin of a stream which retains an average width of thirty feet gives title to the grantee only to the water line of such stream; the title to the bed of the stream being reserved to the State."

If that act could and did so change the rule as to exclude from a grant that part of the bed of a stream not navigable in fact, but coming within the act, that lies between the margin of its waters and the middle or thread of such stream, and that by its own force and without specification in the grant, then likewise it must be held, it seems to us, to exclude from the grant that part of the bed of such a stream that lies wholly within the grant.

Our Supreme Court, in the case of *Landry vs. Robison*, 219 S. W., 819, has also said:

"Had there been no statutory reservation of the beds or channels of navigable rivers, we do not think that such general language as 'other public lands' could be held to include the soil beneath navigable waters. For our decisions are unanimous in the declaration that by the principles of the civil and common law soil under navigable waters was treated as held by the State or nation in trust for the whole people. The trust impressed thereon withdraws such soil from the operation of general provisions like those of the Act of April 9, 1913, for the reason that nothing short of express and positive language can suffice to evidence the intention to grant exclusive private privileges or rights in that held for the common use and benefit. *City of Galveston vs. Menard*, 23 Texas, 390; *Rosborough vs. Picton*, 12 Texas Civ. App., 116, 34 S. W., 791, 43 S. W., 1033; *Hynes vs. Packard*, 92 Texas, 49, 45 S. W., 562; *Wiel on Water Rights in the Western States*, Section 898."

After citing and discussing certain cases and quoting this article of the statutes, the court in this case further says:

"It was decided in *Land Co. vs. Thompson*, 83 Texas, 179, 17 S. W., 920, that surveys astride Devil's River, made in 1876 and 1877, constituted no appropriation of the land, to protect it from subsequent location, because forbidden by the statute, and therefore illegal.

"It follows that until the Legislature passed the Act of March 16, 1917, the law did not authorize, but forbade, the grant by the State to individuals of any right in the bed or channel of such a river as the San Jacinto."

Among other authorities considered by us in passing upon this question are the following:

*New York & Texas Land Company vs. Thompson*, 83 Texas, 169 (17 S. W., 920).

*Bunnell vs. Sugg* (Ct. Civ. App.), 137 S. W., 701.

*Horton vs. Pace*, 9 Texas, 81.

*Desmuke vs. Houston* (Ct. Civ. App.), 31 S. W., 198.

*Day Land & Cattle Company vs. State*, 68 Texas, 562 (4 S. W., 865).

*King vs. Schaff* (Ct. Civ. App.), 204 S. W., 1039.

*Baylor vs. Tillebach* (Ct. Civ. App.), 49 S. W., 720.

*Hamilton vs. Menifee*, 11 Texas, 718.

*Roberts vs. Terrell*, 101 Texas, 577 (110 S. W., 733).

*Welder vs. State* (Ct. Civ. App.), 196 S. W., 868.

*DeMeritt vs. Robison*, 102 Texas, 358 (116 S. W., 796).

*Tabor vs. Commissioner General Land Office*, 29 Texas, 508.

*State vs. Macken* (Ct. Civ. App.), 162 S. W., 1160.

We are in no way passing upon the validity of any grant that may have been located across or astride, or that may include within its boundaries, the bed of a stream that comes within the provisions of said Article 5338.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2455, Bk. 58, P. 393.

MINES AND MINING—PUBLIC FREE SCHOOL LAND—FORFEITED SALES  
—CHANGE IN CLASSIFICATION—REINSTATEMENT—OIL AND  
GAS PERMITS—PATENTS.

An application for the reinstatement of a forfeited sale of public free school land classified as "agricultural" at the time of sale does not vest in the applicant the right to a reinstatement if after such forfeiture and before the making of such application the classification of the land is changed to "mineral and agricultural" and there is at the time such application is made a valid oil and gas permit outstanding upon such land applied for before the making of such application for reinstatement, nor will the fact that such application, together with interest money paid thereon, remain in the Land Office during the life of, and is there upon the termination of, such permit, operate to vest in the applicant the right to reinstatement, nor, upon tender of the balance due the State, to a patent to such land under such forfeited sale.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 13, 1922.

*Honorable J. T. Robison, Commissioner, General Land Office, Austin, Texas.*

DEAR SIR: This is in reply to yours of May 12, 1922, addressed to the Attorney General, which is as follows:

"I beg to submit the facts below for your consideration and advice as to whether or not this department should patent the section of land involved:

"1. Section 12, Cert. 427, H. & T. C. Ry. Co., Brazoria County, was purchased by W. T. Freeland September 22, 1905, as dry grazing—File 83172. The title in this office to this tract under that purchase, as far as compliance with law is concerned, is regular.

"2. This sale was forfeited December 30, 1915, for non-payment of interest and the land was classified as mineral and agricultural.

"3. On April 28, 1916, Geo. L. Harris filed an application for oil and gas prospect with the county clerk of Brazoria County, in which the land is located, and a permit was issued under Section 3, Chapter 173, Act approved April 19, 1913, June 9, 1916.

"4. On April 18, 1917, the forfeiture of the sale of this land was set aside and the sale reinstated subject to the mineral reservation to the State under the classification when it was put on the market under the forfeiture of December 30, 1915.

"5. On May 6, 1916, the money was paid into this department for the reinstatement of the above sale.

"6. The records of this department show that development work was begun under Permit 1574 within the time prescribed by law, but oil and gas were not found.

"7. On June 7, 1918, \$160.00, or twenty-five cents per acre, was paid on this Permit 1574 for a third year extension of the permit, it having been shown that development work was done and over \$4,000.00 expenditures incurred.

"8. This Permit 1574 expired by its own limitations without having oil or gas developed therein.

"9. On June 10, 1919, J. L. Wait filed an oil and gas prospect application with the county clerk of Brazoria County for the aforesaid Section 12, and permit was issued thereon September 15, 1919. Payments upon that permit have been kept up, development work shown and, so far as the records of this department show, it is in good standing at the present time.

"10. Under an opinion from the Attorney General's Department dated May 7, 1919, the former reinstatement of the cancelled sale to the land herein mentioned was cancelled and certificate of facts issued for the refund of the money. This action occurred September 16, 1919.

"11. Since the rendering of that opinion of May 7, 1919, there has been decided the case of Gulf Production Company vs. The State, reported, I believe, in 231 S. W., 124.

"To summarize, you will note at the time the owner of the forfeited sale applied to have it reinstated there was an outstanding mineral permit. That mineral permit remained in force some three years from its date. You will note the first mineral permit, No. 1574, was dated June 9, 1916, and seems to have been in force three years. Also, another mineral application was filed with the county clerk the 10th of June, 1919, at 8 o'clock a. m. Upon that state of the record some questions arise which must be determined in order for this department to know whether or not it would be authorized to issue patent upon the original sale to W. T. Freeland for said Section 12 upon full payment of all principal and interest due the State:

"1. Was Mineral Permit No. 1574 issued June 9, 1916, an intervening right against the reinstatement of the former cancelled sale of said Section 12?

"2. Was Permit 1574 an intervening right that would prevent reinstatement?

"3. Was the application for reinstatement and the payment of the necessary back interest—both remaining in this office—so impressed with those elements of a continuing right as to be such application for reinstatement when Permit 1574 expired three years after its date?

"4. Was the application filed June 10, 1919, at 8 a. m. for the new Permit 4972 prematurely filed, or was there a space of time intervening between the expiration of 1574 and the filing of the new application on June 10, 1919, for 4972 so that the former application to reinstate could become effective if it were a continuing right and therefore preclude any right to reinstate attaching under the former application to reinstate and payment of money?

"I would thank you to advise if patent should be issued to the land involved."

Replying to your questions upon the foregoing facts, you are respectfully advised:

1. That the Harris Permit No. 1574, applied for April 28, 1916, and issued June 9, 1916, was on May 6, 1916, an intervening right against the reinstatement of the forfeited Freeland sale, and was such an intervening right as precluded such reinstatement.

2. That said application for reinstatement and the payment of the necessary back interest, both remaining in your office, was not, and did not at any time become, nor give rise to nor ripen into, a continuing or other application for reinstatement of said forfeited Freeland sale, neither upon the expiration or termination of said Harris Permit No. 1574, or otherwise, and that the right to reinstatement of said forfeited Freeland sale has at no time revived, vested or attached, by reason of said application therefor made May 6, 1916.

3. That the application for the Wait Permit No. 4972 was not prematurely filed, that no right to reinstatement of the forfeited Freeland sale arose or attached under said application therefor, and that same did not become effective as a result of the period of time intervening between the expiration or termination of the Harris Permit No. 1564 and the filing of the application for the Wait Permit No. 4972, or otherwise, and did not at any time become or constitute, or give rise to, any intervening or other right that precluded the issuance of said Wait Permit No. 4792.

4. That you would not be authorized to issue a patent to this land as under the original Freeland application and sale.

5. In Opinion No. 2046, addressed to you by the Attorney General under date of April 10, 1919, you are advised that in the opinion of the Attorney General the filing with the county clerk by George L. Harris on April 28, 1916, of an application for a permit to prospect for oil and gas in and upon this land constituted such an intervening right as precluded the reinstatement of the forfeited Freeland sale upon the application made therefor on May 1, 1916. The permit to

Harris upon this application had not then expired, however, and was then in good standing.

6. That the Commissioner of the General Land Office was authorized to reclassify this land upon the forfeiture of the Freeland sale is well established. *Johnson vs. Sunshine Oil Corporation* (Crt. Civ. App.), 227 S. W., 698; *Johnson vs. Robison* (Sup. Crt.), 240 S. W., 300; *Clements vs. Robison* (Sup. Crt.), 239 S. W., 902.

7. The application for the Harris Permit No. 1574 was made and permit was issued under the provisions of Chapter 173, page 409, General Laws, Regular Session, Thirty-third Legislature, and we assume that it was originally granted for the period of two years from its date as authorized by Section 5 of this act, and that same was extended for one additional year as authorized by Sections 6 and 7.

8. Your attention is also called to Opinion No. 2157 by the Attorney General to you on December 9, 1919 (Report and Opinions Attorney General, 1918-1920, p. 329), in which the Attorney General held that failure on the part of a permittee to comply with the provisions of this act did not, ipso facto, forfeit his permit to the extent that another might acquire from the State any right to or interest in the minerals within or upon the land covered by the permit, and that in such case the issuance of a permit on an application therefor filed prior to an affirmative cancellation or forfeiture of such permit by the Commissioner of the General Land Office and a proper entry or notation thereof made by him, was not authorized, citing *Underwood vs. Robison* (Sup. Crt.), 204 S. W., 314; *Adams vs. Terrell*, 101 Texas, 331; *Willoughby vs. Townsend*, 92 Texas, 70; *Ford vs. Brown*, 96 Texas, 537; *Boswell vs. Terrell*, 97 Texas, 239; *Erp vs. Robison*, 155 S. W., 180; and other authorities.

9. It will also be noted that our Supreme Court in the case of *Fox vs. Robison*, 229 S. W., 456, held that one to whom a permit had been granted under this act might relinquish same, that such "relinquishment is equivalent to an abandonment and a refusal to proceed with reasonable diligence in a bona fide effort to develop the area, \* \* \* and is in effect a forfeiture of his permit," and that in such case, "the land being subject to relocation, a permit should have been awarded" to another who had applied therefor after such relinquishment.

10. It is our opinion, however, that a mineral permit issued under this act, as was the Harris Permit No. 1574, is limited by statute to a maximum period of three years from the date on which issued, and that unless otherwise limited by its terms, or forfeited or relinquished at an earlier date, it expires, and all rights thereunder terminate, by operation of law upon the expiration of three years from the date on which it was issued, without an affirmative act of the Commissioner of the General Land Office so declaring or being noted as indicated in the case of *Underwood vs. Robison*, supra. The life of a permit under this act is expressly limited by the act to a period of time not to exceed three years from the date of its issuance. No power or option is vested either in the owner of the permit or in the Commissioner of the General Land Office to extend such a permit beyond this time. On the other hand, a permit under this act may or may not continue for the full period of three years, depending upon its terms or compliance with certain requirements of the act, as in said case of *Underwood vs.*



Robison. It is true that courts do not favor forfeitures, but mineral permits under this act do not "forfeit," or become subject to "forfeiture," by reason of the expiration of three years from their dates in the sense in which this rule in regard to forfeiture is applied. They expire by virtue of the act limiting them to a period of time not to exceed three years from their dates of issue. What seems to us as analogous statutes are those providing for the lease of public free school lands. R. C. S., 1911, Arts. 5421 and 5450 to 5456. Such leases are limited by statute to a maximum period of five years from their dates, and it has been held by our Supreme Court that such a lease executed April 16, 1897, and not specifying a shorter period of time, "terminated at midnight of the 16th of April, 1902," and that thereupon a qualified purchaser filing with the county clerk on April 16, 1902, and with the Commissioner of the General Land Office on April 23, 1902, a proper application to purchase the land included in such terminated lease, was entitled to have such land awarded to him. *Patterson vs. Terrell*, 74 S. W., 19. That court has also held that the lease of a tract of public free school land executed April 23, 1908, for a period of five years "expired April 23, 1913," and that another lease of the same land executed February 25, 1913, was unauthorized, the former lease not having expired. *Pruett vs. Robison*, 192 S. W., 537.

11. We are of the opinion, therefore, that the Harris Permit No. 1574 expired, and that all rights thereunder terminated, at midnight of June 9, 1919, without any affirmative action on the part of the Commissioner of the General Land Office so declaring and being noted, either as indicated in said case of *Underwood vs. Robison*, or otherwise, and that thereupon the minerals in this land, being reserved to the State, became subject to application for permits to prospect therefor in like manner as before the issuance of said permit, subject to such rights, if any, as may have thereupon vested or attached under the request made May 6, 1916, for reinstatement of the forfeited Freeland sale.

12. We are also of the opinion that the right of an applicant to an oil and gas permit on surveyed public free school land attaches upon and from the time of the filing of the application therefor with the clerk of the county court of the county in which the land, or any part thereof, is situated, or with the clerk of the county court of the county to which the county in which the land is situated is attached for judicial purposes, other provisions of the law being complied with. See Sections 1, 3 and 16, Chapter 83, page 158, General Laws, Regular Session, Thirty-fifth Legislature, and opinions of the Attorney General, No. 2137, dated September 25, 1919, and No. 2149, dated November 28, 1919, both addressed to you.

13. From the foregoing, and the facts stated in your letter, it follows that the issuance of the Wait Permit No. 4972 upon the application therefor filed June 10, 1919, at 8 o'clock a. m., eight hours after the termination or expiration of the Harris Permit No. 1574, was authorized, and was not premature, unless the issuance of same was precluded by the request made May 6, 1916, for reinstatement of the forfeited Freeland sale. Was there, by virtue of this application for reinstatement made May 6, 1916, vested in Freeland or his ultimate

vendee the right to have the forfeited Freeland sale contract reinstated upon the termination of the Harris Permit No. 1574?

14. A negative answer to this question may not be wholly free from doubt, but in our opinion it should be so answered. There is some similarity between our statutes pertaining to the sale and lease of surveyed public free school lands and the statute providing for reinstatements, and except in a very few instances involving an insignificantly short period of time, it has been uniformly held by the courts of this State, as stated in Opinion No. 2170 by the Attorney General addressed to you on June 6, 1920, that:

"For one to acquire the right to have awarded to him surveyed public free school land such land must be on the market and subject to sale at the time his application is made, and even though a purported sale of such lands may be, and may have been from its inception, invalid and void as against the State, such a sale may nevertheless be valid as against all other adverse claimants, and an applicant is not entitled to have such land awarded to him, even after the cancellation or forfeiture by the State of a purported sale invalid as against the State, but valid as to each applicant, on an application filed prior to such cancellation or forfeiture, such purported sale, as far as the applicant is concerned, being valid and hence having the effect of taking the land off the market. (R. C. S., 1911, Arts. 5416, 5488, 5489; Nobles vs. Magnolia Cattle Co., 9 S. W., 448; Logan vs. Curry, 69 S. W., 129; Adams vs. King, 66 S. W., 484; King vs. Robison, 128 S. W., 368; Wyeart vs. Terrell, 100 S. W., 133; Adams vs. Terrell, 107 S. W., 537; Erp vs. Tillman, 131 S. W., 1057; Erp vs. Robison, 155 S. W., 180; Pruett vs. Robison, 192 S. W., 537.)" Rep. & Op. Atty. Gen., 1918-1920, p. 281.

On this point reference is also made to Underwood vs. Robison, Patterson vs. Terrell and Pruett vs. Robison, cited in paragraph 10 of this opinion. The provisions of our statute governing the sale and lease of surveyed public free school lands applicable to this question are too numerous and lengthy to be set out here. The only provision bearing upon the reinstatement of forfeited sales is found in Article 5423 of the Revised Civil Statutes of 1911. The first part of this article provides for forfeitures for nonpayment of interest. Provision is then made for suit against the Commissioner of the General Land Office to contest forfeitures declared by him to lands purchased prior to August 20, 1897. Then follows our only statutory provision pertaining to reinstatements, which reads:

"In any case where lands have been forfeited to the State for non-payment of interest, the purchasers or their vendees, may have their claims reinstated on their written request by paying into the treasury the full amount of interest due on such claims up to the date of reinstatement, provided that no rights of third persons may have intervened."

It is our view that this language means to fix the time for making, or rather, the condition or status that must exist at the time of making the request for reinstatement as well as to grant the right to reinstatement. It does not seem reasonable that the Legislature could have intended by this provision to authorize the making of applications for reinstatement pending an intervening right, same to become effective on a forfeiture or termination of such intervening right at some uncertain or remote time in the future. In the case of an intervening sale such an application could never give rise to a right to reinstatement, and the making of it would be futile, except upon the assumption that either the purchaser or the State would breach the intervening contract of sale, whereas the presumption must be in-

dulged that both will live up to their contract. It must also be presumed that both the State and the permittee will perform their respective obligations under an oil and gas permit, and in such case, since the rights under a permit merge and ripen into the right to a lease, if under the permit oil and gas are developed in commercial quantities, an application for reinstatement made during the life of a permit, could never give rise to the right to reinstatement except upon the assumption either that oil or gas will not be developed in commercial quantities, or, even if they are, that the permittee will either fail or refuse to avail himself of the right to a lease. We believe that neither of these assumptions could be indulged, either upon reason or upon the working of this statute. We think that under this statute the full amount of interest due the State must be paid "up to the date of reinstatement" before the right to reinstatement attaches, and we cannot conceive that the Legislature intended by this provision to authorize payments of interest from time to time and from year to year pending a possible forfeiture or termination of an intervening right, in contemplation and with the intent that the right to reinstatement should attach and become effective upon such possible future forfeiture or termination. Such a construction would result in piling up funds in the hands of the Commissioner of the General Land Office, the handling and disposition of which are not provided for by law, or else an accumulation into the permanent and available school funds of the State numberless payments that under the present law would have to be refunded, and would lead to endless confusion in many other ways. Without further discussion, we think we are warranted in our conclusion that an applicant for reinstatement in order that he may be vested with the right conferred by this statute, must make his application and payment of interest at a time when there is no intervening right, and that such an application made at any time during the pendency of an intervening right does not vest in the applicant the right to reinstatement at some future time when such an intervening right might terminate or be forfeited.

15. Since no right to reinstatement of the forfeited Freeland sale has attached or arisen under the application made therefor on May 6, 1916, a reinstatement of that sale has never been and would not now be authorized, and from this it follows, of course, that you would not be authorized to issue a patent to this land under the forfeited Freeland purchase and sale contract.

16. We have considered the case of Gulf Production Company vs. State, 231 S. W., 124. In that case the Court of Civil Appeals at San Antonio held that a change in the classification of land from "dry agricultural" to "mineral and agricultural" after the forfeiture of a purchase made under the former classification, although authorized, did not of itself constitute such an intervening right as deprived the ultimate vendee of the purchaser under the former classification of the right to have such forfeited sale reinstated, and that this right, although for the time being suspended by an intervening application for and award to another purchaser of the land in question, revived upon the forfeiture of such intervening application and sale, and that a reinstatement of the original sale upon request and payment of interest made after the forfeiture of such intervening right was proper

and valid. The original sale in that case was made to J. M. Kidd on January 22, 1900, and was forfeited in December, 1915, for nonpayment of interest. This holding was affirmed by our Supreme Court, without a written opinion, on March 1, 1919. Texas Writs of Error, 238 S. W., p. vii. The difference in the facts of that case and those stated in your letter pertaining to the Freeland forfeited sale is that in the former the application for reinstatement was made after the forfeiture and termination of the intervening sale, and also that said sale was not in fact perfected, while in the latter the application for reinstatement was made three years, lacking eight days, prior to the expiration or termination of the intervening right; that is, the Harris Permit No. 1574, and at a time when said permit was clearly valid and in good standing. This appears to us to be a marked and material difference and we do not regard this case as requiring or authorizing a reinstatement of the forfeited Freeland sale on the application made therefor on May 6, 1916.

With respect to your questions, therefore, you are advised as indicated at the outset of this opinion.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2473, Bk. 58, P. 299.

#### COUNTY SURVEYORS—OFFICIAL BONDS—FEES OF OFFICE.

1. Before entering upon the duties of his office each county surveyor, whether a licensed land surveyor or not, should give bond in the sum of not less than \$500.00 nor more than \$10,000.00 as fixed by the commissioners court, and otherwise in compliance with law.

2. Those portions of Article 3876 of the Revised Civil Statutes that fix the compensation of a county surveyor at \$3.00 a mile, including all expenses, for surveying land when the distance actually run is one mile or more, \$2.50 a mile, including all expenses, for surveying land when the distance run is less than one mile, and \$5.00 a day for services in designating a homestead, and Article 1383 fixing his compensation at \$3.00 a mile for surveying and marking county boundary lines under orders of the county court, are repealed by Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, and said act fixes the compensation of such surveyors for such services at \$10.00 a day.

3. Said act also repeals that part of said Article 3876 fixing the fees of a county surveyor at twenty cents for each one hundred words for certified copies of field notes, papers and records of his office, and fixes his fees for such copies at thirty-five cents for each one hundred words.

4. The fees and compensation of county surveyors for their services as such are now fixed by statute as indicated in this opinion.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 16, 1922.

*Hon. A. L. Duff, County Attorney, Seminole, Texas.*

DEAR SIR: The Attorney General is in receipt of an inquiry of the 11th inst. from Mr. N. R. Morgan, Seminole, Texas, stating that he has just been elected to the office of county surveyor of Gaines County, and requesting the opinion of the Attorney General on the questions hereinafter indicated. You are aware that the Attorney General is not permitted to give legal advice or written opinions other-

wise than to certain State, district and county officers, and ordinarily we refer such inquiries to the county attorney of the proper county, but inasmuch as the question of fees here presented by Mr. Morgan would seem to be one of considerable importance to county surveyors, and presents a question of the present validity of certain statutes prescribing fees for county surveyors for certain services, we are availing ourselves of this opportunity to pass upon this question.

Without setting out Mr. Morgan's letter in full the questions presented by him may be concisely stated as follows:

1. What is the amount of the official bond required of a county surveyor?

2. What fees is a county surveyor entitled to charge for his services?

An answer to these questions involves a consideration on these two points of Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, effective October 21, 1919. We will refer to this act as the act of 1919.

We find nothing in this act that in any way changes the law pertaining to the official bond required of county surveyors. It provides for the examination of those who desire to become licensed land surveyors and for the granting of licenses to those who successfully pass the examination. Section 6 provides that licensed land surveyors "may be elected county surveyors of the county in which they reside," but further provides that "if so elected (they) shall qualify as provided by law for county surveyors," and Section 9 provides that "a surveyor who does not hold a license under this act may, nevertheless, be elected to the office of county surveyor and perform the duties of that office." Nothing in the act changes in any way the provisions of Article 5301 of the Revised Civil Statutes of 1911 pertaining to the bond required to be given by county surveyors. That article reads as follows:

"Before entering upon his duties the county surveyor shall take the oath of office prescribed by the Constitution, and shall enter into bond, with two or more good and sufficient sureties, to be approved by the commissioners court of the county, in such sum as may be fixed by such commissioners court, not to be less than five hundred dollars nor more than ten thousand dollars payable to the Governor and his successor in office, conditioned that he will faithfully perform all of the duties of his office, which bond shall be deposited and recorded in the county clerk's office of the county."

It is the duty of the commissioners court to fix the amount of the bond within the limits prescribed by this article to be given by the county surveyor and before entering upon the duties of his office, whether he be a licensed land surveyor or not, the county surveyor should give bond in the amount fixed, and otherwise in compliance with this article.

The fees that a county surveyor, when acting as such, is authorized to charge for his services, except as repealed or changed, if at all, by Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, effective October 21, 1919, are as follows:

- |  |         |
|--|---------|
| 1. Inspecting and recording field notes and plat of a survey for any tract of land over one-third of a league (R. C. S. 1911, Art. 3876) | \$ 3.00 |
| 2. One-third of a league (R. C. S. 1911, Art. 3876)  | 2.00    |
| 3. Less than one-third of a league (R. C. S. 1911, Art. 3876)  | 1.00    |
| 4. For recording surveys and plats required by Article 5319, for each one hundred words (R. C. S. 1911, Art. 3876)                       | .20     |

5. Examination of papers and records in his office at the request of any person (R. C. S. 1911, Art. 3876)	.25
6. Copies of all field notes and plats or any other papers or records in his office, for each one hundred words, including certificate (R. C. S. 1911, Art. 3876)	.20
7. Surveying any tract of land, including all expenses in making the survey, and returning the plat and field notes of the survey, for each English lineal mile actually run (R. C. S. 1911, Art. 3876)	3.00
8. Surveying any tract of land, including all expenses of making the survey, and returning the plat and field notes, when the distance actually run is less than one English lineal mile (R. C. S. 1911, Art. 3876)	2.50
9. For services in designating a homestead, to include pay for chain carriers, for each day's service (R. C. S. 1911, Art. 3876)	5.00
10. Surveying and marking county boundary lines under orders of the county court for each mile run (R. C. S. 1911, Art. 1383)	3.00
11. Obtaining from commissioner of general land office certified transcripts of maps, field notes or other records of his office of his county, when such records of his office have been destroyed or any new county is organized, for each one hundred words (R. C. S. 1911, Art. 5324)	.05
12. Transcribing records of his office when so ordered by the commissioners court, for each one hundred words, not more than (R. C. S. 1911, Art. 5334)	.10
13. Filing and recording each application for survey for prospecting for oil or natural gas on certain public lands (Sec. 4, Ch. 83, Gen. Laws, Reg. Ses. 35th Leg.)	1.00
14. Filing each application for mining claim for coal or lignite on certain public lands (Sub. 2, Sec. 10, Ch. 83, Gen. Laws, Reg. Ses. 35th Leg.)	1.00
15. Filing each mining application other than for oil, natural gas, coal or lignite, on certain lands (Sec. 4, Ch. 79, Gen. Laws, 2nd Called Ses. 35th Leg.)	1.00
16. All services for making a survey of mining claims other than for oil, natural gas, coal or lignite, for each day so engaged, not exceeding (Sec. 5, Ch. 79, Gen. Laws, 2nd Called Ses. 36th Leg.)	10.00

The only provisions in the Act of 1919 pertaining to the compensation of county surveyors are found in Sections 8, 9 and 10 of that act. These sections read as follows:

"Sec. 8. A licensed land surveyor shall receive as compensation for his services not to exceed ten dollars per day and other expenses incident to the survey shall be agreed upon between the surveyor and the interested party, whether that be a private person, a county, a court, or the State.

"Sec. 9. A surveyor who does not hold a license under this act may nevertheless be elected to the office of county surveyor and perform the duties of that office and one who does not hold such license may be appointed deputy county surveyor and perform the duties of that office and they shall receive such compensation for their services as licensed State land surveyors.

"Sec. 10. Surveyors qualified under this act and county surveyors may make a certificate of any fact shown by the books, documents and records of any county surveyor's office and may make a certified copy of any book, document or record or entry therein shown by the record of said office, \* \* \* and for such service the surveyor may charge a fee of one dollar for each certificate and thirty-five cents for each one hundred words contained in any certified copy; provided, when a county has a county surveyor such surveyor alone shall be authorized to make certificates and certified copies and receive the fees therefor."

Section 13 of the act repeals all laws and parts of laws in conflict with the act.

The words "their services" as used in Section 9 of this act are quite general and broad and might be construed to embrace all official services that county surveyors are authorized or required by law to render, and if so construed, since an officer as such can only charge for such

services as he is authorized by law to charge for, and then only the fees or compensation provided by law, it would follow that this provision, being in conflict therewith, would repeal all those statutes heretofore noted prescribing fees or compensation for county surveyors and that such surveyors would have to charge "by the day," and at the rate of not to exceed \$10 a day, for all services that they are authorized or required by law to render. We do not believe the Legislature intended this provision to have such effect, that is, that county surveyors should be compensated "by the day" for such services as inspecting and recording field notes, examining papers and records of their office, obtaining certified transcripts from the General Land Office, transcribing the records of their office, filing papers, and the like. Compensation for services of this character has never been placed upon a per diem basis for any officer in this State.

Manifestly, the Act of 1919 deals primarily with the making of land surveys, going out in the field, upon the ground, and there, by the use of instruments and means adapted to that purpose, making, establishing and marking, or ascertaining and pointing out, the lines and corners of circumscribed landed areas, and with a method of ascertaining who are qualified for such work and granting them licenses so evidencing. Other provisions of the act, such as those pertaining to compensation, were evidently intended as merely incident to this main purpose. The making of land surveys, as is well and commonly known, generally requires the time of a day, or, in many instances, several days, and it is not unusual for the surveyor making the survey to be compensated on a per diem basis. In our opinion, it was with this in mind that these provisions for compensation by the day were embodied in this act.

It is true that Section 6 of this act provides "that land surveyors, licensed and otherwise qualified as provided in this act, are hereby authorized to perform the duties that are now or may be hereafter required of county surveyors" and that "their jurisdiction shall be co-extensive with the limits of the State," and, except as to the services mentioned in Section 10, provides no other compensation than that "for his services" he shall receive "not to exceed \$10 per day," but whatever may be included in this charge of "not to exceed \$10 per day" for "his services" as applied to a licensed land surveyor, we cannot think that by this act it was intended to repeal all other statutes prescribing fees or other compensation for county surveyors. Such statutes are not expressly repealed, and the conflict between this act and certain of these statutes is not such as, in our opinion, repeals them by implication, notwithstanding the broadness of the words "their services" as here applied to county surveyors.

Since, in our opinion, this per diem charge prescribed by the Act of 1919, as we have already indicated, applies to actual surveying and field work upon the ground and is intended for compensation for that class of services, it follows that to that extent this act is in conflict with and therefore repeals prior statutes prescribing compensation for the same kind of services.

In answer to these questions it is our opinion, therefore, and you are so advised:

1. That before entering upon the duties of his office each county

surveyor, whether a licensed land surveyor or not, should give bond in the sum of not less than five hundred (\$500) dollars nor more than ten thousand (\$10,000) dollars as fixed by the commissioners court, and otherwise in compliance with law.

2. That the statutes heretofore fixing the fees or compensation for county surveyors, as indicated in the 6th, 7th, 8th, 9th and 10th items of the list of fees hereinbefore set out in this opinion, are repealed by Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, but that said act in no way amends or repeals any other of said fee statutes, and that the fees now fixed by law for county surveyors are as follows:

1. Inspecting and recording field notes and plat of a survey for any tract of land over one-third of a league (R. C. S. 1911, Art. 3876) . . . . .	\$ 3.00
2. One-third of a league (R. C. S. 1911, Art. 3876) . . . . .	2.00
3. Less than one-third of a league (R. C. S. 1911, Art. 3876) . . . . .	1.00
4. For recording surveys and plats required by Article 5319, for each one hundred words (R. C. S. 1911, Art. 3876) . . . . .	.20
5. Examination of papers and records in his office at the request of any person (R. C. S. 1911, Art. 3876) . . . . .	.25
6. For each certificate of any fact shown by the books, documents and records of his office (Ch. 67, p. 173, Gen. Laws, 2nd C. S. 36th Leg.) . . . . .	1.00
7. For making certified copies of any book, document, record or entry shown by the records of his office, for each 100 words (Ch. 67, p. 173, Gen. Laws, 2nd C. S. 36th Leg.) . . . . .	.35
8. For services reasonably necessary and rendered in making official surveys upon the ground, such as surveying and marking county boundary lines under order of the county court, making surveys of public lands and mining claims for oil, natural gas, coal or lignite, and such like surveys as it is the duty of the county surveyor as such to make, not to exceed per day (Ch. 67, p. 173, Gen. Laws, 2nd C. S. 36th Leg.) . . . . .	10.00
9. Obtaining from Commissioner of General Land Office certain transcripts of maps, field notes, or other records of his office of his county, when such records of his office have been destroyed or any new county is organized, for each one hundred words (R. C. S. 1911, Art. 5324) . . . . .	.05
10. Transcribing records of his office when so ordered by the commissioners court, for each one hundred words, not more than (R. C. S. 1911, Art. 5334) . . . . .	.10
11. Filing and recording each application for survey for prospecting for oil or natural gas on certain public lands (Sec. 4, Ch. 83, Gen. Laws, Reg. Ses. 35th Leg.) . . . . .	1.00
12. Filing each application for mining claim for coal or lignite on certain public lands (Sub. 2, Sec. 10, Ch. 83, Gen. Laws, Reg. Ses. 35th Leg.) . . . . .	1.00
13. All services for making a survey of mining claims other than for oil, natural gas, coal or lignite, for each day so engaged, not exceeding (Sec. 5, Ch. 79, Gen. Laws, 2nd C. S. 36th Leg.) . . . . .	10.00

In this connection we call your attention to the later part of Section 9 of the Act of 1919, which reads as follows:

"Nothing herein contained shall be construed to prevent any surveyor or person to survey for another by private contract and the criminal penalties contained herein shall not apply to such surveyor or person surveying for another by private contract or to surveyor surveying lands by order of the court."

County surveyors may, of course, do private surveying or surveying by private contract and the expression "private contract" as here used relates to such surveys as it is not the duty of the county surveyor as such to make. A survey that it is the duty of the county surveyor as an officer to make must be made by him at the compensation herein



indicated and he would not be authorized by private agreement to charge a greater compensation therefor than as herein stated. Likewise the expression "by order of court" relates to such surveying as may be done under an order of court and such as it is not the duty of the county surveyor as such officer to do.

We also call your attention to that part of Section 8 of this act, which provides that the expenses incident to the making of a survey other than the \$10 per diem charge for the surveyor shall be as agreed upon between the surveyor and the interested party, whether that be a private person, a county, the court, or the State, and there is no statute prescribing what such expenses may be even with respect to such surveys as it is the duty of the county surveyor as such officer to make.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2547, Bk. 59, P. 162.

OFFICERS—FEES OF OFFICE.

The act of the Thirty-eighth Legislature allowing the sheriff 15 cents for each day for the safe keep of each prisoner not to exceed the sum of two hundred dollars per month, does not repeal or supersede the provisions of Article 1143, Code of Criminal Procedure, allowing the sheriff a certain amount for guards.

Chapter 181, General Laws, Regular Session, Thirty-eighth Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 17, 1924.

*Hon. E. F. Walsh, County Auditor, Wichita Falls, Texas.*

DEAR SIR: On July 16, 1923, I wrote you a letter expressing the opinion that the provision in Senate Bill No. 63 (now Chapter 181, General Laws, Regular Session, Thirty-eighth Legislature), amending Article 1142, Code of Criminal Procedure, supersedes the provisions of Article 1143 with reference to jail guards, etc. We have been urged to reconsider the question, and having done so the Department is of the opinion that we should have advised to the contrary.

We are of the opinion that the provision mentioned does not have the effect of repealing or superseding the guard statute. In the first place the new statute is not essentially different from the old one so far as our question is concerned. The old statute made an allowance to the sheriff "for the safe keeping, support and maintenance of prisoners confined in jail or under guard." The new statute makes allowance for the same purpose, that is, "safe keeping, support and maintenance of prisoners confined in jail or under guard," the change in form being that the new law separates the allowance for "safe keep" from the allowance for support and maintenance making a separate allowance for each. Thus the two statutes accomplish the same thing in a different form.

Then again, we find that for a great many years the statutes have contained a provision for guards in addition to one for safe keeping, support and maintenance. We need not go back further than the

act of August 23, 1876 (8 Gammel's Laws, p. 290), where we find in a single act of the Legislature the two provisions, that is, one for "safe keeping and feeding" and another for "guards." The portion of that act making these allowances to the sheriff reads as follows:

"For keeping and feeding from one to four prisoners, he shall be paid not exceeding forty-five cents per day for each prisoner; but whenever the number of prisoners in jail shall be more than four, then the pay for feeding prisoners shall not exceed forty cents each per day; this shall be inclusive of all fees or allowances to sheriffs for the support, maintenance, keeping and feeding prisoners; for guards necessarily employed in the safekeeping of prisoners, one dollar and fifty cents per day for every guard so employed by the sheriff; and there shall not be anything allowed for the board of such guards, nor shall any allowance be made for jailor or turnkey."

Ever since that time the two provisions, one for safe keeping, support and maintenance and the other for guards, have been carried along together in the statutes in substantially the same form as that contained in the Act of 1876. The provisions were carried forward in the Code of Criminal Procedure of 1879 as Articles 1065 and 1066. Article 1065 provided for safe keeping, support and maintenance, and Article 1066 made an allowance for guards "necessarily employed in the safe keeping of prisoners." The same provisions are to be found in the Code of Criminal Procedure of 1895 as Articles 1097 and 1098 and in the Code of Criminal Procedure of 1911 as Articles 1142 and 1143.

Article 1097 of the Code of Criminal Procedure of 1895 was amended by Chapter 64, General Laws, Regular Session, Thirty-second Legislature, the act having been approved March 13, 1911, and the same article, which had by this time become Article 1142 of the Code of Criminal Procedure of 1911, was again amended by Section 2, Chapter 19, General Laws, Regular Session, Thirty-seventh Legislature. But neither of these acts mentions or purports expressly to repeal the guard statute. So it is with the amendment of the Thirty-eighth Legislature. It amends the article in reference to safe keeping, support and maintenance without mentioning the guard statute or containing any express language indicating an intention to repeal or supersede the article in reference to guards.

In view of the fact that an allowance seems to have always been made for guards in addition to allowance for safe keeping, support and maintenance, the fact that the statute relative to the latter has been altered so as to change the method of collecting to some extent and the amount allowed for safe keeping, support and maintenance, would not seem to be significant of an intention to supersede the guard allowance. The legislative intent seems to have been that the sheriff should have both, and the new statute does not indicate a different intention. The two allowances having been carried in the statutes side by side for all these years, it is to be presumed that the Legislature would have indicated its intention to repeal or supersede the guard statute in clear and specific language if that had in fact been its intention. Not having done so, we are justified in assuming that the Legislature still desires the sheriff to have this allowance for guards in addition to the allowance for safekeeping, support and maintenance of the prisoners.

It is the opinion of this Department, therefore, that the provision

in the new statute making an allowance for safe keeping does not supersede the old statute making an allowance for guards.

Very truly yours,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2544, Bk. 59, P. 236.

OFFICERS—DISTRICT JUDGES—FILLING VACANCIES.

Where a district judge, who has been elected for a four-year term, resigns and the Governor fills the vacancy until the next general election, at which time a judge is elected, the election is for the unexpired term only and is not for a full four-year term.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 3, 1924.

*Hon. C. O. Hamlin, Judge, Ninetieth Judicial District of Texas,  
Breckenridge, Texas.*

DEAR SIR: Under date of January 15, 1924, an assistant in this office wrote you a letter expressing the opinion that in the fall of 1922 you were elected to a full four-year term as district judge of the Ninetieth Judicial District.

Since that time the matter has been brought to our attention in such a manner as to cause us to reinvestigate and reconsider the question, with the result that we are now of the opinion that the advice given was in error. We endeavor, as best we can, to be correct in our advice and opinions and are always reluctant to change a former opinion, but when a fair-minded person finds he is wrong, there is only one thing for him to do, and that is, get right. So that we consider ourselves at this time in duty bound to withdraw our former advice to you and to advise you to the contrary.

Your inquiry of January 12, 1924, reads as follows:

"I was appointed by Governor Neff Judge of the Ninetieth Judicial District in March, 1921, to succeed Hon. G. O. Bateman, resigned. Judge Bateman had just been elected in the general election of 1920 and had served just a little over two months on the four-year term for which he was elected, at the time he resigned.

"I was a candidate in the July primary and the general election in November, 1922 (the same being the first general election after my appointment by the Governor), and was elected to succeed myself as Judge of the Ninetieth Judicial District.

"Personally, there has never been any question in my mind but what I was elected in the general election of November, 1922, for a full term of four years, as provided for in the Constitution and statutes, but inasmuch as I have heard it suggested that perhaps I was only elected to fill out the unexpired term of Judge Bateman, I would appreciate a ruling on this question from your Department."

The Ninetieth Judicial District was created by the Third Called Session of the Thirty-sixth Legislature, Chapter 3. As to the appointment and election of a judge, the act contains the following provisions:

"The Governor shall appoint a suitable person, as judge of the Ninetieth Judicial District Court as herein constituted, who shall hold such office until the next general election and until his successor shall have been elected and qualified.

The judges of said court shall thereafter be elected as provided by the Constitution and laws of the State for the election of district judges."

It will be noted that according to the act the Governor was to make an appointment and thereafter the judge is to be elected as provided by the Constitution and laws of the State for the election of district judges.

Section 7 of Article 5 of the State Constitution provides that the district judge shall hold his office for the period of four years. Section 28 of the same article of the Constitution deals with the subject of filling vacancies in certain judicial offices, and reads as follows:

"Vacancies in the office of judges in the Supreme Court, of the Court of Appeals, and district court shall be filled by the Governor until the next succeeding general election; and vacancies in the office of county judge and justices of the peace shall be filled by the commissioners court, until the next general election for such offices."

Another provision of the Constitution which must be considered is Section 27 of Article 16, which is in the following language:

"In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only."

The general statutes also provide for four-year terms for district judges and for the filling by the Governor of any vacancy in the office until the next succeeding general election. (See Articles 1672 and 1674, Revised Civil Statutes, 1911.)

Since the Constitution fixes the term of district judges at four years, any appointment or election of an incumbent prior to the expiration of four years would appear to be the filling of a vacancy, and the Constitution provides that all elections to fill vacancies shall be for the unexpired term only. It is true that in certain instances, as in your case, such a construction necessitates the filling of the vacancy, in a sense, twice, first by appointment and then later by election. However, the appointment by the Governor, in our judgment, is only temporary until the general election, when an opportunity will be given to the voters to select their judge for the remainder of the term in keeping with the policy of our Constitution and laws to elect judges by direct vote of the people.

The exact situation confronting us now was passed upon in the case of Nicks vs. Curl et al., 86 S. W., 368. The case was decided by the Court of Civil Appeals March 15, 1905, and writ of error was denied by the Supreme Court of Texas April 20, 1905. Our Constitution and statutes in reference to the matter under consideration were the same at that time as they are today. In that case it was held that the election (following an appointment by the Governor until the next general election) was to fill out the unexpired four-year term of the district judge who had died. Upon the death of the district judge the Governor appointed a judge and at the next general election the appointee was elected to the office, but at that time the original four-year term of the judge who had died had not expired. The court held, under these circumstances, that the election at the next general election after the appointment, was for the unexpired term only and not for a four-year term.

Now, as to your case. Judge Bateman was elected for a four-year term at the general election of 1920. In March, 1921, you were ap-

pointed by Governor Neff to succeed Judge Bateman, resigned. At the general election in November, 1922, you were elected to the office. At the time of this latter mentioned election only two years of the original Bateman term had expired. Therefore, your election in 1922 was for two years only, to fill out the unexpired term of four years.

In view of the provisions of the Constitution in reference to the filling of vacancies, and particularly in the light of the decision of the Court of Civil Appeals in which writ of error was refused, you are respectfully advised that in the opinion of this Department your election in November, 1922, was for the unexpired four-year term of Judge Bateman and was not for a full four-year term.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2509, Bk. 59, P. 252.

COMMON SCHOOL DISTRICTS—REDEFINING BOUNDARIES—ABOLISHING  
COUNTY LINE DISTRICT—VALIDATING ACT.

A general validating act, enacted by the Legislature for the purpose of validating common school districts created by proper officers, is inadequate to validate an order of commissioners court redefining a common school district when the effect of such order is to abolish a county line school district, without the consent of commissioners courts of both counties in which such county line district is situated.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 25, 1923.

*Hon. S. M. N. Marrs, State Superintendent and ex-Officio Secretary of  
the State Board of Examiners, Capitol.*

DEAR SIR: Your letter of recent date to the Attorney General has been referred to me, and replying thereto I have to say, I quote the following from your letter:

"On October 2, 1895, a petition was filed with the county commissioners court of Travis County praying for the establishment of a county line school district, located partly within Burnet County and partly within Travis County. This petition was granted, and the formation of the county line school district was subsequently approved by the commissioners court of Burnet County, and the jurisdiction over the district was given to Travis County. Said district is known as school district No. 54, Haynie Flat, and the petition and order establishing said school district appears of record in Book G, pages 494 to 496 of the commissioners court minutes of Travis County, Texas.

"On September 27, 1913, the county commissioners court with all its members present passed the following order:

"Whereas, the common school districts of Travis County as heretofore established and defined have never been properly recorded in the minutes of the commissioners court and their boundaries being for the most part indefinite and some having no order recorded establishing the same;

"Now, therefore, be it ordered by the commissioners court that all of the school districts of Travis County be and are hereby re-established and defined according to the following field notes, which are hereby ordered recorded in the minutes of this court, and the county map, having all of said districts defined thereupon, be ordered framed to preserve the same and that the same be hung in the county clerk's office for the public inspection and information and not to be removed therefrom without order of this court, as follows: \* \* \*

"In record book L, page 39, et seq., of the commissioners court minutes,

Travis County, Texas, is found the new boundaries of Haynie Flat district, as determined in pursuance of the foregoing order. These new boundaries place all of the Haynie Flat district within Travis County, and in nowise affects that part of the Haynie Flat district which was in Burnet County.

"It is agreed that this action on the part of the Travis County commissioners court was without authority of law, inasmuch as the county authorities of Burnet County were not consulted in the dismemberment of the Haynie Flat county line district. An act passed by the Thirty-fourth Legislature, First Called Session, Chapter 28, which was approved June 4, 1915, reads as follows:

"All common school districts in this State heretofore laid out and attempted to be established by the proper officers of any county and heretofore recognized by said county authorities as school districts of said county are hereby validated in all respects as though they had been duly and legally established in the first instance."

*"Query.*

"Conceding that the action of the Travis County authorities in redefining the boundaries of Haynie Flat school district No. 54 without the consent of the Burnet County authorities was illegal, does the act of the Legislature above cited, which became a law, subsequent to the action of the Travis County authorities, legalize the Haynie Flat district as it now appears of record in Travis County?"

The only question involved in this inquiry is: Did the validating act passed by the Thirty-fourth Legislature, First Called Session, Chapter 28, validate action of the commissioners in creating a common school district thereby changing the lines of and abolishing a county line common school district? The act in question is a general validating act, the purpose of which, as expressed in the act, was to validate all common school districts heretofore laid out and attempted to be established by the *proper officers* of any county.

We do not question the fact that the commissioners court of Travis County had authority to create common school districts, but did such court have authority to abolish a county line district? Article 2815b contains the following language with reference to county line district: "shall not be changed or abolished, except by the consent of the commissioners court of each county having territory contained in such a district, and then shall not be changed so that such a district will contain less than sixteen square miles of area, and in the case such a district has outstanding bonds, the same shall not be changed or abolished in any way until after such bonds are finally paid and discharged."

When the commissioners court redefined the common school districts of Travis County on September 27, 1913, it defined district No. 54 as a common school district, including only that part of the territory which is in Travis County, thereby changing or abolishing the county line district. The commissioners court of Travis County, acting alone, did not constitute the *proper officers* to dissolve or change the lines of a county line district. This could only be done with the consent of the commissioners court of both counties, and the Legislature, in passing a general validating act, cannot be presumed to have intended to validate a district created in this way. It may be contended that the Legislature has authority to validate any act which it could authorize in the first instance, but when the Legislature validates an act performed by different officers or in a different manner than prescribed by statute, then it should specifically designate the particular act which it intends to validate.

In the case of *Chicago vs. Rumpff*, 45 Ill., 90, the court used the following language:

"But an act of the Legislature passed subsequent to the passage of a void ordinance, purporting to empower the local corporation to enforce any regulation heretofore made upon a particular subject, but not naming the ordinance in question, is inadequate to render the ordinance valid."

It is conceded, that without the validating act herein referred to the action of the Travis County authorities in redefining the boundaries of Haynie Flat School District No. 54 without the consent of the Burnet County authorities was illegal, and since the validating act was too general in its terms to include the creation of a district which could only be created by changing the boundaries of a county line district, and the commissioners court of Travis County not being the proper officers to change the line of a county line district without the consent of the commissioners court of Burnet County, such validating act is inadequate to render valid the action of the commissioners court of Travis County in undertaking to so abolish or change the lines of a county line district.

You are therefore advised that in our opinion the action of the commissioners court of Travis County in redefining common school district No. 54, including therein only that part of a county line district which is in Travis County, was void and that the validating act of the Thirty-fourth Legislature did not have the effect of making same legal.

Yours very truly,

C. F. GIBSON,  
Assistant Attorney General.

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Op. No. 2554, Bk. —, P. —.

COMMON SCHOOL DISTRICTS—CONSOLIDATION OF DISTRICTS LYING IN  
TWO OR MORE COUNTIES—CREATION OF COMMON COUNTY LINE  
DISTRICTS AS DISTINGUISHED FROM CONSOLIDATION.

1. There being no machinery in our law for the holding of an election to consolidate two or more common school districts lying in different counties and our courts having held that consolidation of common school districts may be had only by virtue of an election held for that purpose, two or more common school districts lying in different counties may not be consolidated into a common county line school district.

2. The county board of school trustees of two or more counties may not consolidate common school districts lying in different counties by reciting that they are creating a common county line school district when in fact they are consolidating two or more common school districts lying in different counties.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 1, 1924.

*Judge T. S. Johnson, Attorney at Law, Austin, Texas.*

DEAR JUDGE: I am in receipt of your letter of June 26, 1924. You write as follows:

"Referring to my conversation with you and Judge Wilson in regard to the above school district, I have concluded to trouble you a little further about it, if you will let me do so. You will remember that the question involved is in the validity of this district, whether it is a 'consolidation' of the two districts,

or whether it is a district 'created' under the provisions of Article 2815a, Complete Texas Statutes, 1920. The proceedings relating to the proposed bond issue, in the 'Order of Bond Election,' recite that this, the Common County Line School District No. 36 'has been heretofore properly established in accordance with Section 50a, Chapter 100, Acts of the Regular Session of the Thirty-second Legislature, as amended by the Thirty-fifth Legislature.' Section 50a referred to is now Article 2815a, above mentioned.

"I hand you herewith an order passed by the county board of trustees of Taylor County, reciting the petition, asking for the 'consolidation' of the two districts and 'creating' a new common county line district; also that it appeared to the board that it would be to the best interest of the two districts to consolidate, and it is then ordered by the board that the new district 'be and is hereby created' within the metes and bounds set out. For present purposes it may be assumed that the board of school trustees of Jones County passed a similar order.

"As I understand it, you and Judge Wilson are disposed to the view that there is no law providing for the 'consolidation' of school districts, as in this case, or if there is such law, it is deficient in not providing the machinery under which the consolidation may be accomplished. I understand also that your view is that a county line district may be 'created' under the provisions of Article 2815a. Then I understand the question with you will be, do these proceedings show a consolidation of the two districts, or the creation of a new district under Article 2815a?

"Assuming that all proceedings, both as to the establishment of this district and as to the proposed bond issue, shall come up to your satisfaction, I ask your advice as to whether you can approve the bonds issued by this district under its proceedings for 'consolidation' or 'creation' whichever it may be."

Prior to the adoption of Section 1 of Chapter 65 of the General Laws of the Second Called Session of the Thirty-fourth Legislature (now Article 2817 $\frac{1}{4}$ , Revised Statutes, 1920) the authority to consolidate common school districts of this State was vested in the county board of trustees of the various counties. The Supreme Court of the State of Texas, in the case of Dover Common School District No. 66 et al. vs. County School Trustees of Navarro County et al., 248 S. W., 1062, held that the above mentioned statute repealed all other methods of consolidation and that consolidation could be effected only as provided in Article 2817 $\frac{1}{4}$ , Revised Statutes, 1920. The first paragraph of this section reads as follows:

"When any number of contiguous common school districts within this State, desiring to consolidate for school purposes, present a petition *to the county judge of the county wherein such districts are situated*, signed by twenty or a majority of the legally qualified voters of each district so desiring to consolidate, the county judge shall issue an order for an election to be held in each of the common school districts so petitioning, which elections shall be held on the same date. The county judge shall give notice of the date of such elections by publication of the order in some newspaper published in the county, for twenty days prior to the date on which such elections are order (ordered), or by posting a notice of such elections in each of the districts, or by both such publication and posted notices."

You will note that the statute provides that the petition for an election shall be presented "to the county judge of the county wherein such districts are situated." Therefore, no machinery is provided for the consolidation of districts situated in different counties.

Since no machinery is provided for the consolidation of two or more common school districts situated in different counties, there seems to be no way in which they may be consolidated.

I note that the order of the county board of trustees which you have submitted to me provides that the common county line district shall



be *created*. It is true that the county board of trustees have the authority, under our statutes, to create common county line school districts.

However, they are not granted the authority to consolidate common school districts which are in different counties, inasmuch as Article 2817 $\frac{1}{4}$  took away from them that authority.

The fact that the boards of trustees of the counties in question recited that their act was a creation of a common county line school district would not change the character of the act, if, in fact, it was a consolidation of two districts lying in two different counties. The mere recital will not change the character or effect of such act.

You are advised, therefore, that I would not regard such a district "consolidated" or "created" as you have stated as a valid district, and, therefore, could not approve an issue of bonds voted by such invalid district.

Very truly yours,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2528, Bk. 59, P. 144.

CONVICTS—ATTENDANCE UPON SCHOOLS—COMMUTATION OF TIME.

Under our present statutes, State convicts are not entitled to and may not be allowed extra time, or commutation of time, for teaching in or attendance upon schools for prisoners established by the Board of Prison Commissioners.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 8, 1923.

*Board of Prison Commissioners, Huntsville, Texas.*

GENTLEMEN: Replying to yours of the 20th ult. and 1st inst., you are advised that in our opinion the Board of Prison Commissioners would not be authorized to allow prisoners overtime or extra time either for teaching in or attendance upon such schools as may have been established by the Board of Prison Commissioners under the provisions of Article 6203 of the Revised Statutes.

That attendance upon and teaching in these schools are not made compulsory on the part of prisoners, and cannot be made so by the Board of Prison Commissioners under present statutes, is evident. For this reason the failure or refusal of prisoners to attend upon or teach in such schools could not constitute misconduct on their part.

Aside from executive clemency, credit for or commutation of time can only be allowed prisoners, and when earned can only be forfeited, to the extent and for the reasons authorized and provided for by Articles 6217, 6214, 6215 and 6220 of the Revised Civil Statutes of 1911, the three last articles as amended by Chapter 32, page 49, General Laws, First Called Session, Thirty-fifth Legislature. These articles are too lengthy to be set out here.

Under Article 6217 each prisoner against whom "no charge of misconduct has been sustained" is entitled absolutely to the commutation fixed by that article, and such commutation can be forfeited only on the ground of a "sustained charge of misconduct in violation of some

rule of the prison system, known to the prisoner, \* \* \* escape, or attempt to escape, mutinous conduct, or other serious misconduct." This being true, and since no charge of misconduct against a prisoner can be based on his failure or refusal to attend upon or teach in these schools, it follows that each prisoner who otherwise occupies the status of "no charge sustained" is entitled to and should not have taken from him the commutation of time to which that status entitles him under this article irrespective of whether he attends upon or teaches in these schools or fails or refuses to do so.

Articles 6214, 6215 and 6220 limit the time and hours that prisoners may be worked, but permit "extra work" or "work over time," and authorize and fix the amount of extra commutation, in addition to that provided by Article 6217, to which the prisoner shall be entitled for such "extra work" or "work over time," and authorize the forfeiture of same in whole or in part "for misconduct or violation of the rules of the prison system." Considering these articles as a whole, we think the words "extra work" and "work over time" as here used mean what is ordinarily meant by these expressions and include only such work as prisoners may be properly required to perform but which they may by choice continue in beyond the time required, and that they do not include either attendance upon or teaching in these schools. This is clearly true of Article 6215 and the third paragraph of Article 6220, and we find no intimation in any statute that a different meaning was intended to be given these words as elsewhere used.

It is our opinion, therefore, that prisoners are not entitled to and may not be given extra time or commutation of time for attendance upon or teaching in the schools provided for by Article 6203, and that such extra time or commutation of time as they otherwise may be entitled to may not be forfeited for their failure or refusal to attend upon or to teach in such schools.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2453, Bk. 58, P. 458.

#### GROSS RECEIPTS TAX—OIL.

What constitutes the "market value" of oil within the meaning of Article 7383, Revised Civil Statutes, 1911, as amended by Chapter 77, General Laws, passed at the Regular Session of the Thirty-sixth Legislature, is a question of fact to be determined from all the circumstances and conditions existing in the field of production at the time the oil is produced.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 8, 1922.

*Hon. Lon A. Smith, Comptroller, Capitol.*

DEAR SIR: Your letter of this date addressed to the Attorney General has been received. It reads:

"Will you please give me an opinion on the following?

"Should an oil company pay gross production tax on the total barrels of oil produced based on the posted price, or should be pay on the total barrels at

the sales price, or should he pay on the total barrels at the amount realized on said sales?"

An answer to your inquiry necessitates a review of the provisions of Article 7383, Vernon's Sayles' Civil Statutes, 1922 Supplement. This article reads:

"Art. 7383. Oil Well Companies.—Each and every individual, company, corporation or association, whether incorporated under the laws of this or any other State or Territory or of the United States, or any foreign country, which owns, controls, manages or leases any oil well within this State shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association showing the total amount of oil produced during the quarter next preceding and the average market value thereof during said quarter. Said individuals, companies, corporations and associations at the time of making said report shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date, equal to one and one-half (1½) per cent of the total amount of oil produced in this State by said individuals, companies, corporations or associations, respectively, during the quarter next preceding at the average market value thereof, as shown by said report."

The provisions of this article are plain and unambiguous. It requires each and every individual, company, corporation or association which owns, controls, manages or leases any oil well within this State to make quarterly reports to the Comptroller of Public Accounts, on certain days, showing the total amount of oil produced during the quarter next preceding and the average market value thereof during said quarter. At the same time these reports are made those making the report are required to pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date, equal to one and one-half (1½) per cent of the total amount of oil produced in this State by those making the report during the quarter next preceding at the *average market value* thereof, as shown by said report.

The question arises, what is the meaning of the term "market value?" This term has frequently been defined by the courts, both State and Federal. Some of these definitions are as follows:

"The 'market value' of an article of merchandise is the price at which its owner or producer holds it for sale; the price at which it is freely offered in the market to all the world; such price as dealers in the article are willing to receive and purchasers are required to pay when the goods are bought and sold in the ordinary course of trade." *Glasgow Steam Shipping Co. vs. Tweedie Trading Co.*, 154 Fed., 84.

"'Market value' is said to be such sum of money as the property is worth in the market generally to the persons who would pay the just and full value for what the property would bring at a fair sale, where one party wants to sell and the other to buy." *Redhead Bros. vs. Wyoming Cattle Inv. Co.*, 102 N. W., 144, 126 Iowa, 410.

"'Market value' means the fair value as between one who wants to purchase and one who wants to sell; not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from necessity of another, but its present value at a sale which a prudent owner would make if he had the power of election as to the time and terms." *Madisonville, H. & E. R. Co. vs. Ross*, 103 S. W., 330, 13 L. R. A. (N. S.), 420 (quoting and adopting the definition in 15 Cyc., p. 685).

"Bouvier defines 'market value' as a price established by public sales in the way of ordinary business. and in *Sloan vs. Baird*, 56 N. E., 753, 162 N. Y., 330, the Court of Appeals said that the market value of property is established

when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed." *Rau vs. Seidenberg*, 104 N. Y. Supp., 798.

For other definitions of the term "market value" see *Words and Phrases*, Vol. 5, p. 4383, et seq.

Article 7383, supra, was first passed by the Legislature in 1907 and amended by Chapter 77, General Laws, passed at the Regular Session of the Thirty-sixth Legislature which convened in January, 1919. The Legislature is presumed to have known of the definitions of this term as fixed by the courts of this country. The courts have generally given the term "market value" a uniform definition or meaning. We think that the definition of this term as given by the court in *Madisonville, H. & E. R. Co. vs. Ross*, supra, which is the same as that given in 15 Cyc., p. 685, is perhaps the clearest and best general definition that can be found.

Your inquiry contains three questions as follows:

(a) Should an oil company pay gross production tax (under the provisions of Article 7383) on the total production of oil produced, based on the posted price; (b) or should the tax be paid on the total production based on the sales price; (c) or should the tax be paid on the total production based on the amount realized from the sale thereof?

The statute under consideration requires the tax to be paid on the "average market value" of the oil produced for the preceding quarter. We think whether the "posted price" in any particular oil field constitutes the market value of oil produced in that particular field is a question of fact to be determined from all the facts and circumstances connected with the production, sale and purchase of oil in that field. We believe, as a general proposition, the price of oil as posted in an oil field constitutes the market value in that field. We think this is clearly true when those who purchase oil in that field pay the "posted price" for oil offered them for sale by the producers in the field, and the sales so made at that price are so great and in so many instances that the value becomes fixed and generally recognized by both those who are in the market for the purchase of oil and those who have oil to sell at the market value in that locality.

We, therefore, in answer to your first inquiry, advise that the tax should be paid on the total production, based on the "market value" thereof, as that term has heretofore been defined, and the total value of the production is based upon the market value as the same is produced and then a general average obtained for the quarter, which is the basis of the tax for the succeeding quarter.

Your second inquiry must be answered in the negative. The statute answers this question by fixing the "market value" as the basis upon which the tax is to be paid or collected. A producer might sell his oil in advance of production at a price which would greatly exceed the "average market value" during the period for which he had sold his production, or he might sell his production at a price a great deal less than the "average market value" of his production within that period. If he should pay tax on the sales price, in the first instance, he would pay too much, while in the latter instance he would not pay enough. Again, if the tax were to be computed upon this basis there

would be a great opportunity for fraud to be perpetrated upon the State.

We do not fully understand your third question, but we presume that it is intended to cover a situation which might arise where a producer of oil sold his production at or near the market value and was paid by the purchaser a bonus on each barrel purchased which would bring the amount realized from the sale above its "market value." Here, again, the statute has answered the question when it fixed the basis upon the tax to be paid as the "market value." We think the definition given in the Madisonville case, *supra*, covers this condition like a blanket, because the sale may be under peculiar circumstances and a greater than a fair price obtained, or it may be that this higher price may have been secured because of the necessity of the purchaser.

In this connection, however, we will take occasion to observe that should a condition arise in any particular oil field where it has become customary to pay more for oil than the "posted price" by paying a bonus above the posted price, then that condition might become so generally accepted by both the purchasers and the sellers as to constitute the market value of oil in that particular locality. As heretofore stated, what constitutes the "market value" in any particular oil field is a question of fact to be determined from all the facts and circumstances existing in that particular field.

We hope we have satisfactorily answered your inquiry.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2519, Bk. 59, P. 265.

OCCUPATION TAX—OPTOMETRIST—PEDDLERS.

Regularly licensed optometrists who have an established office in a county but make visits to other towns either in the same county or in other counties, establish temporary offices there and solicit business, are subject to the payment of the occupation tax provided for by Section 6, Article 7355, Revised Statutes, 1911.

A person not a regularly licensed optometrist, who travels from place to place selling eyeglasses as articles of merchandise and delivering the same to his customers at the time of purchase, is not subject to the payment of the occupation tax provided for by Section 6, Article 7355, Revised Statutes, 1911, but is subject to the payment of the occupation tax provided for in Section 11 of said article.

Sections 6 and 11, Article 7355, Revised Statutes, 1911.

Article 130, Penal Code.

Chapter 51, General Laws, 2nd Called Ses., 37th Leg.

Tipton vs. State, 168 S. W., 97.

Baker vs. State, 240 S. W., 924.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 5, 1923.

*Hon. Lon A. Smith, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: You have requested this Department to advise you:

(1) Whether regularly licensed optometrists who have an established office in a county but make visits to other towns either in the

same county or in other counties, establish temporary offices there and solicit business, are subject to the payment of the occupation tax provided for by Section 6, Article 7355, Revised Statutes, 1911.

(2) Whether a person, not a regularly licensed optometrist, who travels from place to place selling eyeglasses as articles of merchandise and delivering the same to his customers, at the time of purchase, is subject to such tax.

In order to answer your questions it will be first necessary to examine the statutes pertinent to your inquiries and to review some legislative and judicial history pertaining to optometrists in this State.

The first paragraph of Article 7355 of the Revised Civil Statutes and Section 6 of said article read respectively as follows:

"There shall be levied on and collected from every person, firm, company or association of persons pursuing any of the occupations named in the following numbered subdivisions of this article, an annual occupation tax, which shall be paid annually in advance, except where herein otherwise provided, on every such occupation or separate establishment, as follows:

"From every itinerant physician, surgeon, oculist or medical or other specialist of any kind, traveling from place to place in the practice of his profession, except dentists practicing from place to place in the county of their residence, an annual tax of fifty dollars."

Article 130 of the Penal Code makes it a penal offense for any person to pursue a taxable occupation without first paying the tax. This article reads:

"Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes due, and not more than double that sum."

Under the provisions of the above quoted articles of the statutes one Tipton was convicted in the county court of Scurry County for unlawfully practicing his profession, that of an oculist, a specialist within the meaning of Section 6, supra, without a license. The Court of Criminal Appeals affirmed the conviction, 168 S. W., 97. Associate Justice Harper of that court, in writing the opinion, said:

"Appellant was prosecuted for unlawfully engaging in, pursuing, and following the occupation of a specialist in the line of an optician, traveling from place to place in the practice of his profession without first having obtained a license therefor.

"(1) Bob Browning testified that appellant came to his house and made a trade with him to drive him over the county for twenty-one days, and he did so; that appellant was taking orders for glasses from samples of lenses he had with him to be sent to the party who ordered. I bought two pair of glasses from him, one of them was for my mother. Yes, I went with him to a number of houses, spent several days in Ira neighborhood, in Scurry County, some fifteen miles south of where I live. He also worked the county west of Snyder between Ira and where I live. I also went with him over in the Polar neighborhood, in Kent County. He told me he had worked up about Spur, in Dickens County, and in Haskell County and about Stamford, in Jones County; also said he had been in the eye business for several years. He did tell me that he was an optician, and had been for several years."

"J. Burron testified: 'I know this defendant, John F. Tipton; he took my wife's measurement for what he called a pair of medicated glasses some time during the month of January, 1914. He represented himself to be an optician; said his glasses, by virtue of being medicated, would cure the headache. This happened in Scurry County, State of Texas. He had implements for testing

eyes, and tested my wife's eyes. He said he had been following the business of an optician for six or seven years.'

'A number of other witnesses testified that appellant came to their homes; that he had with him instruments for testing the eyes and fitting glasses; that he would sell the glasses, taking the money therefor; that he stated he would send for the glasses and have them delivered, and they would come in about ten days.

"These facts would, within contemplation of the law, make him liable for the occupation tax levied by Section 6 of Article 7355 of the Revised Civil Statutes, and the court did not err in so holding. The evidence conclusively shows that appellant had not paid the tax levied by this provision of the law."

Since the rendition of the opinion in the Tipton case, the Court of Criminal Appeals in the case of Baker vs. State, 240 S. W., 924, held that a person whose business it was "to detect and characterize disorders of the eye by means of scientific devices and to correct defects of vision by means of lenses" was practicing medicine within the meaning of what is commonly referred to as the "Medical Practice Act."

After the rendition of this opinion, by the Court of Criminal Appeals, the Legislature did, at the First Called Session of the Thirty-seventh Legislature (Chapter 51), pass a law defining and regulating the practice of optometry in this State. The act defines "the practice of optometry," and provides for the creation of a board of examiners; defines its powers and duties and prescribes the manner whereby those who were practicing optometry at the time the act became effective might continue the practice; provides a method whereby beginners in the profession may lawfully begin the practice in this State; provides for the issuance of license and the registration thereof; denounces the practice of optometry without a license; denounces certain other acts as penal offenses and prescribes the penalties therefor. The pertinent portions of said act are Sections 1 and 16. These sections read respectively as follows:

"Section 1. The practice of optometry is hereby defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Provided that nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer any drug or drugs externally or internally, nor to prescribe drug or drugs or physical treatment whatsoever, unless such optometrist is a regular licensed physician or surgeon under the laws of this State.

"Section 16. Nothing in this act shall be construed to apply to persons who sell spectacles and eyeglasses as merchandise and those who fit glasses for their customers; officers or agents of the United States or the State of Texas in the discharge of their official duties."

Section 1 defines the practice of optometry in broad and comprehensive language, while Section 16 exempts from its provisions all those persons and classes of persons enumerated therein. The particular exceptions found in said Section 16, with which we are concerned, are "those (persons) who sell spectacles and eyeglasses as merchandise and those who fit glasses for their customers." The question naturally follows: What did the Legislature mean by these exceptions? What is the distinction between an optometrist and one who sells "spectacles and eyeglasses as merchandise" or "who fits glasses for his customers." It is necessary to answer this question before we can properly answer your second inquiry, for if those who fall within these exceptions are

specialists within the meaning of Section 6 of Article 7355, then they are subject to the payment of the tax.

In the case of *Baker vs. State*, supra, the testimony discloses some of the means used by the modern optometrist to enable them to properly fit a customer with lenses or prisms, or what is usually known to the average layman as eyeglasses or spectacles. Among the instrumentalities so used are trial cases, test cards, charts, and the retinoscope, phorometer, ophthalmometer and ophthalmoscope. The purposes for which an optometrist uses these respective instrumentalities are stated in the opinion as follows:

“Concerning the apparatus used, an expert testified on behalf of the appellant. He described the purpose of the ‘test card’ to determine the exact acuity. The ‘ophthalmoscope’ consists of a mirror which enables the examiner to see the interior of the eye, giving the view of the media through which the light passes and a view of the retina or back part of the eye in which the rays of light are brought to a focus.”

“The ‘retinoscope’ is described as a mirror with a hole in the center by which, when used by the operator, light and dark spaces might be discerned, and by which one familiar with the mathematical and physical principles involved could determine the nature of the lense required, and ‘whether the eye is near-sighted or far-sighted; that is, whether it is an astigmatism or hypermetropic.’ The ‘phorometer’ is designed to determine the muscular state of the eye—that is, the extrinsic muscles—the eye being controlled by six muscles. By the use of this instrument the operator will be enabled to ‘determine whether or not the muscles are in their proper relationship.’”

By some or all of these means, the skilled optometrist is able to advise a person desiring to purchase eyeglasses the particular kind of lenses best suited and adapted to aid him in his vision. Such person must be guided in his selection of lenses, not so much by what he himself may know or has learned from the examination of his eyes by the optometrist, but largely from what he is told by such optometrist.

We think any person who does, by the use of the scientific devices above mentioned, detect and characterize disorders of the eye and correct defective vision by means of lenses, is a specialist.

By the use of the word “optometrist” we mean a person who does the things mentioned in Section 1 of the Optometry Act. We do not, for the purpose of this opinion, in any way mean to refer to the regularly licensed physician who may fit glasses by the means of medicine or other instrumentalities for his patients. Such a physician is not in any way affected by the Optometry Act. He, however, may be subject to the payment of the tax under consideration.

It is a well known fact that at the time of the passage of the Optometry Act, and long prior thereto, that many merchants carried eyeglasses in stock for the purpose of sale. These glasses were either obtained direct from the manufacturers thereof or through jobbers. A person desiring to purchase spectacles from such a retailer went to his place of business and from his stock selected a pair of spectacles that would best aid him in his vision, or in other words that would “fit” him. He made the selection by actual experiment. He made his purchase without any recommendations from the seller. He alone was able to tell whether or not the article purchased was suited to his needs. The retailer could not assist him in any way, unless it be done in the following manner: The merchant, in addition to his regular stock of eye-glasses, frequently carried what is usually known as a test



case. In this case was an instrument which fitted over the eyes like the ordinary spectacle but so arranged that the lenses might be removed and others substituted. The case also contained a large number of individual lenses which were marked or numbered to correspond with lenses carried in the frame and in stock by the merchant. When a prospective customer came to the merchant for the purpose of buying eye-glasses, instead of trying on numerous glasses in an effort to secure a proper "fit," the merchant would assist his customer in his efforts to secure proper lenses by putting over his eyes the instrument above referred to and would then take from the test case such individual lenses as he thought might suit his customer and by actual trial ascertain the proper lenses needed. When he had thus completed the examination and the proper lenses found he would then go to his stock and find the spectacles that corresponded with the numbers used from the test case and complete the sale. This character of assistance certainly does not require the aid of a specialist.

It is our opinion that the Legislature, by the exceptions heretofore quoted, found in Section 16, did not intend to interfere with this class of sales by the merchant or to prohibit the merchant from fitting glasses for their customers in this manner. In all such cases the customer depends upon securing the proper lenses from experiment made by himself although he may be aided, as indicated above, by the merchant. But the above does not alone apply to the merchant. It applies to the peddler who may go from house to house doing the same thing that the merchant does. Neither is subject to the tax provided for in Section 6, Article 7355, if he does no more than set out above. The peddler is subject to the payment of the tax provided for in Section 11 of said Article 7355.

In addition to the retail merchant and the peddler who sell eye-glasses as articles of merchandise in the manner stated above, there is the manufacturer who sells to the jobber, who in turn sells to the retailer. Such a manufacturer or jobber is not engaged in the "practice of optometry" as that term is defined by Section 1 of the Optometry Act.

This brings us back to your questions. Section 6 does not impose an occupation tax on every physician, oculist, medical or other specialist of any kind but only on such as are itinerant—traveling from place to place in the practice of his profession. Below are given some of the meanings which the courts have given to the word "itinerant:"

"One who travels over the country selling patent rights or the privilege to sell such rights, though he has a definite residence in the State, is an 'itinerant person' selling such rights and privileges, within the statutes thus defining a peddler. *Bohon's Assignee vs. Brown* (Ky.), 49 S. W., 450."

"To constitute an itinerant vendor it is not necessary that the person should travel all the time, and have no fixed place of sale. *Snyder vs. Closson*, 50 N. W., 678, 84 Iowa, 184."

"The term 'itinerant vendor' includes anyone who goes from place to place to peddle or retail goods, wares, or other things, without regard to the distance between the different places visited in so selling. *West vs. City of Mt. Sterling* (Ky.), 65 S. W., 120, 122."

"Agents, who traveled through the country with teams, selling machines in regularly established places of business, and by means of such teams going through the country were 'itinerant dealers.' *Singer Sewing Mach. Co. vs. Brickdell*, 199 Fed., 654, 656."

The statute under consideration does not define the word "itinerant" further than "traveling from place to place," but we may look to the exception contained in said Section 6 with reference to dentists to aid us in ascertaining the legislative intent. The single exception contained in said section applies to and "excepts dentists practicing from place to place in the county of their residence." If the Legislature had not thought that the word "itinerant" was broad enough to mean "practicing from place to place in the county of residence," it would not have been necessary to have used specific language to exempt from the payment of the tax dentists who so practiced. Allaying to Section 6 the maxim, *expressio unius est exclusio alterius*, we conclude that the Legislature by making a specific exception in the case of dentists practicing from place to place in the county of their residence excluded the idea that there were to be any other exceptions to said section.

It is, therefore, clear to us that the Legislature intended that physicians, surgeons, oculists, medical and all other specialists of every kind, who traveled from place to place in the practice of their respective professions, whether within or without their county of residence, should pay the tax imposed by said Section 6, "except dentists practicing from place to place in the county of their residence." Dentists practicing from place to place without the county of their residence are subject to the payment of the tax.

The word "optometrist" does not appear in Section 6, but in view of the decision of the Court of Criminal Appeals, in the case of Tipton vs. State and Baker vs. State, *supra*, we think there can be no question but what optometrists are specialists within the purview of said Section 6. The argument has been advanced to us that inasmuch as the word "optometrist" is not found in said Section 6 and the practice of optometry not having been defined or legally recognized in this State until recently, that the act recognizing and legalizing the practice of optometry in this State would operate to exempt optometrists from the payment of the tax imposed by said section. Those optometrists who advanced this argument rely upon the provisions of Section 11 of the Optometry Act of 1921 as sustaining their contention. Said section reads:

"Every candidate successfully passing examination shall be registered by the Board as possessing the qualifications required by this act, and shall receive from said Board a license which, when registered with the county clerk, as provided, shall entitle the person so examined and licensed to practice optometry in this State; provided that the Board shall have authority, at its discretion, to recognize the license which has been issued, after full examination by the State Board of Examiners in Optometry of other States having a standard of education in optometry satisfactory to the Texas State Board of Examiners in Optometry and may issue to such persons a license to practice optometry in Texas."

We do not believe this language is sufficient to create an exception in favor of optometrists. The license granted to physicians entitles them to practice medicine *in this State* when they shall have registered the same in the county or counties where they practice, but this privilege does not relieve them from the payment of the tax imposed by Section 6 when they become itinerant within the meaning of said section. If it had have been the intention of the Legislature to exempt

optometrists from the payment of the tax under consideration by the provisions of the Optometry Act, we think language would have been used which would have clearly expressed that intention. In our opinion, there is nothing in said act which would even indicate such an intention.

From what we have heretofore stated, it is the opinion of this Department, and you are so advised, that your first question must be answered in the affirmative and your second question in the negative.

In this connection, you are advised that persons traveling from place to place selling eye-glasses and spectacles in the same manner as heretofore indicated, that merchants might sell the same without violating the optometry law, are not specialists within the meaning of Section 6, Article 7355, and are not required to pay the tax therein provided for but should pay the peddler's tax provided for in Section 11 of said article.

Very truly yours,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2552, Bk. 59, P. 277.

TAXES—REDEMPTION—SALES TO STATE—TAX LIEN FORECLOSURES.

1. A tract of land that has been at any time bid off to the State at a tax lien foreclosure judgment sale may be redeemed by the owner or anyone having an interest in same paying within two years from the date of such sale the amount of taxes, interest, penalties and costs for which same was bid off to the State, together with all taxes, interest, penalties and costs against same remaining unpaid at the time of redemption.

2. After the expiration of two years from the date of the sale to the State of a tract of land bid off to the State under a tax lien foreclosure judgment the redemption of same is unauthorized.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 13, 1924.

*Honorable Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: The following is in reply to your inquiry of the 31st ultimo pertaining to the redemption of lands bid off to the State at tax lien foreclosure judgment sales.

The provisions of our State Constitution that bear most directly on this question are Sections 13 and 15 of Article 8. They read as follows:

"Sec. 13. Provision shall be made by the first Legislature for the speedy sale of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale of all lands and other property, upon which the taxes have not been paid, and the deed of conveyance to the purchaser for all lands and other property thus sold be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided that the former owner shall, within two years from date of purchaser's deed, have the right to redeem the land upon the payment of double the amount of money paid for the land."

"Sec. 15. 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 payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide."

As to lands, we have express statutes providing for such sales and the enforcement of such liability either by summary sales or by sales under tax lien foreclosure judgments. At least our courts have held that either of these methods may be pursued. It is also provided that, as to either of these methods, if there are no bidders the land being sold may be bid off to the State for the taxes and certain interest, penalties and costs, and that in such cases deed shall be executed conveying such lands to the State, subject to the right of redemption as hereinafter indicated.

We have a number of statutes providing for the redemption of lands sold for State and county taxes. They are Articles 7641, 7642, 7642a (Vernon's 1918 Supp.), 7643, 7649, 7651, 7695, 7696, 7697, 7698 (Vernon's 1922 Supp.), and Section 1, Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature.

Articles 7641 and 7643 relate to redemptions from sales to others than the State, and Articles 7649 and 7651 relate to the redemption of lands bid off to the State at summary sales by the tax collector.

Article 7695 pertains to the redemption before sale to the State under tax lien foreclosure judgments of lands either "returned delinquent or reported sold to the State for taxes." Article 7696 deals only with the redemption of lands sold to some person other than the State under tax lien foreclosure judgments. Section 1 of Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature, has to do with the redemption of lands "prior to the institution of suit for the collection" of taxes due on same. Articles 7642, 7642a (Vernon's 1918 Supp.), 7697 and 7698 (Vernon's 1922 Supp.), also deal, in part, with the redemption of lands bid off to the State at summary sales by the tax collector. The wording of these statutes providing for the redemption of lands sold for taxes other than those bid off to the State at tax lien foreclosure judgment sales, and the respective dates of their enactment, together with other statutes pertaining to the enforced collection of taxes on lands, raise some interesting questions, but the form of your inquiry eliminates them from present consideration.

There is also elimination here from that part of Section 13 of Article 8 of our State Constitution to the effect that "former owner shall within two years from date of purchaser's deed, have the right to redeem the land upon the payment of double the amount of money paid for the land," since it has been held in the *City of San Antonio vs. Berry*, 92 Texas, 319 (48 S. W., 496), and followed by certain of our Courts of Civil Appeals in *Collins vs. Ferguson*, 56 S. W., 225; *Guergin vs. City of San Antonio*, 50 S. W., 140; and *City of Marlin vs. Green*, 78 S. W., 704, and 79 S. W., 40, that this provision of our Constitution has no application to lands sold for taxes under tax lien foreclosure judgment. This is also indicated in *League vs. State* (Crt. Civ. App.), 56 S. W., 262; 93 Texas, 553 (57 S. W., 24); and 184 U. S., 156.

Although Section 15 of Article 8 of our present Constitution, hereinbefore quoted, provides that "the annual assessment made upon landed property shall be a special lien thereon," and Article 7528 of

our Revised Civil Statutes of 1911, enacted in 1876, provides that "all taxes upon real property shall be a lien upon such property until the same shall have been paid," it was not until the passage of the Act of April 13, 1895 (Ch. 42, p. 50, Gen. Laws, Reg. Sess., 24th Leg.), that any provision was made by statute for the enforcement of such lien by court proceedings. This act, with certain amendments, now appears as Chapter 15 of Title 126 of our Revised Civil Statutes of 1911 (Arts. 7683-7700), that chapter having been further amended by subsequent acts. Article 7684 of that chapter provides:

"All lands or lots which have been returned delinquent or reported sold to the State, or to any city or town, for taxes due thereon since the first day of January, A. D. 1885, or which may hereafter be returned delinquent or reported sold to the State, or to any city or town, shall be subject to the provisions of this act."

Succeeding articles provide for the compilation and making of a record of all lands delinquent or sold to the State for taxes since January 1, 1885, and provision has been made from time to time for compiling supplemental records. Provision is then made for the bringing of suits in the proper district courts to foreclose the lien on these lands securing the payment of taxes on same remaining unpaid since December 31, 1908, and for the sale of same under tax lien foreclosure judgments for such taxes, including interest, penalties and costs. Article 7689, as amended by Chapter 21, page 180, General Laws, Third Called Session, Thirty-eighth Legislature, provides that:

"\* \* \* If there shall be no bidder for such land that the county attorney, sheriff or other officer selling the same, shall bid said property off to the State for the amount of all taxes, penalty, interest and costs adjudged against such property, \* \* \* and in all such cases where the property is bid off to the State, it shall be the duty of the sheriff to make and execute a deed to the State, using forms to be prescribed and furnished by the Comptroller, showing in each case the amount of taxes, interest, penalty and costs for which sold, and the clerk's fees for recording deeds, as hereinafter provided. He shall cause such deed to be recorded in the record of deeds by the county clerk in his county, and when so recorded, shall forward same to the Comptroller."

The redemption of lands so bid off to the State at such sale is provided for by Articles 7642, 7642a (Vernon's 1918 Supp.), 7697 and 7697 (Vernon's 1922 Supp.). These statutes are substantially the same. Each is composed of two parts of one sentence each. The first part of each provides for the redemption "within two years from the taking effect of this act" of lands "sold to the State or any city or town under decree of court in any suit or suits brought for the collection of taxes thereon." The last of these acts, Article 7697 of Vernon's 1922 Supplement (Ch. 59, p. 103, Gen. Laws, 3rd C. S., 36th Leg.), became effective September 17, 1920. By their own terms, therefore, this provision of these statutes has expired and redemption under it is no longer authorized. The only statute we now have, then, under which lands bid off to the State at tax lien foreclosure judgment sales is the latter part of these statutes. This provision is exactly the same in each, and reads as follows:

"Where lands or lots shall hereafter be sold to the State or to any city or town for taxes under decree of court in any suit or suits brought for collection of taxes thereon, or by a collector of taxes or otherwise, the owner or anyone having any interest in such lands or lots shall have the right at any time

within two years from date of sale to redeem the same after such sale upon payment of the amount of taxes for which sale was made, together with all costs and penalties required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of redemption."

Any tract of land, therefore, that has been at any time bid off to the State at a tax lien foreclosure judgment sale may be redeemed by the owner or any one having an interest in same paying within two years from the date of such sale the amount of taxes, interest, penalties, costs for which same was bid off to the State, together with all taxes, interest, penalties and costs against same remaining unpaid at the time of redemption, but after the expiration of two years from the date of such sale the redemption of such land is unauthorized; and you are advised accordingly.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2551, Bk. 59, P. 284.

TAXES—REAL PROPERTY—FORECLOSURE OF LIEN—EFFECT OF ON  
TAXES FOR PRIOR YEARS.

1. Certain courts of this State, other than the Supreme Court, have held that the sale of a tract of land under a judgment foreclosing the lien on same for State and county taxes for any given year or years, in cases where the sale is made to some person other than the State, extinguishes or precludes the enforcement of the lien for such taxes previously assessed on same for any prior year or years, where no express reservation is made in such foreclosure suit of the lien for such taxes so previously assessed for such prior year or years, and the utmost diligence should be exercised on the part of those charged with the duty of enforcing such judgments, particularly district and county attorneys, to see that no tract of land is sold under any such judgment when such sale would leave unsatisfied the lien securing the payment of State and county taxes previously assessed on same for any prior year or years; and each suit to foreclose the lien for such taxes on any tract of land should include all State and county taxes on same delinquent at the time the suit is filed.

2. We are inclined to the view that the holding in this State to the effect that the sale of a tract of land to some person other than the State under a judgment foreclosing the lien on same for State and county taxes for any given year or years extinguishes or precludes the enforcement of the lien for such taxes previously assessed on same for prior year or years, is not so well founded and final that a district or county attorney would be unwarranted in bringing suit to foreclose the lien on such tract of land for State and county taxes previously assessed on same for such prior year or years, and that this rule may not be applied so as to inure to the benefit of the owner of such lands, or one liable for the payment of the taxes on same for which such foreclosure and sale was had.

3. The sale of a tract of land to some person other than the State under a judgment foreclosing the lien on same for State and county taxes for any year or years does not cancel nor extinguish unpaid State and county taxes previously assessed against such tract of land for any prior year or years and payment of same may be enforced against the property of the person liable therefor, except that the homestead is liable only for the taxes against it.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 5, 1924.

*Honorable Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: The Attorney General has yours of the 19th ult., requesting advice on the following:

1. Would the sale of a tract of land under a judgment foreclosing the lien on same for State and county taxes for any given year or years, where such sale is made to some other person other than the State, extinguish or preclude the enforcement of the lien for such taxes previously assessed on same for prior year or years?

2. Would the sale of a tract of land to some person other than the State under a judgment foreclosing the lien on same for State and county taxes for any given year or years cancel or extinguish the State and county taxes previously assessed against same for prior year or years?

We answer your second question in the negative. The sale of a tract of land under a judgment foreclosing the lien on same for State and county taxes for any year or years does not cancel or extinguish unpaid State and county taxes previously assessed against such tract of land for any prior year or years and payment of same may be enforced against the property of the person liable therefore, except that the homestead is liable only for the taxes against it. St. Con., Art. 8, Secs. 13 and 15; R. C. S., Art. 7630; *City of Houston vs. Bartlett*, 68 S. W., 730.

Your first question presents a matter of some difficulty. It was answered in the negative by Opinion No. 1920, rendered by the Attorney General to Honorable W. C. Jourdan, county attorney, Marfa, Texas, under date of April 9, 1918 (Report and Opinions Attorney General, 1916-1918, p. 691), but since that time it has been qualifiedly answered in the affirmative by our El Paso Court of Civil Appeals in *State vs. Liles*, 212 S. W., 517, decided May 22, 1919. That case is thus stated by the court:

"On February 21, 1906, Sections 115, 117 and 815 were sold for the taxes for the year 1904. Sections 459 and 643 were sold March 7, 1911, for the taxes for the year 1908. The sales were made by the sheriff under tax foreclosure decrees theretofore regularly rendered by the district court of Presidio County. Defendant in error Liles subsequently acquired the title of the purchasers at such sales. On July 24, 1918, plaintiff in error, by its county attorney, filed this suit to recover the sum of \$1521.91 State and county taxes against said lands. A portion of the taxes sought to be recovered were for years antedating the foreclosure sales aforesaid. Upon trial the plaintiff recovered judgment with decree of foreclosure for the taxes for the years subsequent to the foreclosure sales, and was denied recovery of the taxes due for the years antedating those for which the land had been sold, and the lands were decreed to be free and clear of the taxes for those years. From this judgment the State prosecutes this writ of error."

The appellate court sustained the action of the trial court, and in doing so said:

"In some States it is held that the sale of land for non-payment of taxes does not divest the lien of delinquent taxes previously assessed and chargeable on the same premises. This rule is undoubtedly correct where the law directs that the purchaser at the tax sale shall assume and pay all previous delinquent taxes, or where the statute or judgment under which the sale is made orders that he shall take title subject to the lien of existing taxes. But in

the absence of some such provision in the law or the judgment, the doctrine ordinarily prevails that at a valid tax sale the purchaser acquires title free from any lien for taxes assessed and delinquent for any year previous to that for which the sale was made."

As sustaining its holding the court cites Am. Ann. Cas., 1913a, 675; 37 Cyc., 477; City of Houston vs. Bartlett, 68 S. W., 730; Ivey vs. Teichman, 201 S. W., 695; and also cites certain other cases, including Vieno vs. Gibson, 85 Texas, 432 (21 S. W., 1028), to the effect, as stated by the court, that:

"It has been held by the Supreme Court that one holding several liens upon the same property, and who causes the same to be sold in satisfaction of one of his liens without having secured in the foreclosure decree any provision for the preservation of the other lien, cannot maintain a subsequent suit to foreclose such other lien, and that the purchaser at the sale took the property discharged of the other lien."

Chief Justice Harper writes a brief concurring opinion in this case in which, because of certain provisions of our Constitution and statutes, he questions the applicability of this rule to liens securing the payment of State and county taxes.

We say this case qualifiedly answers this question in the affirmative because, although it must be taken as holding that our statutes on this subject are not sufficient to warrant a holding that the purchaser at a sale under a judgment foreclosing the lien for State and county taxes "shall assume and pay all previous delinquent taxes" and "shall take title subject to the lien of existing taxes," it, nevertheless, indicates, both by its language and the theory on which it must have cited Vieno vs. Gibson and other cases to the same effect, that such lien may be preserved in the forfeiture suit. This is also indicated in City of Houston vs. Bartlett, hereinafter considered. Neither of these cases, however, directly so hold.

The case of City of Houston vs. Bartlett, 68 S. W., 730, decided April 17, 1902, by the Galveston Court of Civil Appeals, was a suit by Bartlett to cancel as a cloud on his title a judgment in favor of the city, dated July 17, 1897, foreclosing a lien for taxes on certain lots for the years 1894, 1895, and 1896, Bartlett's title being based upon a sale under a subsequent judgment, dated September 8, 1898, foreclosing the lien for taxes for prior years; that is, for the years 1887 to 1893, inclusive. Judgment was for Bartlett in the trial court, and in affirming this judgment the appellate court said:

"The judgment of the court below was not an extinguishment of any debt due the plaintiff in error, nor were the acts of the city attorney in procuring the sale of the property under a judgment which omitted to reserve a lien for the unpaid taxes not recovered by said judgment a release or extinguishment of any taxes due plaintiff in error. The lien in plaintiff in error's favor upon said property for all taxes due prior to the rendition of said judgment was extinguished by such sale, and plaintiff in error's security afforded by its lien upon said property exhausted; but no unpaid taxes were released or extinguished, and same are still due, and may be collected from the delinquent."

Ivey vs. Teichman, 201 S. W., 695, also decided by the Galveston Court of Civil Appeals and motion for rehearing overruled January 17, 1918, was a suit by Teichman to recover certain lots in the city of Houston, his title being based upon a judgment, dated January 6, 1912, foreclosing the lien for city taxes on same for the years 1906 to



1909, inclusive, and the sale of said lots on March 5, 1912, under the foreclosure judgment. The City of Houston, being also a defendant, alleged and sought to enforce a judgment, obtained by it on July 16, 1914, foreclosing its lien for city taxes on these lots for the years 1877 to 1880, inclusive; 1882 to 1888, inclusive; 1890 to 1898, inclusive; 1901 to 1903, inclusive, and 1910 to 1913, inclusive. Other issues were involved as among the individual parties, but on this branch of the case, in affirming a judgment by the trial court in favor of Teichman, the appellate court said:

"The judgment of the trial court, refusing to foreclose any tax liens upon the property for taxes due prior to judgment for taxes under which the property was sold and purchased by plaintiff's vendor, was correct. It is well settled that a valid sale under a junior assessment cuts off all prior tax liens. *City of Houston vs. Bartlett*, 29 Texas Civ. App., 27, 68 S. W., 730; *Law vs. People*, 116 Ill., 244, 4 N. E., 845; *Wass vs. Smith*, 34 Minn., 304, 25 N. W., 605; *Knox vs. Leidgen*, 23 Wis., 293; *Preston vs. Van Gorder*, 31 Iowa, 251."

Only this one question was presented in *City of Houston vs. Bartlett*, and since a writ of error was denied in that case it seems that the holding in both these cases might be taken as approved by the Supreme Court. It will be noted, however, that these cases dealt exclusively with the lien to secure the payment of city taxes and for this reason we are inclined to the view that they need not necessarily be taken as authority for a similar holding as to the lien for State and county taxes. We say this because of the variance that might exist between the provisions of a city charter and our statutes on this subject. If such variance existed in these cases, however, or entered into the consideration of the case by the courts, there is no intimation of it in the printed reports.

We also note the case of *Taylor vs. State*, 46 S. W., 81, also decided by a Court of Civil Appeals, but in which a writ of error was denied by the Supreme Court. That case holds that the fact that the tract of land there involved had been sold and bought in by the State for State and county taxes for the years 1892, 1893 and 1894 did not extinguish the lien for such taxes for those years nor preclude the State from foreclosing such lien and selling such land thereunder as against those claiming title to same, but the question is not discussed by the court and no authority is cited except that part of Article 5232b of the Revised Civil Statutes of 1895 (Article 7684, R. C. S., 1911), which says that "said taxes shall remain a lien upon said land."

The case of *League vs. State* (Crt. Civ. App.), 56 S. W., 262; 93 Texas, 553 (57 S. W., 34); 184 U. S., 156, was a suit to foreclose the lien on certain lands for the taxes assessed against same for 1885 and subsequent years, the land having been previously sold to the State for taxes for the year 1884. It was held that the sale to the State for the taxes of 1884 did not extinguish nor preclude the State from enforcing by suit its lien for the taxes for subsequent years. This case considers the question rather fully and cites and discusses other cases in point. On this point the Supreme Court of Texas said:

"However, upon the point on which the writ was granted, we will say that the answer of the defendant sets up the sale of the lands for taxes, and the purchase of them by the State; insisting that the State is bound by its purchase. No attack is made upon the sale, nor upon any of the proceedings leading up to it; and it stands before the court, under the defendant's alle-

gations, as a valid sale, by which the title passed to the State. The State, having acquired the title, had the power to waive its right, and, in order to perfect the claim beyond all dispute, to foreclose its lien on the land, as against the then claimant, and, in doing so, had the authority to prescribe such terms as it deemed proper and just. The claimant of the land, being a party defendant, could have disclaimed any interest in it, and might thus have escaped any cost for proceedings had after such disclaimer. The defendant chose not to pursue this course, and he has no cause of complaint, as the case stands before this court, because, by his own showing, he had no title to be affected by it, and depended solely upon the grace of the State for whatever he might get out of the land. This conclusion is based upon the fact that the title in the State is perfect, and it is not intended to express an opinion on the question when the proof does not show this fact."

The sales involved in these cases were summary sales by the tax collector and not sales under judgments foreclosing the lien for taxes, and for this reason, whatever bearing they may have on the question, these cases do not decide the exact question whether or not the sale of a tract of land to the State under a judgment foreclosing the lien for State and county taxes on same for any given year or years, would extinguish the lien for unpaid taxes previously assessed on same for prior year or years, and we express no opinion on that question, since it is not included in your inquiry. It will also be noted that these claimants were not asserting title under the State through these sales for taxes.

It must also be borne in mind that we are not here considering the effect on the lien for State and county taxes of the sale of a tract of land under a judgment foreclosing the lien for other than such taxes, nor the effect on the lien for other taxes of the sale of a tract of land under a judgment foreclosing the lien for State and county taxes, nor to what extent, if at all, this may be done.

A discussion of these general questions, and the citation of numerous authorities, will be found in *Am. Ann. Cas.*, 1913a, 675, in the notes to *Kentucky Lands Investment Company vs. Fitch*, 144 Ky., 273 (137 S. W., 1040); 35 L. R. A., 372, in the notes to *Seattle vs. Hill*, 14 Wash., 487; 30 L. R. A. (N. S.), 761, in the notes to *Baldwin vs. Moroney*, 173 Ind., 574 (91 N. E., 3); *Cooley on Taxation* (4th Ed.), Vol. 3, p. 2451, Ch. 19, and p. 2936, Sec. 1492; *Am. Digest* (Dec. Ed.), Vol. 18, p. 2182, Sec. 735; and 26 R. C. L., p. 401, Sec. 360, p. 404, Sec. 361, p. 412, Sec. 370, and p. 414, Sec. 371.

The authorities are not in accord on this question. As stated by the Supreme Court of Minnesota in *Oakland Cemetery Association vs. County of Ramsey*, 98 Minn., 404 (108 N. W., 857, 116 Am. St. Rep., 317), after a general review of these authorities:

"It is plain that there is good reason and specific authority for deciding this case either way, that it is not possible to decide it without doing violence to just and weighty considerations, and that the balance in favor of either conclusion is not pronounced. Nor are we without grave doubt on the subject."

On motion for rehearing (109 N. W., 237), after adhering to its holding in *Gates vs. Keigher*, 108 N. W., 860, that "where lands have been sold for taxes, and the purchaser thereafter perfects his title thereunder, the State could not impeach such title by resale of the land for taxes due and unpaid for prior years," the court says:

"After a careful reconsideration of the question, we have concluded to ad-

here to the conclusion on this point announced in the original decision, namely, that whether a later sale on an earlier tax lien should take precedence over an earlier sale on a later lien is primarily a question of statutory construction."

As further indicating the power of the Legislature on this subject, we here quote the following from Cooley on Taxation (4th Ed.), Vol. 3, p. 2936, Sec. 1492:

"The Legislature has power to provide either that the tax sale shall create a new title cutting off all prior liens, encumbrances and interests, or to provide that the tax purchaser shall acquire the interest only of the person in whose name the land was assessed or of the real owner. Observing the statutory directions and precautions, and the principles of the common law and of public policy, to which reference has been made, the officer may transfer to the purchaser the full interest in the land which has been assessed, and may convey a complete and perfect title if such is the provision of law on the subject, as in many States is the case. Indeed, it has been said that 'the prevailing opinion seems to be that a tax title is a new title, and not merely the sum of old titles.' Generally a tax title divests all interest in the land sold and vests in the grantee an independent and paramount title. Where the whole title is sold it cuts off and divests estates in remainder or reversion, rent charges, trust estates, homestead interests, inchoate rights of dower, mortgages and other encumbrances, judgment liens, and even back taxes and tax titles, unless other provision is made; but in some States the sale is only of the title which the person taxed had at the time, while in others nothing passes but the title and interest of the parties who were made defendants to the judicial proceedings anterior to the sale."

This being true, and the statutes of the various jurisdictions on this subject being so dissimilar, the decisions of one jurisdiction are of but little value in deciding the question for another, and the answer as to each jurisdiction should rest on its Constitution and statutes rather than on any general rule of law deducible from the reported cases of other jurisdictions, and rather than upon the general rule applicable to contractual or private liens.

Turning to our Constitution and statutes, we find Sections 13 and 15 of Article 8 of our State Constitution and Articles 7578 and 7683 to 7700, with amendments, of our Revised Civil Statutes as bearing most directly on this subject.

Section 15 of Article 8 of the Constitution provides that "the annual assessment made upon landed property shall be a *special lien thereon*," and Section 13 requires the Legislature to make provision for the sale "of a sufficient portion of all lands and other property for the taxes thereon, and each year thereafter for the sale of all lands and other property upon which the taxes have not been paid."

Article 7528 provides that "All taxes upon real property shall be a lien upon such property until the same shall have been paid." Articles 7683-7700, with certain amendments, relate to the foreclosure of the lien upon and the sale of lands for taxes. Article 7684 brings within these provisions all lands delinquent for taxes "since the first day of January, A. D. 1885," and provides that "said taxes shall remain a lien upon said lands" and that "the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment for any preceding year." Article 7688 as amended (Ch. 21, p. 180, Gen. Laws, 3rd C. S., 38th Leg.) makes it the duty of the county attorney to bring suit "for the total amount of taxes, interest, penalty and costs that have remained unpaid for all years since

*the thirty-first day of December, 1908,* and to pray judgment for the payment of the several amounts so specified therein and *shown to be due and unpaid by the delinquent tax records.*

We also note Articles 7565, 7663 to 7682, inclusive, and 7702 to 7715, inclusive, providing for the assessment and enforced collection of taxes on land "which has not been assessed or rendered for taxation for any years since 1870," or that "has been omitted from the tax rolls for any years or years since 1884," or with respect to which "any previous assessment \* \* \* for the years mentioned are invalid or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said property." It is true that no lien attaches until a valid assessment has been made, but it would seem inconsistent to say that the sale of a tract of land under a judgment foreclosing the lien on same for State and county taxes for any given year or years extinguishes or precludes the enforcement of the lien for such taxes properly assessed against same for prior year or years, and, at the same time, to hold that if there has been an invalid assessment, or no assessment, of such taxes for such prior year or years, such assessment may be made subsequent to such a sale and carry with it an enforceable lien upon such tract of land to secure the payment of same. This, however, is only referred to as an argument. We are not here expressing any opinion on it.

It seems that these provisions of our Constitution and statutes, and certain other provisions of our statutes to the same effect not herein specifically mentioned, and the apparent spirit and intent of them, should be sufficient to warrant answering your first question in the negative, notwithstanding the absence of a direct and express provision to that effect. To answer it otherwise is, at least in effect, to hold that certain officers, particularly district and county attorneys, can, whether by mistake, inadvertence or design, bring about a situation that will nullify the lien expressly created by the Constitution and statutes of this State to secure the payment of taxes. To say that an inadvertence must be given this effect is going a long way, and to say that such a situation brought about by design on the part of officers must be accorded this result seems to us wholly unsound. We cannot quite conceive how these officers, by any act or failure of duty on their part, or even our courts by construction, can nullify the plain constitutional and statutory lien created and reserved to secure the payment of taxes.

Since our Supreme Court, as we understand it, has not passed upon this exact question, and in view of our Constitution and statutes on this subject, we answer your first question as follows:

1. That certain courts of this State, other than the Supreme Court, have held that the sale of a tract of land under a judgment foreclosing the lien on same for State and county taxes for any given year or years, in cases where the sale is made to some person other than the State, extinguishes or precludes the enforcement of the lien for such taxes previously assessed on same for any prior year or years, where no express reservation is made in such foreclosure suit of the lien for such taxes so previously assessed for such prior year or years, and the utmost diligence should be exercised on the part of those charged with the duty of enforcing such judgments, particularly dis-

tract and county attorneys, to see that no tract of land is sold under any such judgment when such sale would leave unsatisfied the lien securing the payment of State and county taxes previously assessed on same for any prior year or years; and each suit to foreclose the lien for such taxes on any tract of land should include all State and county taxes on same delinquent at the time the suit is filed.

2. That we are inclined to the view that the holding in this State to the effect that the sale of a tract of land to some person other than the State under a judgment foreclosing the lien on same for State and county taxes for any given year or years extinguishes or precludes the enforcement of the lien for such taxes previously assessed on same for prior year or years, is not so well founded and final that district or county attorneys would be unwarranted in bringing suit to foreclose the lien on such tract of land for State and county taxes previously assessed on same for such prior year or years, and that this rule may not be applied so as to inure to the benefit of the owner of such lands, or one liable for the payment of the taxes on same for which such foreclosure and sale was had.

3. That the sale of a tract of land to some person other than the State under a judgment foreclosing the lien on same for State and county taxes for any year or years does not cancel nor extinguish unpaid State and county taxes previously assessed against such tract of land for any prior year or years, and payment of same may be enforced against the property of the person liable therefor, except that the homestead is liable only for the taxes against it.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2525, Bk. 59, P. 355.

TAXATION—PAYMENT ON ONE TRACT OF LAND WITHOUT PAYMENT ON OTHER TRACTS.

1. Where a tract of land within the meaning of our tax laws is properly separately described and valued on the list or inventory of property listed or rendered for taxation for a given year, such tract should be separately entered and valued on the tax rolls for such year, and the owner of such tract, irrespective of when or how acquired, or other person where necessary to preserve unimpaired a property right in same, has the right to pay the taxes assessed (or properly assessable) against such tract for such year, at any time after such taxes become due and payable, without the payment of taxes for such year against any other person or property, and this although such tract may have been listed with other property, all so listed together on the same list or inventory as the property of one ownership, and although all such property so listed may have been entered together on the same tax roll form for such year in the name of and as the property of one ownership, and with the taxes calculated and stated or extended on such tax roll form for such year only as against the total or aggregate value of all such property, and not separately as against such tract; provided:

(a) If such tract has become delinquent for the taxes on same for such year payment must also be made of such interest, penalties and costs, including court costs, if any, as are properly chargeable against such tract for such year.

(b) The taxes on no part of such tract of land for such year may be paid

without the payment of all taxes assessed (or assessable) against the whole of same for such year.

2. This opinion is not intended to apply to nor as construing Article 7627 of the Revised Civil Statutes of 1911, nor any other statute that relates to or deals with any particular or peculiar condition or state of facts.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 11, 1923.

*Honorable Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: We have your inquiry of recent date accompanied by numerous inquiries addressed to you pertaining to the matter of the payment of taxes against a single tract of land that is included in the same rendition and assessment with other lands, or with personal property, without the payment of all taxes assessed against all the property included in such rendition or assessment, and in reply thereto, until and unless otherwise held by our courts, you are advised as follows:

1. Where a tract of land within the meaning of our tax laws is properly separately described and valued on the list or inventory of property listed or rendered for taxation for a given year, such tract should be separately entered and valued on the tax rolls for such year, and the owner of such tract, irrespective of when or how acquired, or other person where necessary to preserve unimpaired a property right in same, has the right to pay the taxes assessed (or properly assessable) against such tract for such year, at any time after such taxes become due and payable, without the payment of taxes for such year against any other person or property, and this although such tract may have been so listed with other property, all so listed together on the same list or inventory as the property of one ownership, and although all such property so listed may have been entered together on the same tax roll for such year in the name of and as the property of one ownership, and with the taxes calculated and stated or extended on such tax roll form for such year only as against the total or aggregate value of all such property, and not separately as against such tract; provided:

(a) If such tract has become delinquent for the taxes on same for such year payment must also be made of such interest, penalties and costs, including court costs, if any, as are properly chargeable against such tract for such year.

(b) The taxes on no part of such tract of land for such year may be paid without the payment of all taxes assessed (or assessable) against the whole of same for such year.

2. This opinion is not intended to apply to nor as construing Article 7627 of the Revised Civil Statutes of 1911, nor any other statute that relates to or deals with any particular or peculiar condition or state of facts.

For many years this has been a vexing question, not only to property owners, but also to the officers who are charged with the duty of administering our tax laws pertaining to the assessment and collection of taxes on real property, and in view of Section 4 of Chapter 21, page 180, General Laws, Third Called Session, Thirty-eighth Legislature, and the decision of our Supreme Court in the case of Richey vs. Moor, 249 S. W., 172, decided February 28, 1923, it seems that the former practice pertaining to this matter must be somewhat modified.

We deem it advisable to set out at some length the case of Richey

vs. Moor as disclosed by the opinion of the court. Such of the facts of that case as are here material are stated by the court as follows:

"On January 1, 1917, Moor owned eight separate and distinct tracts of land situated in said county, which, for convenience, are designated by numbers in this opinion. These tracts were listed on the same assessment sheet, but each tract was separately rendered and valued. For the year 1917, State and county taxes were levied against the lands and which the tax collector was authorized to collect, as follows: Tract No. 1, \$2.80; tract No. 2, \$23.67; tract No. 3, \$23.68; tract No. 4, \$23.66; tract No. 5, \$10.82; tract No. 6, \$6.45; tract No. 7, \$27.82; tract No. 8, \$23.67; total, \$142.57. In March, 1917, Moor conveyed tract No. 8, the purchaser assuming and agreeing to pay the taxes thereon for the year 1917. The total of the taxes levied against tracts Nos. 1 to 7, inclusive, was \$118.90.

"On January 28, 1918, Moor tendered to Richey, the collector, in full payment of the taxes for the year 1917, on said tracts 1 to 7 the amount stated. This tender was made in due form, and was legally maintained at all times thereafter, and during the progress of this litigation, and the amount thereof paid into the registry of the court when this suit was instituted. No question is made as to the sufficiency of the tender, except as to the amount, and as to that only because it did not embrace the taxes due on tract No. 8. No tender was made of the taxes due on tract No. 8, Moor at the time advising the collector that he had sold said tract, and that the purchaser had assumed the payment of the taxes due thereon."

The certified questions answered by the court in this opinion were:

"First. Are tracts Nos. 1 to 7, inclusive, upon which Moor tendered the taxes for the year 1917, incumbered by a lien to secure the payment of the taxes for the year 1917 upon tract No. 8?

"Second. Was it the duty of the tax collector to accept the tender made and issue a statutory receipt showing payment of the taxes for the year 1917 upon said tracts 1 to 7, inclusive?"

The first question was answered in the negative and the second in the affirmative:

In thus answering these questions the court, among other things, said:

"The right to discharge the lien on any particular tract of land arises as a necessary corollary from the constitutional provision which limits the lien on any tract to the amount assessed against it. Our whole taxation system is based upon the idea that the amount assessed against each tract of land is, in effect, a separate tax. True, it becomes a part of the gross amount of taxes owed by the taxpayer, but it is separately assessed, separately secured by the lien, separately set forth in the statutory tax receipt if paid, and, if not paid, separately reported on the delinquent tax rolls, separately described when sued for, separately adjudged against the land, which must be separately sold, and specified in the tax deed."

\* \* \* \* \*

"While the general rule is that taxes must be paid in full at one time, and, unless otherwise provided by statute, a taxpayer cannot tender a portion of the tax and demand a receipt therefor, yet this rule is subject to some qualification. The citizen always has the right to pay the amount of any one tax listed against him, or as held in some jurisdictions, to pay the tax on any one item or piece of property which has been separately assessed, without offering to pay the taxes on other parts."

\* \* \* \* \*

"In considering the rule requiring the full payment of the taxes, we think it an appropriate deduction from the authorities to say that, where it is necessary for anyone, in order to preserve unimpaired his property rights, to pay the taxes due on any separate tract or parcel of land which has been separately

assessed, he has the right to do so; and, where the statutes can be construed to accomplish this end, they should be so construed."

\* \* \* \* \*

"We are of the opinion that the tax against each separate tract or parcel of land, in so far as the right of payment is concerned, is to be regarded as a separate tax, and may be paid without at the same time paying other taxes. Since the right of payments exists, the statutory receipt should issue correctly describing the property and the tax, limiting the effect, of course, to the property actually involved and the tax actually paid."

Note that the court refers to "the constitutional provision which limits the lien on any tract to the amount assessed against it." Other expressions are, "the amount assessed against each tract of land is, in effect, a separate tax," "it is separately assessed," "a separate and distinct tax against the land," "the statute supporting the assessment," "taxes assessed against each particular tract of land as possessing in most respects the element of a separate tax," "any one item or piece of property which has been separately assessed," "can pay the taxes on a particular piece of property," "the taxes due on any separate tract or parcel of land which has been separately assessed," "the tax against each separate tract or parcel of land \* \* \* is to be regarded as a separate tax."

Based on these and other similar expressions by the court, and bearing in mind the meaning of the words "assess" and "assessment" as defined by our standard lexicographers, there is some reason for the contention that the decision in this case is only applicable to a state of facts such as is stated by the court; that is, that it is applicable only where the taxes on a particular tract of land for a given year have been separately calculated and stated or extended on the tax rolls, but we doubt if under our general system of taxation this decision should be given such a strict and technical application, at least in so far as it relates to the right of a property owner to pay taxes for a given year on a particular tract of land properly separately listed and valued for taxation. To do so would render this case inapplicable to most if not all our assessments where two or more tracts of land, whether with or without other property, or where even one tract of land with other property, are properly separately entered together on the same list or inventory as the property of one ownership, and so entered on the same tax roll form, and this for the reason that in all such cases the taxes are seldom if ever calculated and stated or extended on the tax rolls separately as against each tract of land, respectively, but only as against the total or aggregate value of all such property.

Indeed, such were the facts as to the assessment before the court in that case; that is, that assessment included not only the eight tracts of land mentioned by the court, but also other lands, together with personal property, and, although each tract of land was separately valued, the tax rolls show the taxes calculated and stated or extended, all on the same tax roll form, only as against the total or aggregate value of all such property and not separately as against each tract of land, respectively, and to construe the opinion in that case as is contended for would render it inapplicable even to the assessment then before the court. We rather incline to the view that the court states the legal effect of or the conclusion that should be drawn from the true facts of the case as far as the right of the property owner to pay taxes is con-



cerned, because we cannot assume that the true facts of the case were not known to the court, or were withheld from or not presented to the court. This is also indicated by the holding of the court that:

"Our entire scheme of taxation, from the initial proceeding or rendition to that of final payment, or of sale under seizure or by court process, provides for keeping separate the description of each tract of land, with the amount of taxes levied against it, from other taxes assessed against the taxpayer, or taxes levied against other tracts of land. The statutes referred to will be cited later."

\* \* \* \* \*

"A land tax, although a portion of the general taxes due by the taxpayer, is nevertheless a separate and distinct tax against the land, and must be so considered from the initial step of rendition to the finality of the tax deed under seizure and sale by the sheriff or under orders of the court. The statutes supporting the statements made above are as follows: Vernon's Sayles' Revised Civil Statutes (1914), Arts. 7520, 7530, 7553, 7555, 7556, 7562, 7563, 7708, 7617, 7594, 7685, 7687a (Supp. 1922), 7688, 7689, 7688a (Supp. 1922). These statutes, in the main, have been given effect by the courts, and, together with the opinions, clearly show that our public policy has been to treat the taxes assessed against each particular tract of land as possessing in most respects the elements of a separate tax. See, generally, *House vs. Stone*, 64 Texas, 677; *Henderson vs. White*, 69 Texas, 103, 5 S. W., 374; *State vs. Farmer*, 94 Texas, 232, 59 S. W., 541; *City of San Antonio vs. Raley* (Texas Civ. App.), 32 S. W., 180; *Moses vs. McFarlin*, 2 Posey's Unrep. Cas., 291; *McCormick vs. Edwards*, 69 Texas, 106, 6 S. W., 32; *Clegg vs. State*, 42 Texas, 607; *State vs. Baker*, 49 Texas, 762; *Edmondson vs. City of Galveston*, 53 Texas, 157; *Schleicher vs. Gatlin*, 85 Texas, 270, 20 S. W., 120; *Fant vs. Brannin*, 2 Posey's Unrep. Cas., 323; *Allen vs. Courtney*, 24 Texas Civ. App., 86, 58 S. W. 200."

This being true, and since the duty of properly entering on the tax rolls property listed or rendered for taxation, and calculating and stating or extending on the rolls the taxes against such property, rest wholly on the Comptroller of Public Accounts, the board of equalization and tax assessor, the property owner being charged with no duty or responsibility in that regard, it is immaterial to the property owner, as to his rights in the matter of paying taxes, as to whether the taxes are calculated and stated or extended on the tax rolls against the aggregate value of all property, or separately as against the several items of property, respectively, properly listed together, but separately entered and valued, on the same list or inventory.

In this connection it will be noted that in this case the court cites with approval the case of *State vs. Hunt* (Texas Civ. App.), 207 S. W., 636, explains *Masterson vs. State* (Texas Civ. App.), 42 S. W., 1003, *Ryon vs. Davis* (Texas Civ. App.), 57 S. W., 642, and concerning the case of *Masterson vs. State*, supra, the court says:

"Since apparently the Court of Civil Appeals had correctly disposed of the case, the refusal of the writ was not an approval of the erroneous construction of the constitutional provision here involved. *Aspley vs. Hawkins*, 99 Texas, 380, 89 S. W., 972; *American Indemnity Co. vs. City of Austin* (Texas Sup.), 246 S. W., 1019, not yet (officially) reported."

The court does not cite the case of *Stuard vs. Thompson* (Texas Civ. App.), 251 S. W., 277, but that case must, nevertheless, be regarded as overruled or modified to the extent that it is in conflict with *Richey vs. Moor*.

It is our opinion, however, that where a given area of land, whether rural or urban, is properly separately listed and valued as one tract

in a given rendition, and is properly so entered on the tax rolls, and the taxes calculated and stated or extended on the tax rolls against it as a whole, either separately or as included with other property, one has not the right to pay any sum as in payment of the taxes for a given year on any part of same without the payment of the taxes assessed (assessable) against the whole of such area for such year. One reason for this is that there exists a lien in favor of the State against the whole of such tract so rendered and assessed to secure the payment of the taxes assessed (assessable) against the whole tract. Another reason is that our statutes provide no means for determining the respective values of any part or parts of a tract of land so rendered and assessed, or for arriving at the amount of tax that should be paid on same, or for apportioning to such part or parts the total taxes against the whole tract.

Said Section 4 of Chapter 21, page 180, General Laws, Third Called Session, Thirty-eighth Legislature, reads as follows:

“When two or more lots or blocks or tracts of land are rendered in the same rendition with separate valuations, and the taxes due thereon become delinquent, the tax collectors shall, when tendered, accept payment of the taxes due on each lot or block or tract of land having such separate valuation.”

The words “each lot or block or tract of land” as used in this section might be easily construed to require the payment of the taxes on each lot, block or tract before acceptance of payment by the tax collector of the taxes on any one of them, but in view of the section as a whole and the evident purpose of it, we think these words should be construed as meaning “any one or more of such lots or blocks or tracts of land.”

It will also be noted that this section applies only to the payment of taxes on lands and lots after delinquency and that it contains no requirement for the payment of interest, penalties and costs. This section, however, must be construed in connection with other statutes pertaining to the payment of delinquent taxes on lands, and when so construed cannot be held to authorize the payment of taxes on a particular lot or tract of land so separately listed and valued without the payment of such interest, penalties and costs, including court costs, if any, which under other statutes are chargeable against such lot or tract.

We realize the difficulties that must arise under our present statutes and method of assessing and collecting taxes and receipting for, reporting and checking same, particularly after delinquency, in making a practical application of this ruling, especially where taxes are calculated and stated or extended on the tax rolls as against the total or aggregate value of all property included on a given tax roll form in the name of and as the property of one ownership, and not as against each tract of land separately, but these difficulties cannot be held to deprive a property owner of a right which our Supreme Court seems to have held he has.

The opinions of this Department rendered to J. W. Stephens, Comptroller, under date of January 3, 1905 (Rep. and Op. Atty. Gen., 1906-1908, p. 91), to W. B. McCampbell, Corpus Christi, Texas, under date of February 8, 1907 (Rep. and Op. Atty. Gen., 1906-1908, p. 380), and to Honorable Carey Legett, county attorney, Port Lavaca, Texas, under date of August 3, 1917 (Rep. and Op. Atty. Gen., 1916-1918,

p. 667), as well as all other opinions of this Department, in so far as they are in conflict herewith, are to that extent hereby modified.

In this connection, while not involved in your inquiry, it is well that it be borne in mind that payment of the taxes against a particular tract of land, except as to the homestead, will not relieve such tract of its liability for other taxes that may be due and owing by the owner of same.

On this point Article 7630 of the Revised Civil Statutes of 1911 reads as follows:

"All real and personal property held or owned by any person in this State shall be liable for all State and county taxes due by the owner thereof, including taxes on real estate, personal property and poll tax; and the collector of taxes shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding."

This is particularly true as to "any delinquent taxpayer" because of that part of Section 15 of Article 8 of our State Constitution, which says:

"\* \* \* 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."

We also quote just here that part of Section 13 of Article 8 of our State Constitution, which reads as follows:

"Provision shall be made by the first Legislature for the speedy sale of a sufficient portion of all lands and the other property for the taxes due thereon, and every year thereafter for the sale of all lands and other property upon which the taxes have not been paid."

As to the method of enforcing this liability, in so far as here applicable, we quote the following from *Richey vs. Moor*, supra:

"Without attempting to review the statutes composing our taxation system, we may say, generally, that three methods are provided for securing and collecting taxes: First, foreclosure of and sale under the constitutional lien imposed on each tract of land for the taxes assessed against it; second, the summary process of seizure and sale by the collector; and, third, suit for taxes, and the levy on and sale of all lands (except the homestead) in satisfaction of the judgment. Having provided these three methods of enforced collection of taxes by express and elaborate laws, we cannot say that a fourth method, to wit, that of retaining the lien on each particular tract by refusing to take the taxes due thereon when tendered until all taxes are paid, arises by implication or in virtue of any general rule."

It will be noted that Article 7627 of the Revised Civil Statutes of 1911 is not mentioned by the court in the case of *Richey vs. Moor*, supra, and we are not attempting to say here whether or not under this statute, or under any other statute that relates to or deals with a particular or peculiar condition or state of facts, there exists an exception to the general rule herein stated.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2479, Bk. 58, P. 453.

## DELINQUENT TAXES—FORECLOSURE SALES—LESS THAN AMOUNT OF JUDGMENT.

Where land is being sold under judgment in favor of the State foreclosing the State's lien for taxes, neither the county attorney nor the sheriff is required or authorized to bid on same for the State if there are other bona fide bidders, and in such case sale may be made for an amount less than the aggregate of the taxes, penalties, interest and costs, but where there are no bona fide bidders it is the duty of the county attorney, or, in his absence, of the sheriff, to bid the property off to the State at not less than the amount of the taxes, penalties, interest and costs adjudged against the property.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS. February 6, 1923.

*Honorable Birge Holt, District Attorney, Seventieth Judicial District,  
Barstow, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 23rd ultimo, in which you refer to Article 7689 of the Revised Civil Statutes of 1911 and propound to the Attorney General the following question:

"For the purpose of this inquiry, to make my request more specific, can land advertised for sale under judgment of foreclosure for taxes, penalty, interest and cost be sold for less than the full amount of taxes, interest, penalty and costs?"

The article of the statute referred to by you, in so far as here applicable, reads as follows:

"\* \* \* in case of foreclosure, an order of sale shall issue, and the land sold thereunder as in other cases of foreclosure; \* \* \* if there shall be no bidder for such land, that the county attorney shall bid said property off to the State for the amount of all taxes, penalties, interest and costs adjudged against said property; and, in the absence of the county attorney, the sheriff is authorized to bid to the State, when there are no bidders. \* \* \*"

When at such sales there are no bidders and the lands are bid off to the State by the county attorney, or, in his absence, by the sheriff, it is required that such bid shall be "for the amount of all taxes, penalties, interest and costs adjudged against said property," and the sheriff making the sale would not be authorized to accept in such case a bid in behalf of and make the sale to the State for less than the amount of "all taxes, penalties, interest and costs adjudged against" the land.

Your case, however, as we understand from your letter and the conversation between you and this writer here at the office some time ago, is one where there are bidders but no one of whom bids the full amount of the judgment, and you desire to know whether, in such case, it would be the duty of the county attorney, or, in his absence, the duty of the sheriff, to become a bidder for the State to the extent of raising the bids up to the amount of the judgment, and, if not, whether the sheriff would be authorized to make a sale in such a case for less than the judgment calls for.

The statute is that "if there shall be no bidder \* \* \* the county attorney shall bid said property off to the State, \* \* \* and in the absence of the county attorney the sheriff is authorized to bid to the State, when there are no bidders."

As stated by our Court of Civil Appeals in *Gibbs vs. Scales*, 118 S. W., 188:

"It will be noted that the statute quoted above requires the land to be bid in for the State only when there are no bidders for the same, thus evidencing the policy of the State to become the purchaser only when it is necessary to do so in order to collect the taxes due."

In our opinion, neither the county attorney nor the sheriff is required or would be authorized to bid for the State when there are other bona fide bidders, but are only required and authorized to do so when there are no such bidders, and no other officer is charged with the duty of bidding for the State, or would be authorized to do so, at such sales in any event.

From this it follows that when there are bidders and no one bids the amount of the judgment, either there must be no sale or a sale must be made for less than the judgment calls for. We cannot say that there must be no sale because the statute says "in case of foreclosure an order of sale shall issue and the land sold thereunder as in other cases of foreclosure," and there is no statute forbidding a sale for less than the amount of the judgment. The only alternative is that the sale should be made to the person offering the highest and best bid even though the amount of such bid may be less than the judgment calls for. In short, when there are bidders these sales take the same course as similar foreclosure sales—"and the land sold \* \* \* as in other cases of foreclosure."

In the case of *Brown vs. Bonougli*, 232 S. W., 490, our Supreme Court has said:

"It seems to us not to admit of reasonable doubt that the validity of the sale under judicial foreclosure of a tax lien is to be determined by the rules governing judicial sales, and not sales purely statutory and summary. The law is thus plainly written in Article 7689. The proceedings before judgment are to conform to the practice in other suits in the district court for the enforcement of liens on land. A foreclosure on the land being decreed, it is prescribed, in language clear and unambiguous, that an order of sale is to be issued and the land is to be sold 'as in cases of other foreclosure.'"

In the case of *Gibbs vs. Scales*, hereinbefore referred to, the sale was attacked upon the ground that it was made to the county attorney and that a purchase by the county attorney at such sale was incompatible with his duties as an officer, or contrary to public policy. The court held against this contention, sustained the sale, and a writ of error was denied by the Supreme Court, but from expressions used by the court in its opinion we conclude there were other bidders at the sale than the county attorney. We doubt if a purchase by the county attorney for himself at such a sale at not more than the amount of the judgment, where there were no other bidders, would be sustained. Such a purchase by him, we think, would be clearly inconsistent with the duty enjoined on him by law to bid for the State in such a case "the amount of all taxes, penalties, interest and costs adjudged against the property." Under well known principles of law it would not be proper for the sheriff to bid or purchase for himself at such sales at any price, and regardless of whether there were other bidders or not.

You are advised, therefore, that in the sale of lands under foreclosure of tax liens by the State where there are bona fide bidders, sales

may be made to the highest and best bidder, even though the bid be for less than the amount called for by the foreclosure judgment, but where there are no bidders it is the duty of the county attorney, or, in his absence, of the sheriff, to bid off the property to the State at not less than the amount of the taxes, penalties, interest and costs, that is, for not less than the amount called for by the judgment.

You are familiar, of course, with those rules of law under which foreclosure sales have been held invalid or void on the ground of fraud or collusion, or because the sale was for a grossly inadequate price. In a proper case these rules are applicable to sales of land under tax lien foreclosures.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2500, Bk. 58, P. 446.

TAXES—DELINQUENT—ENFORCED COLLECTION—TAX COLLECTOR—  
POLL TAX—WORK ON PUBLIC ROAD.

1. One who has been assessed with and is liable for the payment of a poll tax in one county and who, without paying same, has moved to and become a resident of another county, cannot be required to work upon the public roads of the latter county upon the ground that he has failed to pay such poll tax, either under Article 6973 of the Revised Civil Statutes or under any local road law that may have been passed for either of such counties as at present enacted.

2. One who has been properly assessed with and who is liable for the payment of a State and county poll tax, or property taxes, in one county, and who, without paying same, has moved to and become a resident of another county, or whether such person had so moved or not, and such taxes have become delinquent, is nevertheless liable for the payment of such taxes and payment of same may be enforced by seizure and sale of any personal property subject to seizure and sale in the enforced collection of taxes.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 25, 1923.

*Honorable Roy Formway, County Attorney, Rotan, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 19th instant, and has referred same to me for reply. Your inquiry is as follows:

"The commissioners court wants to know if they can collect poll tax from a man that has lived in Jones County, Texas, and moved to Fisher County, Texas, on the 15th day of May, 1923. He did not pay his poll tax in Jones County. Can he be forced to pay his poll tax in Fisher County or work on the road?"

1. That one who has been assessed with and is liable for the payment of a poll tax in one county and who, without paying same, has moved to and become a resident of another county, cannot be required to work upon the public roads of the latter county upon the ground that he has failed to pay such poll tax, either under Article 6973 of the Revised Civil Statutes or under any local road law that may have been passed for either of such counties as at present enacted.

2. That one who has been properly assessed with and who is liable

in one county for the payment of a State and county poll tax, or other State and county taxes, whether as to real or personal property, and who, without paying same, has moved to and become a resident of another county, or whether such person has so moved or not, and notwithstanding such taxes may have been returned delinquent, is, nevertheless, liable for the payment of such taxes, and payment of same may be enforced by seizure and sale by the proper tax collector of any personal property, wherever situated in this State, subject to seizure and sale in the enforced collection of taxes under the provisions of Articles 7622, 7624, 7625, 7628, 7629, 7631, 7632 and subdivision 5 of Article 7618 of the Revised Civil Statutes of 1911, the latter as amended by Chapter 124, page 190, General Laws, Regular Session, Thirty-fourth Legislature, approved March 22, 1915, and it is the duty of the tax collector to proceed with the enforced collection of such taxes under these statutes irrespective of the year for which same may be delinquent, or whether same be the poll tax or taxes due and owing on real or personal property, or at what place in this State such person may reside, or whether or not such person owns, or has assessed against him or her, real property.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2548, Bk. 59, P. 306.

#### INHERITANCE TAXES.

1. Personal property permanently situated within the territorial boundaries of this State, regardless of whether owned by residents or non-residents, is within the jurisdiction of this State and is subject to inheritance taxes in Texas.

2. Personal property belonging to residents of this State, regardless of where located, is within the jurisdiction of this State and is subject to inheritance taxes in Texas.

3. Real estate situated in this State is within the jurisdiction of this State and is subject to inheritance taxes in Texas.

4. Real estate belonging to residents of this State and situated in a foreign State is not within the jurisdiction of this State and not subject to inheritance taxes in Texas.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 24, 1924.

*Honorable Lon A. Smith, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: Your letter of the 5th instant to the Attorney General has been referred to me. For convenience, your letter is here copied, as follows:

"In the administration of the Inheritance Tax Law of 1923, known as Chapter 29 of the Acts of the Second Called Session of the Thirty-eighth Legislature, it is necessary for me to determine as a matter of law what transfers of property are subject to an inheritance tax under Section 2 of said act, which reads as follows:

"Sec. 2. All property within the jurisdiction of this State, real or personal, corporate or incorporate, and any interest therein whether belonging to inhabitants of this State or to persons who are not inhabitants, regardless of

whether property is located *within* or *without* the State, which shall pass absolutely or in trust by will or by the laws of descent or distribution of this or any other State or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall upon passing to or for the use of any person, corporation or association be subject to a tax for the benefit of the State's general revenue fund in accordance with the following classifications, to-wit:'

"Will you construe said Section 2, especially as suggested by the following questions:

"1. When is property within the jurisdiction of this State so that the transfer thereof is subject to an inheritance tax under Section 2 of said act?

"2. Is the transfer from a resident decedent of chattels, notes and other securities located in a foreign State subject to an inheritance tax in this State?

"3. Is the transfer from a resident decedent of real estate situated in a foreign State subject to an inheritance tax in this State?

"There is now pending in this Department several estates which own real estate and personal property in other States, which real estate and personal property have not been reported as assets of such estates subject to the Texas inheritance tax laws."

Chapter 29 of the Acts of the Second Called Session of the Thirty-eighth Legislature is an amendment of former acts on the same subject. The original act levying inheritance taxes was enacted in 1907 and was carried forward in the revision of 1911 as Articles 7487 to 7502, inclusive. An amendment to the original act was adopted in 1907, being Chapter 166 of the Acts of the Regular Session of the Thirty-fifth Legislature. In 1919 another amendment was adopted, being found in Chapter 164 of the Acts of the Regular Session of the Thirty-sixth Legislature.

Section 2 of the 1923 amendment was Article 7487 in the 1911 revision, which article remained the same as originally enacted in 1917 until the adoption of the 1923 amendment, the latter amendment making only slight changes in the language of the article. The courts apparently have not construed this provision of our inheritance tax law, either before or after the enactment of the 1923 amendment.

An inheritance tax is not a property tax, but is in the nature of a privilege tax. For this reason the established rules in reference to the situs of property for the purposes of taxation generally will not always apply, but will no doubt be applied by the court wherever possible.

The language of Section 2 of the 1923 amendment is very broad and sweeping and includes in it all property within the jurisdiction of the State. Notwithstanding the broad scope of the language used in the section, the Legislature evidently did not intend by the enactment of said section to change established rules governing the situs of property for the purposes of taxation generally.

As to personal property belonging to residents of this State, Article 7505 of the Revised Statutes of Texas furnishes the rule for determining the situs of such property for taxation purposes generally, as follows:

"Personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of the State, whether the same be in or out of the State."

As to personal property situated in the State and belonging to non-residents of the State, the Supreme Court of Texas, in *Hall vs. Miller*, 115 S. W., 1158, has laid down the following rule:



"A State has no authority to levy taxes upon personal property temporarily within its borders when the owner resides elsewhere. But it is equally true that tangible property which has acquired a situs within the State is subject to taxation, although the owner be a non-resident thereof."

See, also,

*Carmody vs. Clayton*, 154 S. W., 1067.  
*Dredging Co. vs. State*, 201 S. W., 1065.

As stated above, these rules govern in matters of taxation generally, and have no specific application to inheritance tax questions, but, generally speaking, furnish the proper rules for inheritance taxation.

As the Texas courts have not had occasion to prescribe rules by which to determine the situs of property for the purposes of inheritance taxes, it will be necessary to look to other jurisdictions for such rules. In 26 R. C. L., Section 178, page 209, the following is stated:

"The tendency in many States has been to tax all personal property within its territorial boundaries, notwithstanding it may be owned by non-residents, and also to tax all property of its residents, notwithstanding it may be located without the State. Clearly, this is not entirely consistent, and possibly it is not free from injustice, but it is not opposed to constitutional principles."

In Section 179, page 210 of the same volume of R. C. L., this principle is stated:

"The personal property of a decedent, whatever its character and wherever situated, is subject to an inheritance tax in the State of which its owner was a resident at the time of his death."

Under these rules double taxation is possible, but such is not contrary to fundamental law, as will be seen in the decisions of the Supreme Court of the United States in *Blackstone vs. Miller*, 188 U. S., 189, and *Bullen vs. State of Wisconsin*, 240 U. S., 625.

Section 2 of our inheritance tax law is very similar to the corresponding section of the inheritance tax law of the State of Massachusetts. In the case of *Frothingham vs. Shaw*, 55 N. E., 623, the Supreme Court of Massachusetts, in construing that section of the Massachusetts law, said:

"It is true that the public statutes provide that personal property, wherever situated, whether within or without the commonwealth, shall be taxed to the owner in the place where he is an inhabitant. But it is obvious that the Legislature cannot authorize the taxation of property over which it has no control, and the principle underlying the provision is that personal property follows the person of the owner, and properly may be regarded, therefore, for the purposes of taxation, as having a situs at his domicile, and as being taxable there."

At another place in the same opinion it is stated:

"In arriving at the amount of the tax, the property within the jurisdiction of the commonwealth is considered, and we see no reason for supposing that the Legislature intended to depart from the principle heretofore adopted, which regards personal property, for the purposes of taxation, as having a situs at the domicile of its owner."

See, also, the following authorities:

*People vs. Union Trust Co.*, 99 N. E., 377 (Ill.).  
*State vs. Ramsey County Probate Court*, 145 N. W., 390 (Minn.).  
*In re Swift*, 32 N. E., 1096 (N. Y.).  
*State vs. Dalrymple*, 17 Atl., 82 (Md.).

In re Rogers, 112 N. W., 931 (Mich.).  
 In re Ramsdell, 83 N. E., 584 (N. Y.).

As to real estate, the rules are somewhat different. In Gleason & Otis on Inheritance Taxation, Third Edition, 1922, on page 300, the following rule is stated:

"The authorities are all agreed that the real estate of a resident decedent located in a foreign jurisdiction is not taxable and *a fortiori* as to a non-resident," citing authorities from several States.

In 26 R. C. L., Section 180, page 211, the following is stated:

"The succession to the real estate of a deceased intestate depends upon the law of the State in which it is situated and not upon that of the domicile of the owner, and there is no jurisdiction upon which to base an inheritance tax in the State of the owner's domicile with respect to real estate situated in another State. If the deceased left a will, while the devolution is governed by the testamentary instrument, and thus in a sense by the law of the testator's domicile, the will can have no effect with respect to real property in another State unless it is admitted to ancillary probate in such State, and the inheritance tax laws of the testator's domicile have not been held to apply in such a case. It is held in some jurisdictions, however, that when the testator directs in his will that land in other States be sold for payment of his legacies, or when it is manifestly impossible to carry out the will without selling the land, by virtue of the doctrine of equitable conversion, the legacies are taxable in the State of the testator's domicile although paid in whole or in part out of the proceeds of the sale of land situated in other States. To effect a conversion of realty into personalty by law, there must be a positive direction to sell or it must be necessary to sell, to carry out the provisions of the law, or there must have been a blending of the realty and personalty which creates a single fund out of which the beneficiaries are to be paid."

On the question of equitable conversion, the weight of authority seems to be against the application of the doctrine.

Gleason & Otis on Inheritance Taxation, 3rd ed., p. 301.  
 Connell vs. Crosby, 71 N. E., 350 (Ill.).  
 McCurdy vs. McCurdy, 83 N. E., 881 (Mass.).  
 Matter of Swift Est., 32 N. E., 1096 (N. Y.).

In the case of McCurdy vs. McCurdy, 83 N. E., 881, the Supreme Court of Massachusetts, in refusing to adopt the rule of equitable conversion, said:

"Secondly, the law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different States."

The following authorities support the doctrine of equitable conversion:

In re Marr's Estate, 87 Atl., 621 (Pa.).  
 In re Sanford's Estate, 175 N. W., 506 (Iowa).

Answering your questions specifically and in the order propounded, you are advised as follows:

1. (a) All personal property permanently situated within the territorial boundaries of this State, regardless of whether owned by residents or non-residents, is within the jurisdiction of this State and is subject to inheritance taxes in Texas.

(b) All personal property belonging to residents of this State, re-

ardless of where located, is within the jurisdiction of this State and is subject to inheritance taxes in Texas.

(c) All real estate situated in Texas is within the jurisdiction of the State and is subject to inheritance taxes in this State.

2. In answer to your second question, you are advised that the transfer from a resident decedent of chattels, notes and other securities located in a foreign State is subject to an inheritance tax in this State.

3. In answer to your third question, you are advised that the transfer from a resident decedent of real estate situated in a foreign State is not subject to an inheritance tax in this State.

Yours very truly,

R. E. SEAGLER,  
Assistant Attorney General.

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Op. No. 2534, Bk. 59, P. 313.

CONSTITUTIONAL LAW—POWERS OF COMMISSIONERS COURT—DELINQUENT TAX.

1. The commissioners' courts are without authority to contract with attorneys to act independent of the county and district attorneys in the filing of suits for collection of delinquent taxes.

2. Commissioners' courts possess only such powers as are expressly conferred upon them either by the Constitution or statutes, and, in addition, such implied powers as are reasonably necessary to the proper execution of those expressly conferred. The Constitution gives such court exclusive control over county affairs and precludes the court from exercising any authority or control of State taxes or other State funds.

3. The Constitution of this State inhibits the Legislature from conferring authority on the commissioners' court to exercise discretion as to whether or not suit for collection of delinquent taxes shall be brought.

4. The Constitution of this State expressly takes from the Legislature the power to enact any statute, the effect of which would be to release, extinguish or abandon any taxes, delinquent or otherwise, due the State with the exception made in Section 10, Article 8. However, the collection of delinquent taxes by suit and judicial sale not being the only, or exclusive remedy or means available to the State for the collection of delinquent taxes, this provision of the act does not conflict with any constitutional provision and is, therefore, valid.

5. There is no statutory or constitutional provision authorizing the commissioners' court to contract with attorneys or other persons for the collection of delinquent taxes except that such court may contract with an attorney to assist the county and district attorneys in the performance of their duties. Other contracts for the purpose of collecting delinquent taxes are invalid and unenforceable.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 10, 1923.

*Hon. Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: This is to acknowledge receipt of letters addressed to you and by you referred to this Department, relative to the collection of delinquent taxes by suit. In the letters above mentioned are submitted the following questions:

1. Has the commissioners' court authority to contract with an attorney for the purpose of filing and prosecuting suits for the collection of delinquent taxes, the attorneys so employed to proceed in such suits without the joinder or assistance of the county or district attorney?

2. Has the commissioners' court authority to use or appropriate State taxes for the purpose of compensating an attorney to enforce or assist in the enforcement of the collection of delinquent State and county taxes by suit, such compensation being fixed by the commissioners' court at a certain per cent of such taxes, penalty and interest actually collected?

3. Has the commissioners' court authority to have suits for delinquent taxes involving \$5.00 or less instituted or not instituted as such court may deem to be for the best interest of the county?

4. Does the provision made in Article 7688, as amended by the Thirty-eighth Legislature, Third Called Session, precluding county and district attorneys from filing suit for the collection of delinquent taxes remaining unpaid for all years since the 31st day of December, 1908, contravene the constitutional provision inhibiting the Legislature from releasing or authorizing the releasing of the indebtedness, liability or obligation of any incorporation or individual to the State or county?

5. Has the commissioners' court legal authority to contract with an attorney or other person for the purpose of collecting delinquent taxes on real or personal property otherwise than by suit?

The above questions will be discussed in their order and each question involves the construction and interpretation of House bill No. 11, Chapter 13, page 31, Acts of the Second Called Session of the Thirty-eighth Legislature, as the same was amended by House bill No. 68, Chapter 21, page 180, Acts of the Third Called Session of the Thirty-eighth Legislature.

1.

Section 2 of House bill No. 68, Chapter 21, page 184, Acts of the Third Called Session of the Thirty-eighth Legislature, provides that the commissioners court of any county, after thirty days' written notice to the county attorney or district attorney, to file delinquent tax suits and his failure so to do, and if such commissioners court shall deem it necessary or expedient, such court may contract with any competent attorney to enforce or assist in the enforcement of the collection of any delinquent State and county taxes for a per cent of the taxes, penalty and interest, actually collected and it shall be the duty of the county or district attorney to actively assist any person with whom such contract is made by filing and pushing to a speedy conclusion all suits for collection of delinquent taxes under any contract hereinabove specified, and further providing that where any district or county attorney shall fail or refuse to file and prosecute such suits in good faith he shall not be entitled to any fees therefor, but such fees shall nevertheless be collected as a part of the cost of suit and applied on the payment of the compensation allowed by the attorney prosecuting such suit, and the attorney with whom such contract has been made is hereby fully empowered and authorized to proceed in such suits without the joinder or assistance of said county or district attorney.

The validity of Section 2 of House bill No. 68, amending Section 7 of House bill No. 11, providing for the employment of an attorney by the commissioners court for the purpose of filing suit for the collection of delinquent taxes and authorizing such attorney to proceed in such suits without the joinder or assistance of the county or district attorney is questioned upon the ground that its necessary effect is to substitute the attorney whom the commissioners court may thus employ for the county or district attorney of the State in the prosecution

of suits by the State for the collection of delinquent taxes or, in other words, to disregard the county and district attorneys and supplant them by the employment of another attorney and to empower such attorney to discharge the duties imposed upon the county and district attorney by statutory and constitutional provisions of this State.

If such be the effect of this part of the act and its provisions in respect to the functions or duties of the attorney whom the commissioners court is authorized to engage for the services named, it is condemned by the Constitution. That instrument, by Section 21 of Article 5, lodges with the county and district attorney the duty of representing the State in all cases in the district and inferior courts with the right in the Legislature to regulate by law the respective duties of district and county attorneys.

The powers thus conferred by the Constitution upon county and district attorneys are exclusive. The Legislature cannot devolve them upon others.

In the case of *Terrell vs. Greene*, 31 S. W., 631, the Supreme Court of this State held:

"While the commissioners' court might employ counsel to assist the county attorney in the performance of this duty, it had not the authority under the law to displace him from his position and rightful authority under the law as an officer of that county."

In the case of *the State vs. Moore*, 57 Texas, 309, the Supreme Court held the following:

"It must be presumed that the Constitution, in selecting depositaries of a given power, unless it be otherwise expressed, intended that the depositary should exercise an exclusive power, which the Legislature could not transfer by appointing some other officer to the exercise of the power."

The above quoted language was again approved by the Supreme Court of this State in the case of *the State vs. I. & G. N. R. R. Co.*, 35 S. W., 1067. In this case there is a distinction drawn in the provisions made in Section 22, Article 4, of the Constitution, and Section 21, Article 5, of the Constitution, as to the duties conferred upon the Attorney General and the county and district attorneys. It was held that the county and district attorneys could not perform the duties imposed upon the Attorney General by the Constitution, and the court further held that:

"It results that the statute above quoted, in so far as it attempts to confer on the district and county attorney authority to institute the proceedings in this cause, is unconstitutional and void, unless there be some other constitutional provision authorizing the Legislature to confer upon the district and county attorneys concurrent jurisdiction with the Attorney General in such cases."

In the case of *Harris County vs. Stewart*, 41 S. W., 650, the Supreme Court of this State held:

"Under Constitution, Article 5, Section 2, providing for the election of the county attorney where there is no resident district attorney, and that he shall 'represent the State in all cases in the district and inferior courts' of his county; and that, '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. Where there is a county attorney the charter provision of a city in the county

authorizing the city attorney, in the recorder's court, to exercise the powers conferred on the county attorney, is unconstitutional."

In the case of *Brady vs. Brooks*, 89 S. W., 1057, the Supreme Court of this State held that:

"The main purpose of Section 21 of Article 5 being manifestly to make it the duty of the county attorney or district attorney, as the case might be, to prosecute the pleas of the State, it may be gravely doubted whether it was within the power of the Legislature to deprive them of that function, by conferring it in whole or in part upon another officer."

As is stated by Chief Justice Gaines, in the language just quoted, if it may be gravely doubted whether it was within the power of the Legislature to deprive county and district attorneys of certain powers, authority and privileges and conferring such in whole or in part upon another officer of the State, then it is certainly reasonable to say that if the Legislature did not have the power to confer such duties and functions upon another officer of the State, it could not confer such duties and powers upon an individual of the State. The rule of law announced in the cases above cited was followed, and if possible, emphasized and made stronger by Chief Justice Phillips in the case of *Maud vs. Terrell*, 200 S. W., 376. In this case the Comptroller was authorized to employ an attorney for the purpose of collecting inheritance taxes, and the court said:

"If such is the necessary effect of the act and its provisions in respect to the functions of the person or persons whom the Comptroller is authorized to engage for the services named are not separable, it is condemned by the Constitution. That instrument, by Section 21 of Article 5, lodges with the county attorneys the duty of representing the State in all cases in the district and inferior courts, with the right in the Legislature to regulate by law the respective duties of district and county attorneys where a county is included in a district having a district attorney; and by Section 22 of Article 4 that duty as to suits and pleas in the Supreme Court is confided to the Attorney General. With the limitation existing in the authority of the Legislature, under Section 22 of Article 4, to create additional causes of action in favor of the State and intrust their prosecution, whether in the trial or in the appellate courts, solely to the Attorney General, the powers thus conferred by the Constitution upon these officials are exclusive. The Legislature cannot devolve them upon others. Nor can it interfere with the right to exercise them. *Brady vs. Brooks*, 99 Texas, 366; 89 S. W., 1052. *Harris County vs. Stewart*, 91 Texas, 133; 44 S. W., 650. *State vs. International & Great Northern Railroad Company*, 89 Texas, 562; 35 S. W., 1067. It may provide assistance for the proper discharge by these officials of their duties, but since in the matter of prosecuting the pleas of the State in the courts the powers reposed in them are exclusive in their nature, it cannot, for the performance of that function, obtrude other persons upon them and compel the acceptance of their services. Wherever provision is made for the services of other persons for this express purpose, it is the constitutional right of the Attorney General and the county and district attorneys to decline them or not at their discretion, and, if availed of, the services are to be rendered in subordination to their authority."

In disposing of the constitutionality of this statutory provision, we think that Chief Justice Phillips, in the case of *Maud vs. Terrell*, supra, clearly states the rule of construction, which we here adopt:

"An act of the Legislature is not to be declared unconstitutional unless plainly so. The presumption is that the Legislature acted in the light of the Constitution, with the intention to observe it rather than violate it. Where the language of the particular enactment is unambiguous and the conflict with the Constitution is hence apparent, there is no alternative but to declare the enactment void. In such cases words cannot be read into a statute or out of

is to save it. But where the language is of doubtful meaning, reasonably susceptible of different constructions, rendering the act valid if construed in one sense and invalid if construed in another, that construction will be adopted which sustains the act rather than destroys it. Likewise, where the terms used in a statute are general, reasonably admitting of a construction which does not condemn it, the language will be restrained in its operation so as to harmonize the statute with the Constitution though, literally, it be susceptible of a broader meaning which would conflict with the Constitution. These are just and wise rules. They are of general application. They exist because courts are not to sit as severe and anxious critics of legislative expression, or as censors of the form in which statutes are written. It is the duty of courts to see that the Constitution is observed in the enactment of laws and to fearlessly declare a law void which violates the Constitution. But these rules are for their guidance as an injunction that the language used in the writing of statutes is not always precise; that frequently terms of doubtful meaning are employed; that where this is true and the terms used reasonably admit of it, that construction is to be applied which will uphold the law; and that it is only where the language plainly contravenes the Constitution are they warranted in holding a law invalid.

"The test, therefore, to be used in determining the validity of this act is simply whether by plain and unambiguous language it deprives the county attorneys and the Attorney General of their authority to prosecute in the courts suits by the State for the recovery of inheritance taxes."

The Thirty-eighth Legislature, at its Third Called Session, Section 2, Chapter 21, page 184, provided that:

"The attorney with whom such contract has been made is hereby fully empowered and authorized to proceed in such suits without the joinder and assistance of said county or district attorney."

We are unable to conceive of any language that the Legislature may have adopted in making this provision that would have been more simple, plain and less unambiguous. Its meaning and effect is so clear as to make it unnecessary for construction.

You are therefore advised that we are of the opinion that provisions made in Section 2, Chapter 21, page 184, Acts of the Thirty-eighth Legislature, at its Third Called Session, authorizing the commissioners court to contract with some competent attorney for the purpose of filing and prosecuting suits for the collection of delinquent taxes without "the joinder or assistance of the county or district attorney," contravenes Section 21 of Article 5 of the Constitution of this State wherein such duties are conferred exclusively upon the county and district attorneys of this State and the commissioners court of the various counties of this State are prohibited from making such contract with such attorneys for such purpose.

2.

Section 2 of Chapter 21, page 184, Acts of the Thirty-eighth Legislature, at its Third Called Session amends Section 71, Chapter 13, page 38, Acts of the Thirty-eighth Legislature at its Second Called Session. However, such amendment in no way affects the issue here involved since the language used in each instance is as follows:

"That whenever the commissioners' court of any county after thirty days' written notice to the county attorney or district attorney to file delinquent tax suits and his failure so to do, shall deem it necessary or expedient, said court may contract with any competent attorney to enforce or assist in the enforcement of the collection of any delinquent State and county taxes for a per cent on the taxes, penalty and interest actually collected."

This provision confers exclusive authority upon the commissioners court to make such contracts and to fix such compensation as they might deem proper and necessary. There is no restriction or limitation upon the commissioners court in fixing the compensation to be allowed the attorney employed for the purpose of assisting or enforcing the collection of such delinquent taxes, but leaves it entirely within the discretion of such court to fix such compensation on a per cent basis at any amount that they might deem in their judgment and discretion necessary. There is nothing in the act to prevent such court from fixing such compensation at 99 9/10 per cent of all taxes, interest and penalties collected, and in this way deprive the State or county of all taxes except one-tenth of 1 per cent of same, nor is there anything in such act to prevent the commissioners court from appropriating all of the delinquent taxes due the State for the purpose of collecting delinquent taxes. Commissioners courts are county governmental agencies, made so by Article 5, Section 18, of the Constitution, possessing only such powers as are expressly conferred on them acting as a court either by constitution or statutes, and, in addition, such implied powers as are reasonably necessary to the proper execution of those expressly conferred. The general scope of their duties being the administration of the county affairs, they are administrative officers rather than judicial or legislative officers. Chapter 2, Title 40, Revised Civil Statutes of this State defines the powers and duties of county commissioners, but nowhere, in any way, gives them authority over State funds or affairs except as a board of equalization, which is provided for by statute and the Constitution. Section 18 of Article 5 of the Constitution reads:

*"The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of this State, or as may be hereafter prescribed."*

This provision of the Constitution is unambiguous. Its terms, meaning and effect cannot be misunderstood. The framers of the Constitution and the people when they adopted the Constitution surely did not intend anything else but that the commissioners court should be a court governing the business affairs of the county alone. It was never intended to possess or exercise any control whatever over State affairs or finances. Since the Constitution makes it a court of this kind, we are at a loss to know how the Legislature confers power or authority upon such court when the same was denied under the plain provisions of our Constitution. We do not think it can be done. However, we recognize the fact that the method to be devised for the collection of delinquent taxes, the Legislature must determine, subject only to such rules, limitations, and restraints as the Constitution of the State may have imposed. The commissioners court has no authority to fix the tax rate for State taxes or have anything to do with the collection of such taxes. The Governor, Comptroller and Treasurer of this State constitute a board to calculate the ad valorem tax to be levied and collected each year for State and public free school purposes. (Article 7349.) The statutes of the State make it the duty of the tax assessor of each county to make to the Comptroller, on or before the 15th day



of July of each year, a statement showing as nearly as can be ascertained the total amount of property in each county subject to taxation. In keeping with the constitutional provisions made by Article 5, Section 18, the Legislature authorized the commissioners court of the several counties of this State to calculate the county rate and adjust the taxes levied in their respective counties for general purposes. (Article 7353.) The above provision of our statutes are referred to for the purpose of indicating that the commissioners court has no control whatever over State taxes. If in these conclusions we are correct it is apparent that in the absence of such provision, such court would be without authority to use or appropriate any part of the State taxes, penalties or interest for the purpose of compensating an attorney employed by such court to file and prosecute suits for the purpose of collecting State and county delinquent taxes, interest and penalty.

Our scheme of taxation as authorized by our Constitution relating to the fixing and raising revenues for State, county, cities, towns, school districts, levy districts, drainage districts and other instances, clearly demonstrates that the framers of our Constitution intended that the State and all of its political subdivisions should exercise exclusive authority in so far as the question of raising and disbursing revenues was concerned. The power and authority to levy and collect and disburse such revenues is by the Constitution and statute placed upon the governing board of such political subdivision and in so far as counties are concerned, this duty is placed upon the commissioners court, and it is a familiar rule of construction that when one governmental agency, be it composed of one or more persons, is named in the Constitution as being authorized to do a certain thing all other governmental agencies are to be excluded from doing the same thing as effectually as if they were positively forbidden. The provision made by our Constitution making the commissioners court the governing body of county affairs subject to such restrictions as are imposed by constitutional and statutory enactment is within itself sufficient to warrant the conclusion that the commissioners court has no right or power to collect, disburse or otherwise exercise any control over State taxes.

If the Legislature can authorize the commissioners court to exercise control in any manner over a part of the State taxes, then it necessarily follows along the same line of reasoning that the Legislature is not inhibited by any constitutional provision from placing all of the State's taxes and funds at the disposal of the commissioners courts of this State, the effect of which would be the abolishing of the constitutional office of State Treasurer and other governmental agencies whose duties and functions are to collect and disburse State revenues, as an office with no duties for the incumbent to perform would be a useless thing.

Section 9, Article 8, of the Constitution of this State deals with the rate and purposes for which the State and its political subdivisions may levy and collect taxes. As before stated, it clearly indicates that it was the intent of the framers of the Constitution to give exclusive control to the State of its revenues. The principal purposes in establishing counties and other political subdivisions is to make effectual

the political organization and civil administration of the State in respect to its general purposes and policies which require supervision and control, and in a large measure the administration of public justice. Since a county, while a body corporate, is a subdivision of the State created for administrative and other public purposes, and owes its creation to the State, it is a rule that it is subject at all times to legislative control and change, that is to say, that aside from the Constitution and the organic law of the State the Legislature is not limited in the right to control the counties inasmuch as these are merely agencies of the State. This being true does not, in our minds, give the Legislature authority to place upon counties and other political subdivisions of the State and their board of managing officers the right to use or appropriate, for any purpose, the taxes of the State levied and collected by a general statute for the purposes of meeting and discharging the expenses and burdens of the State.

Under our plan of taxation and government, as provided by our Constitution and statutes, all State taxes and other revenue must be paid into the State Treasury, from which it cannot be withdrawn except by an appropriation made by the Legislature. Our Constitution authorizes the Legislature to appropriate money paid or to be paid into the State Treasury, but we know of no authority that the Legislature would have to divert or appropriate State funds before they reached the State Treasury except the instance provided for by our Constitution in cases of public calamity, and in that event it requires a two-thirds vote of both houses of the Legislature.

Section 6, Article 8, of the Constitution inhibits the withdrawal of any money from the Treasury except in pursuance of specific appropriation made by law. It will not be contended that the Legislature has authority to appropriate any part of the State's revenues for any purpose that has not been paid into the State Treasury. It would be a very dangerous doctrine to allow the revenues of the public to be tampered with while in process of realization. Then if the Legislature cannot appropriate moneys before it is paid into the State Treasury, can it give authority to the commissioners court to do a thing that the Legislature itself cannot do? Corpus Juris, Vol. 15, pages 585 and 589, announces the correct rule of law as applicable to the question here involved in this language:

"Taxes levied and collected by a county for State purposes must be paid into the State Treasury." "County boards (commissioners' court) have no direction or control over funds which are not county funds, strictly speaking."

The Supreme Court of Michigan, in the case of *People vs. Van Tassel*, 40 N. W., 847, held that "the taxes were levied under a law which compels their payment, undiminished, into the State Treasury. Furthermore, the moneys in question are not county moneys, and never were. The taxes laid on individual taxpayers for the direct benefit of the State. The supervisors (commissioners court) have no more control over the money in their hands than if it were in the State Treasury.

The courts of this State have never passed upon the question as to whether or not a commissioners court has a right to expend or appropriate State funds or taxes for the purpose of compensating an at-

torney for a collection of delinquent taxes, nor have they ever passed upon the question as to whether or not the Legislature had the authority to confer the power upon a commissioners court to exercise any control or supervision whatever or for any purpose over State funds. Indeed, this must be the first instance where a Legislature of this State has ever enacted a statute placing State taxes at the disposal of a commissioners court. For this reason the courts of the State have not heretofore had an opportunity to pass upon this question.

However, the courts of this State have passed upon the rights and authority of the commissioners court to make contracts and fix compensation for the purpose of collecting delinquent taxes, notwithstanding the fact that such cases were decided upon vastly different statutory provisions to those here under discussion and cannot be regarded as applicable to the questions here involved, but we deem it material to discuss and quote from such cases. The case of *Stringer vs. Franklin County*, 123 S. W., 1173, was a suit based upon a contract between county commissioners of Franklin County and C. W. Stringer et al., and the defendants in this case were engaged by such court for the purpose of collecting delinquent taxes and as compensation for their services they were to collect and retain all of the delinquent taxes shown by their delinquent list to be due to the county. In passing upon this contract, Judge Hodges of the Texarkana Court of Civil Appeals held:

"The commissioners' court has no control over the collection of taxes; that duty devolves upon others."

"Where the law imposes on an officer the performance of acts as a part of his official duties, the commissioners' court of the county is without authority to contract with any other person to perform such service."

"All taxes, whether current or delinquent, are first to be paid to the collector, and by him, at certain stated periods, paid over to the treasury, and by the latter paid out upon the proper orders of those designated by law."

"Such a proceeding was not only an attempted transfer of the official duty of the tax collector in collecting delinquent taxes, but it was an effort to barter to private individuals the county's sources of revenue. Neither of these could the commissioners' court do. The duty of the tax collector to collect all taxes due the county and the State is so well settled that it is unnecessary to refer to the specific provisions of the law on that subject. That this duty is one of the important governmental ministerial functions which he alone can exercise, we think it too plain to be disregarded."

If in this case the court correctly held the law in stating that "such a proceeding was not only an attempted transfer of the official duty of the tax collector in collecting delinquent taxes, but it was an effort to barter to private individuals the county's sources of revenue, neither of these could the commissioners court do," then it necessarily follows that since the commissioners court is given authority exclusively over all county business by the provisions made in Section 18, Article 5, of the Constitution of this State, if it could not appropriate the county's taxes over which it had control, it could not appropriate any part of the State taxes over which *it has no control*.

Prior to the enactment of Chapter 141, Acts of the Thirty-fourth Legislature, whereby Article 7707, Revised Civil Statutes, was specifically repealed, the commissioners courts of various counties were authorized to contract with persons to enforce the collection of delinquent State and county taxes, but were only authorized to contract

in so far as the county taxes were concerned. In so far as the State taxes were concerned, Article 7707 authorized the Comptroller to join the commissioners court in such contract. It will be observed that the provisions of Article 7707 were entirely different to the act here under discussion. The prior act not only required the Comptroller to join in such contracts, but placed a limitation upon the compensation to be allowed.

The Legislature, at the time it enacted Article 7707, evidently realized that it had no power to authorize the commissioners court to exercise any control over the collection or disbursement of State taxes. In passing upon contracts made under the authority and in compliance with the provisions of Article 7707, the courts of this State held that since Section 18, Article 5, Constitution, made the commissioners court the governing body of county affairs under such restrictions and limitations as the Constitution and statutes of this State may impose in so far as county affairs were concerned, that such court had the right to contract with persons for the purpose of collecting delinquent taxes due the county, but in no instance have the courts said that the commissioners court has the power to exercise any control over State taxes.

Bailey vs. Aransas County, 102 S. W., 1159.

Lane vs. Mayfield, 158 S. W., 225.

Holt vs. State, 176 S. W., 745.

Cooley on Taxation, 3rd ed., 829, says that a sovereignty will provide such methods for the collection of its revenues as are suitable to the various taxes laid, and its discretion is only limited by the Constitution.

The framers of the Constitution "by public money," most probably meant moneys received by officers of a State and belonging to the State, derived in the ordinary process of taxation, and other ways permissible under the Constitution and statutes of the State.

Section 51, Article 3, of the Constitution inhibits the Legislature from making any grant or authorizing the making of any grant of public money to any individual or association of individuals whatever. The purpose of this act is to authorize the commissioners court to grant public money to individuals or an association of individuals for the purpose of filing and prosecuting suits for the collection of delinquent taxes, interest and penalties.

If we are to give any consideration to the constitutional inhibition last referred to, we must conclude that the Legislature is without authority to empower commissioners courts to grant or barter away the State's public money to individuals or an association of individuals for any purpose whatsoever.

We are cognizant of the fact that the public policy of the State is to be determined by its Constitution and law-making body, but to announce and adhere to the policy of the commissioners court disbursing the public funds of the State would be a startling proposition.

Cooley on Taxation, 3rd ed., 831, uses this language:

"This is a method suited only to arbitrary governments and unenlightened peoples. It may be said in general to consist in putting the collection of the revenues under general rules for the determination of individual taxes, but without any specific listing, into the hands of contractors, who are to return

to the treasury a certain net result, retaining the remainder for their profit. Such a system, by making it the personal interest of those who are to administer the tax laws to render them as productive as possible, might increase the public revenues both by inducing a more vigilant search for subjects of taxation, and by insuring more strict enforcement of collections; but it is so liable to abuse and oppression as generally to be condemned. In America it would not even be proposed, much less tolerated. And, indeed, any arrangement making the collector a party of interest as to the taxes committed to him is contrary to the policy of the law."

We have carefully revolved this question in its various bearings and think it best, according to sound legal principles and sound public policy to shut the door *in limine* upon a doctrine which, if pressed to its legitimate consequences, would lead to dangerous results. You are, therefore, advised that the commissioners courts of the various counties of this State are precluded by constitutional inhibition from exercising any control over the public funds belonging to the State.

3.

Section 3, Chapter 21, page 184, Acts of the Thirty-eighth Legislature, Third Called Session, provides "that where the amount of taxes delinquent is not more than \$5.00, the discretion is hereby given to the commissioners courts to have such suits for \$5.00 or less instituted or not as said courts may deem to be for the best interests of the county." It is apparent from the reading of this portion of the act that the Legislature had in mind only the counties' interests at the time they used the language, "as said court may deem to be for the best interests of the county." There is no language used to indicate that the Legislature gave consideration to the State's interest in delinquent taxes amounting to \$5.00 or less, or probably they were cognizant of the fact that the commissioners courts under constitutional restraint were prohibited from exercising any discretion or control of delinquent taxes due the State. It is to be conceded that the commissioners court enjoyed the right to exercise such powers and jurisdiction over all county business as is conferred by the Constitution and the statutes of the State, not inconsistent with the Constitution. The courts in construing our statutory and constitutional provisions relative to the powers and authority of commissioners courts have never placed any other construction on such provisions save and except that such commissioners courts had only to do with county affairs.

Jernigan vs. Finley, 38 S. W., 24.

Bland vs. Orr, 39 S. W., 558.

Baldwin vs. Travis County, 88 S. W., 484.

The Constitution of this State, after declaring that the powers of the government shall be divided into three departments, each of which shall be confided to a separate magistracy; and no person, or collection of persons, being one of these departments, shall exercise any powers properly attached to either of the others. The Legislature is one of the three departments referred to in the Constitution, and under the principle of the separation of governmental power the legislative power of the State is fixed in the State Legislature. That body is vested with the whole of the law-making power of the State and has authority to

deal with any subject within the scope of civil government except in so far as it is restrained by constitutional provision, either State or Federal. It is a cardinal principle of representative government that, except when authorized by the Constitution, the Legislature cannot delegate the power to make laws to any other authority or body. Since the general power of legislation is conferred upon the Legislature, that body may not escape its duties and responsibilities by delegating such legislative powers to the commissioners court as was attempted to do in the act here under discussion, in so far as delinquent taxes are concerned, amounting to \$5.00 or less. It is a well established and long recognized rule of law supported by an overwhelming weight of authorities that the law must be complete in all its terms and provisions, when it leaves the legislative branch of government, and the option to become or not to become subject to the discretion of the commissioners court has the effect of leaving this provision of the act incomplete whereby it is made optional with the commissioners courts as to whether or not suit shall be instituted for the collection of delinquent taxes amounting to \$5.00 or less. We are of the opinion that this is an authorized delegation of legislative authority.

Cooley, Const. Lim., 7th ed., page 164, says:

“One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that Department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies, upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”

We quote from the case of Dowling vs. Lancashire Insurance Company, 65 N. W., 738, as follows:

“A law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the Legislature, so that in form and substance it is a law in all its details *in praesenti* but which may be left to take effect *in futuro*, if necessary upon the ascertainment of any prescribed fact or event.”

Bradshaw vs. Lankford, 21 Atl., 65.

Owensboro & N. R. Co. vs. Todd, 15 S. W., 56.

Arms vs. Ayer, 61 N. E., 851.

State taxes, whether current or delinquent, are levied, assessed and must be collected under general statutory provisions by virtue of Section 3, Article 8, of the Constitution, providing that “taxes shall be levied and collected by general laws and for public purposes only.” We do not think that this provision of the act meets this constitutional requirement, for the reason that in some counties taxes involving \$5.00 or less might be collected by suit, while in other counties the commissioners court would not deem it for the best interest of the county and would direct that suits involving this amount be not brought. If this act involved only county taxes the commissioners court might have authority under a legislative grant to say whether or not suit should be instituted for the collection of delinquent taxes, but we are unable to

find any constitutional provision that empowers the Legislature to place such control over taxes due the State.

Unquestionably if the Legislature can bestow the power and discretion upon commissioners courts as to whether or not suits for the collection of delinquent taxes, interest and penalties for \$5.00 or less shall be instituted, then there is nothing to prevent such Legislature from conferring the power upon the commissioners courts to determine within their respective counties as to whether or not suit for the collection of delinquent taxes, interest and penalties should be filed regardless of the amount. The inevitable result being that in some counties suits would be filed for the collection of delinquent taxes, interest and penalties, while in other counties this action would not obtain. The policy would be wholly inconsistent with the constitutional requirement that taxes shall be equal and uniform. Furthermore, it would be in absolute disregard of the safeguards granted and conferred by constitutional provision and would resolve itself into a question of legislative policy, to be determined by the discretion of the commissioners court. This transfer of the enactment or enforcement of laws to the commissioners court, to become operative in their discretion with regard to the taxes due the State, is directly subversive of our constitutional form of government and cannot be upheld or justified unless expressly authorized by some provision of the Constitution itself.

You are, therefore, advised that in our opinion that under our Constitution the Legislature is prohibited from conferring upon the commissioners courts of this State the arbitrary power and authority to say whether or not suit shall be brought for the collection of delinquent taxes, interest and penalties, regardless of the amount.

4.

Section 3, Chapter 21, page 185, Acts of the Thirty-eighth Legislature, Third Called Session, provides:

"Whenever any taxes on real estate have become delinquent it shall be the duty of the county attorneys upon the expiration of thirty days' notice provided for in Section 1 of this act, or as soon thereafter as practicable, to file suit in the name of the State of Texas in the district court of the county where such real estate is situated, for the total amount of taxes, interest, penalties and cost that have remained unpaid for all years *since the 31st day of December, 1908.*"

The plain import of the language, "total amount of taxes, interest, penalties and cost that have remained unpaid for all years since the 31st day of December, 1908," makes all delinquent taxes subject to the provisions of this act, regardless of the years for which they were levied and assessed. As taxes due and delinquent prior to the 31st day of December, 1908, and remaining unpaid since that time would be subject to collection by suit under this act for the reasons that they have remained unpaid since the 31st day of December, 1908; they would not be delinquent or subject to suit if such taxes had been paid, but insofar as the provisions of this act are concerned, the county attorney would be authorized to file suit for the collection of such taxes. The act does not say that a county attorney is not authorized or pro-

hibited from filing suits for the collection of all delinquent taxes, interest and penalties accruing prior to the 31st day of December, 1908, but specifically authorizes and makes it the duty of the county attorney to institute suit for all taxes, interest and penalties that have remained unpaid since that time. Probably this was not the intent of the Legislature, notwithstanding the fact that the language used is plain. However, in our opinion the above should not be construed as the intent of the Legislature and for this reason the act will be construed and interpreted by us under the assumption that the Legislature intended to preclude the county and district attorneys from bringing suits for the collection of delinquent taxes, interest and penalties accruing prior to the 31st day of December, 1908. The question to be determined is whether or not the above quoted portion of this act has the effect of releasing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or individual to this State or to any county herein. If such is the effect of this part of the act then it is obviously clear that it is in conflict with Section 55, Article 3; Section 10, Article 8; Section 1, Article 8; Section 2, Article 8, of the Constitution. State and county taxes levied but uncollected are a liability on the part of the delinquent taxpayer, and the payment thereof could not be released or extinguished and the Legislature is without authority to provide or to enact any provision, the effect of which would be to release or extinguish, in whole or in part, such liability of the delinquent taxpayer, or to enact any statute the meaning of which would be one of limitation.

Section 1, Article 8, of the Constitution of this State provides that:

“Taxation shall be equal and uniform.”

Section 2, Article 8, of the Constitution of this State exempts the property therein named from taxation and further provides that:

“All laws exempting property from taxation other than the property above mentioned shall be null and void.”

Section 10, Article 8, provides that:

“The Legislature shall have no power to release the inhabitants of, or property in, any county, city or town, from the payment of taxes levied for State and county purposes.”

Section 55, Article 3, of the Constitution provides that:

“The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or municipal incorporation therein.”

As was said in the case of *Olivier vs. City of Houston*, 93 Texas, 206, 54 S. W., 943, it is to be observed that the Constitution itself furnished many evidences of the earnest purpose of the framers to render impossible every form of government favoritism. The granting of special privileges, the bestowal of favors, the lightening of the public burdens as to one citizen at the expense of others, are contrary both to its spirit and its letter. So it is declared by such instrument that taxation shall be equal and uniform, but the force of this provision would be defeated if the power remained to relinquish at will the liability justly and fairly fixed against all delinquent taxpayers. For the prevention



of these evils, this constitutional provision was inserted. Its terms are broad enough to cover every conceivable obligation or liability due by any incorporation or individual, to the State, or to any county therein, the remission of such obligations or liabilities would diminish the public revenue, and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption. The difficulty of formulating tax laws which may surely accomplish the equal distribution of the burdens of government seems to have been fully realized by the framers of the Constitution embodying our organic laws, and, therefore, the citizen is hedged about with provisions safeguarding him against the abuse of the taxing power.

One of the principles upon which this government was founded is that of equality of right, and this principle is emphasized in that clause of the Fourteenth Amendment of the Federal Constitution which prohibits any State to deny to any individual the equal protection of the laws. It has been repeatedly said that the guaranty of the equal protection of the law means that 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 their lives, their liberty and their property, and in pursuit of happiness. On other occasions it has been said that the equal protection of the laws is a pledge of the protection of equal laws, and that it means equality of opportunity to all in like circumstances. This constitutional guaranty requires that all persons shall be treated alike, both in the privileges conferred and in the liabilities imposed and also in exemption from liabilities.

Could it be said that this act, if given the effect of exempting and releasing all the individuals and corporations of this State or any of its subdivisions, is consistent with such constitutional provisions, or does it meet the requirement of the constitutional guaranty requiring all persons to be treated alike both in privileges conferred and the liabilities imposed and also as to exemption from liability? Under this presumption, to our minds it is wholly inconsistent with such principles and bestows favors upon those whose taxes have been exempted and released and places a hardship and burden on those who have met and discharged their obligations to their government. It does not have the effect of making the taxes equal and uniform.

If the Legislature has the right and authority to enact a statute, the effect of which is to preclude county and district attorneys from instituting suits for the collection of delinquent taxes against land and the foreclosure of the constitutional lien thereon, prior to the 31st day of December, 1908, it must be agreed that it also has the power to preclude the county and district attorneys from instituting suits for the collection of delinquent taxes against land and the foreclosure of the constitutional lien for taxes accruing thereon prior to January 31, 1923, thus the result would be to take away from the State its remedy in the courts for the collection of all delinquent taxes, interest, and penalties, thereby depriving the State not only of the remedy, but of taxes legally levied and assessed, and revenue justly due the State, for which the statutes and Constitution of this State impose a lien to secure the payment thereof.

Section 15, Article 8, of the Constitution makes the annual assess-

ment upon landed property a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent; and such property may be sold for the payment of taxes, and penalties due by such delinquent, *under such regulations as the Legislature may provide*. Under this constitutional provision taxes may be collected under such regulations as the Legislature may provide. It was held in the case of the City of Henrietta vs. Eustis, 18 Texas, 18, 26 S. W., 619, that the remedy "by seizure and sale" does not preclude the right to proceed for taxes by suit at law. The language of this section of the Constitution, "and such property may be sold for the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide," relates to such summary method as the Legislature might deem advisable, then it follows that if our only remedy for the collection of delinquent taxes, interest and penalties was by suit, then the effect of this act would be to release and extinguish all taxes delinquent and accruing prior to the 31st day of December, 1908. However, it was recently held by our Supreme Court, in the case of Richey vs. Moor, 249 S. W., 172:

"That three methods are provided for securing and collecting taxes; first, foreclosure of and sale, under the constitutional lien imposed on each tract of land for the taxes assessed against it; second, the summary processes of seizure and sale by the collector; and, third, suit for taxes and a levy on and sale of all lands (except the homestead) in satisfaction of a judgment."

Under the rule of law announced in the case of Richey vs. Moor, *supra*, it is evident that the collection of delinquent taxes by suit is not our only remedy provided by statute for the collection of delinquent taxes. This being true, this provision of the act does not contravene any constitutional provision for the reason that it does not have the effect of releasing or extinguishing taxes in whole or in part, the indebtedness, liability or obligation of any incorporation, or individual, to the State or county. The Constitution certainly does not, either in terms or by implication, prohibit legislation providing for the foreclosure of the lien for taxes in the courts and the sale thereof by judicial decree. The Legislature clearly had the power to provide such manner for the collection of taxes.

League vs. State, 56 S. W., 263.

City of Henrietta vs. Eustis, 26 S. W., 620.

Brown vs. Bonougli, 232 S. W., 490.

In the case of Brown vs. Bonougli, *supra*, Judge Greenwood, speaking for our Supreme Court, said:

"The Legislature not only provided for a judicial tax sale *in contrast* with THE FORMER SUMMARY TAX SALE, but it was careful to secure the property rights of the owner from invasion. \* \* \* The law is thus plainly written in Article 7689. If it were permissible or necessary to look beyond the plain language of the statute, it would seem manifest that it was the intent of the Legislature to remedy the evils which had been inseparable from the futile attempts to collect taxes through summary sales of land by authorizing their collection through judicial sale. The evils of the method of summary sales *were*:

"1. Disregard of the owner's property rights in dispensing with notice and an opportunity to be heard; and,

"2. Inability of the government to compel payment of that to which it was lawfully entitled."

It might be contended from the above quoted language that the enactment of statutes providing for suits and judicial sales for the collection of delinquent taxes has the effect of repealing the statutes authorizing the seizure and summary sale of property in satisfaction of delinquent taxes. However, if this contention be made it is entitled to but little consideration, since the case of *Richey vs. Moor*, supra, is the latest expression of our Supreme Court on this question, and for the further reason that the language used in the case of *Brown vs. Bonoughi* is not specific in its terms and it could only be said by implication that the holding in that case was in conflict with the case of *Richey vs. Moor*, supra.

The *State vs. Liles*, 212 S. W., 517, announces a rule of law that must be considered in disposing of the question here involved. In this case the court held:

"In the absence of a provision to the contrary in statute or judgment under which sale is made, the purchaser at a valid tax sale acquires title free from any lien for taxes assessed and delinquent for any years previous to that for which sale is made, and the State cannot recover State and county taxes antedating foreclosure sales."

The language just quoted unquestionably expresses a correct rule of law as between individuals, and we recognize a line of decisions of the various courts of this and other States holding that when the State gets into the courts of the country it is subject to and bound by all the rules of law and procedure that are applicable to its citizens. However, we are unwilling to agree to the proposition that the Legislature or the courts of the State can nullify and hold for naught a constitutional lien existing against landed property for the taxes due thereon. The conclusion reached in the concurring opinion in the case of *State vs. Lisle*, supra, as unusual as it is, meets with our approval for the reason that it announces a correct rule of law which we quote:

"But, notwithstanding the line of authorities, it appears to me that the rule cannot be applied to the State because of the Constitution and statutes applicable to delinquent taxes, providing that all assessments upon landed property shall be a special lien thereon, and it shall be subject to seizure and sale for the payment of all taxes, etc., due under such regulations as the Legislature may provide."

In the case of the *State vs. Liles*, supra, we do not know what the court meant by the language, "The State cannot recover State and county taxes antedating foreclosure sales," so we will indulge the presumption that the court meant that the State was precluded from collecting such taxes by suit and judicial sale and not by seizure and summary sale as provided for by statute. To announce and adhere to the proposition that the State had exhausted its statutory and constitutional lien securing the payment of delinquent taxes, thereby destroying all other remedies for the collection of such taxes by virtue of the fact that suit had been instituted and judicial sale had on landed property and such suit not including all the years for which taxes were due and delinquent would unquestionably lead to dangerous results, one of the evils being that it would permit the county or district attorney to unintentionally or otherwise defeat the State's right through its constitutional lien to collect delinquent taxes by failure to

institute suit for the collection of such taxes for some particular year or years for which such taxes were due and delinquent, and, in this way, destroy, invalidate and abrogate a constitutional lien existing against such landed property, a thing that the Legislature is by constitutional provision inhibited from doing. It certainly would be reasonable to presume that the Legislature or the courts of this State would not empower or permit the county attorney or other officer of the State to destroy a lien imposed against the property of individuals and incorporations by the Constitution. The provisions made in this act precluding the county and district attorneys from instituting suit for the collection of delinquent taxes accruing prior to December 31, 1908, not being the only or exclusive means or remedy that the State may invoke for the collection of delinquent taxes, we are of the opinion that this provision of the act does not conflict with any constitutional provision, and is, therefore, valid, and you are so advised.

## 5.

The question here to be determined is whether or not the commissioners court of any county has authority, under the laws of this State, to contract with an attorney for the purpose of collecting delinquent taxes due the State and counties other than by suit. The commissioners court is not given general authority over the county business, but merely such special powers as are specifically conferred by the Constitution and laws of the State.

Mills County vs. Lampasas County, 40 S. W., 404.

Bland vs. Orr, 39 S. W., 558.

Baldwin vs. Travis County, 88 S. W., 484.

We have heretofore concluded that the commissioners court was without authority under the statutes of this State to employ an attorney for the purpose of filing and prosecuting suits for the collection of delinquent taxes, but that such court may employ an attorney to assist the county and district attorneys in the filing and prosecuting suits for the collection of delinquent taxes. This conclusion is based upon the rule of law announced by the Supreme Court of this State in the case of Maud vs. Terrell, 200 S. W., 375, and authorities there cited. If the commissioners court has authority to contract with an attorney or other person for the collection of delinquent taxes, otherwise than by suit, such authority must be derived by virtue of some statutory provision.

An examination of the statutes of this State will not disclose any provision authorizing any person to collect taxes, current or delinquent, save and except the tax collector. The office of tax collector is a constitutional office and the duties of such officer are defined by statute. It is a holding of the courts of this State, as well as the courts of other States, that when an office is created by the Constitution and the duty and qualifications of such officer fixed by statute, that the commissioners court is without power to confer such duties upon any other person.

Therefore, it is clear that the commissioners court is without authority to confer the duties upon some other person, that the Constitu-

tion and statutes of this State have imposed upon the tax collector. It now becomes necessary to determine as to whether or not the statutes of this State impose any duties upon the county or district attorneys relative to the collection of delinquent taxes, otherwise than by suit. We do not deem it necessary to say more than that the statutes impose no duty upon the county and district attorneys of this State with reference to the collection of delinquent taxes, except that of filing suit.

Then, if the holding of our Supreme Court in the case of *Maud vs. Terrell*, supra, is correct, that is to say, that the commissioners court has only authority to employ counsel to assist county and district attorneys in the performance of their duties, and persons thus employed to be under the control, supervision and subordination of the county and district attorneys, the inevitable result would be that the commissioners court did not have authority to contract with attorneys and allow compensation for any services, except to assist the county and district attorneys in the performance of some duty imposed upon such county and district attorneys.

Chapter 21, page 180, Acts of the Thirty-eighth Legislature, Third Called Session, in the caption of such act we find this language: "Further providing for the employment of a special attorney to assist in collecting such taxes." In the body of such act, page 184, we find this provision: "Provided further, that whenever the commissioners court of any county, after thirty days' written notice to the county or district attorney to file delinquent tax suits, and his failure so to do shall deem it necessary or expedient, said court may contract with any competent attorney to enforce or assist in the enforcement of the collection of any delinquent State and county taxes for a per cent on the taxes, penalty and interest actually collected," and further providing, "and the attorney, with whom such contract had been made is hereby fully empowered and authorized to proceed on such suits without the joinder and assistance of said county or district attorney."

The last quoted provision is clearly in conflict with our Constitution. Therefore, it is not material to further discuss, except for the purpose of showing that the Legislature intended by such provision that the attorney so employed should perform no duties other than those imposed upon the county and district attorneys. That is, the filing of suits. That part of the act that we quote relative to contracting with a competent attorney to enforce or assist in the enforcement of the collection of delinquent State and county taxes, when considered and construed with the entire act clearly indicates that the Legislature intended nothing more or less than the hiring or employing of some attorney to assist in the collection of delinquent taxes, by suit.

The statutes controlling the employment of such attorneys is to our mind so plain, clear, unambiguous and so far from being misunderstood that we do not deem it necessary or material to further discuss this question. You are, therefore, advised that there is no statutory or constitutional provision authorizing the commissioners court to contract with attorneys or other persons for the collection of delinquent taxes, allowing therefor a certain per cent of such taxes, interest and

penalties, as are actually collected. The only authority with which a commissioners court is clothed is to contract with some attorney to assist the county and district attorneys in the performance of this duty.

What duty?

The duty of filing and prosecuting suits for the collection of delinquent taxes.

You are therefore advised that it is our opinion that any contract made by the commissioners court with an attorney or other person, that does not conform with the statutes as here construed is invalid and unenforcible.

In advising you that the several provisions of this act, herein discussed, contravene and conflict with certain constitutional provisions, we do so with a great deal of reluctance for the reason that the courts, whose province it is to determine the constitutionality of the unconstitutionality of legislative acts, have in a long series of cases announced the general principle that the presumption is in favor of the constitutionality of the statute. It is only when the invalidity is made to appear clearly and plainly and in such manner as to leave no reasonable doubt that the courts will declare it unconstitutional; it is to be observed, however, that these general principles and presumptions do not have universal application. The courts have declared a doctrine which, we think, applicable to the question here involved. That is to say, that when it is proposed by a statute to deny, modify or diminish a right or immunity secured to the people by the clear and explicit constitutional provisions, this presumption in the favor of the constitutionality of the statute no longer applies, but a contrary presumption arises against the validity of such statute.

*Salter vs. State*, 25 L. R. A. (New Series), 60.

The issues involved in this opinion constitute a very small part of the entire act. It is a fundamental principle that a legislative act may be constitutional in one part and unconstitutional in another part, and that if the invalid part is separable from the rest, the portion which is constitutional may stand, while that which is unconstitutional will be stricken out and rejected; but, where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole act falls. We think, after eliminating the invalid portions of this act, the remaining provisions are sufficient to be operative and accomplish their proper purposes. We do not think, by virtue of the fact that some of the provisions made in this act being in conflict with the Constitution, would render such act void to the extent that suits could not be filed for the collection of delinquent taxes. The question as to whether portions of a statute which are constitutional shall be upheld, while other portions are eliminated as unconstitutional is primarily one of intention on the part of the Legislature. If the objectionable parts of a statute are severable from the rest in such a way that the Legislature would be presumed to have enacted the valid portions without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional.

*Somerset County Commissioners vs. Pocomoke Bridge Co.*, 71 Atl., 472.

Commonwealth vs. Hanna, 81 N. E., 149; 11 L. R. A. (N. S.), 799.  
Mutual Loan Co. vs. Martell, L. R. A., 43 (N. S.), page 746.

We do not think the constitutional and the unconstitutional portions of this act are so dependent on each other as to warrant the belief that the Legislature intended them to take effect in their entirety. Therefore we feel that the Legislature would have passed the act with the unconstitutional part excluded.

The enforcement of the act after the elimination of the unconstitutional provisions would not produce results not contemplated or desired by the Legislature, as such act is sufficiently intact to enable the State and counties to collect delinquent taxes by suit against and judicial sale of the delinquent taxpayer's property.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2539, Bk. 59, P. 299.

OCCUPATION TAXES—EJUSDEM GENERIS—STATUTORY CONSTRUCTION.

1. Section 35, Article 7355, Revised Civil Statutes, as amended by Chapter 16, Acts of the Thirty-eighth Legislature, Second Called Session, does not levy a tax upon coin operated machines or devices, except those specifically named in the act, and others similar in kind and character.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 14, 1923.

*Honorable Shelby S. Cox, District Attorney, Dallas, Texas.*

DEAR SIR: From the statement of facts furnished this Department, it appears that the Interstate Sales Agency has attached within reach of each seat in many, if not all, of the street cars operated in the city of Dallas, a machine or device containing chewing gum. If any person so desires he may deposit a nickel in such machine or device, push a spring or lever, therefor and thereby receiving a package of chewing gum. We are not informed as to how many street cars are operated in the city of Dallas, or the number of seats in such cars, and, for this reason, we are unable to determine the amount of the tax imposed upon the Interstate Sales Agency in the event such concern is subject to the payment of such tax. However, this is immaterial except for the purpose of determining whether or not such tax is confiscatory or unreasonable. If there is a statute imposing a tax upon such concern for the operation of such machine or device, it is an occupation tax imposed by Section 35, Article 7355, of the Revised Civil Statutes of this State, as amended by Chapter 16, page 44, Acts of the Thirty-eighth Legislature at its Second Called Session, which provides:

"From each owner or manager of every coin-operated phonograph, electrical piano, electric battery, graphophone, weighing machine or other machines or instruments where a fee is charged, where such fee is five cents or more, an annual tax of five (\$5.00) dollars."

This act contains another provision repealing all laws and parts of laws in conflict therewith. The emergency clause discloses the fact

that the purpose of this act was to raise revenue, by the use of the following language:

"The fact that there is imperative need for revenue to support the State government creates an emergency and an imperative public necessity," etc.

It will not be contended that each owner or manager of every coin-operated phonograph, electrical piano, electric battery, graphophone, weighing machine, and other machines or instruments similar in kind and character to those specifically enumerated in the act are not subject to the tax imposed by this act, under a well-known rule of statutory construction. The rule of construction referred to is known as *ejusdem generis*, and if given application in the construction of this act, the general terms "other machines or instruments" following an enumeration of specific machines and instruments would have to be considered as and restricted to machines and devices similar in kind and character to those specifically enumerated.

"It is true that the law should be so construed as to effectuate the legislative purpose as indicated by the language used, and in construing laws that impose burdens of taxation nothing should be left to inference or implication, and they should not, by this method, be held to embrace or apply to subjects which are not expressly enumerated, either under some general head or some particular mention."

If the Legislature intended to levy an occupation tax upon this particular vending machine or device, or others of similar kind and character, it would have been an easy matter to have said so, thus relieving the necessity of imposing such tax by implication.

Under our system of government and taxation, the Legislature is the only body possessing the constitutional rights to impose a tax on such privilege or occupation. It is not within the province of the courts of the State to impose or levy taxes by implication unless warranted in so doing by the plain and unambiguous language of the act.

A very full and interesting discussion of this rule will be found in Judge Cooley's work on Taxation (2nd Edition), pages 263-275, where many authorities are cited and discussed, and where conclusions are reached as above indicated.

State vs. Cody, 120 S. W., 267.

If the rule of *ejusdem generis* is to be given application and consideration here, and we think it should, we are unable to conceive either by the wildest stretch of imagination or implication how this act imposes a tax upon such machine or device, as there is no similarity existing between such machine or device and a phonograph, electric piano, electric battery, graphophone, or weighing machine.

Each machine or instrument named in the act is one in which you deposit a coin but receive nothing therefor in return except music, electric shock, or your weight, while from the machine or device here under discussion you receive an article of merchandise. We do not think that music, electric shock or your weight, as used within the meaning of this act, constitutes any commodity or article of merchandise. There are in hotels, drug stores, restaurants and numerous other places, machines or devices whereby on depositing the price of the article of merchandise desired and manipulating a spring or lever you can obtain such article of merchandise. These machines or devices are in no way similar to phonographs, electric pianos, electric batteries,



graphophones or weighing machines, and the use of such machines or devices where a coin is deposited and an article of merchandise received in return therefor, we think constitutes a sale of such article of merchandise. The difference being that in one instance the article of merchandise is sold and delivered by the manipulation of such machine or device, and in the other it is delivered by the person selling such article of merchandise. We do not think that the operation of the machine or device prevents a sale of such article, then, it becomes material to determine whether or not the Legislature by this act intended to impose an occupation tax on such articles as are sold through and by the operation of such machine or device. We do not think that this act should be given such intent or purpose on the part of the Legislature. If such was their intent and purpose, the language used in this act is far from making such intent and purpose plain and certain. The act imposes a tax for pursuing the occupation, or being engaged in the business of operating for a "fee" coin-operated phonographs, electric pianos, electric batteries, graphophones or weighing machines, or other machines or instruments.

The Interstate Sales Agency pursues the occupation and is engaged in the business of selling and distributing chewing gum. It does not pursue the occupation of operating any kind of a coin-operated machine or instrument where a fee is charged, but has selected such machine or device as a means of selling and distributing chewing gum for a fixed price. We do not think that the nickel deposited in such machine or device constitutes a "fee," but, on the other hand, to our minds it is clearly the fixed price of the chewing gum. The machine or device being used for the convenience of its customers. We do not feel warranted in the conclusion or presumption that the Legislature intended for this act to apply to all machines or devices in which coins are deposited for some specific purpose. A great many, if not all, of the street car companies operating within this State have attached to their street cars a machine or device in which the fare is deposited when the customer enters the car. It certainly would not be contended that the street car companies are engaged in the occupation or business similar in kind and character to that of coin-operated phonographs, electric pianos, electric batteries, graphophones and weighing machines due to the fact that they use a device in which the customer places the fare and thereafter receives a ride. This being true, it would be just as reasonable to insist that the Interstate Sales Agency, in selling and distributing its chewing gum by the use of such machine or device, was engaged in a like occupation to that of operating coin-operated phonographs, electric pianos, electric batteries, graphophones and weighing machines.

In *Ex parte Roquemore*, 131 S. W., 1101, the court had for its determination the question of whether a game of baseball on Sunday, to which an admission fee was charged, was a violation of Article 199 of the Penal Code, providing that "any merchant, grocer or dealer in wares and merchandise or trader in any business whatsoever or the proprietor of a place of public amusement, or the agent or employe of any such person who shall sell, barter or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than \$20 nor

more than \$50. The term 'place of public amusement' shall be construed to mean circuses, theaters, variety theaters, and *such other amusements as are exhibited and for which an admission fee is charged.*"

Judge Ramsey wrote the opinion of the court and held that a game of baseball, where an admission fee was charged, was an amusement, but that it was not an amusement within the meaning of the foregoing statute, and that this was true because of the doctrine of *ejusdem generis*, which he held applied. He quoted with approval from Sutherland on Statutory Construction as follows:

"It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import comprehensibly designating acts or things, the latter are the same kind or class as those particularly used. They are to be deemed to have been used not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated."

In *Gladys City Oil Gas & Mfg. Co. vs. Right of Way Oil Company*, 137 S. W., 171, the Court of Civil Appeals adhered to and cited with approval this rule of construction, which was affirmed by the Supreme Court of this State in 157 S. W., 737, citing numerous authorities.

In *Ex parte Williams*, 87 Pac., 566, the petitioner was a saloon keeper who had been arrested and charged with the offense of operating a gambling device "for cigars and tobacco." The California statute made it an offense to operate gambling devices, "for money, checks, credit or other representative of value." The petitioner was discharged because the court held that gambling for "cigars and tobacco" did not come within the meaning of the statute. The court says:

"Courts have no power to legislate, and if the Legislature intended to simply prohibit banking and percentage games, where played for money, checks, credits and other things similar to money, checks and credits, this court has no power to add a further provision and say that it will be a crime if such banking or percentage game is for other kinds of property, such as grain, fruit, horses, cattle, lumber, and all other things of whatever kind which may have a value. The rule seems to be well established in the interpretation of statutes and clauses like the one under consideration, that where general words follow particular ones, the former are construed as applicable to persons or things of the same kind, class or nature."

In *Hempstead County vs. Harkness*, 84 S. W., 799, the Supreme Court of Arkansas held that the rule of *ejusdem generis* was applicable to a statute of that State which allowed the clerk of the Circuit Court ten cents (10c) each for "filing complaint, answer, reply, petition, demurrer, affidavit or other papers in the cause."

The court said: "The words 'complaint,' 'answer,' 'reply,' 'petition,' and 'demurrer,' are all well known legal terms, applicable to certain papers in civil causes, and 'other papers' is, of course, a general term. It is an old and well settled rule of statutory construction which confines the meaning of additional and general descriptive words to the class which the preceding specific words belong."

*Eastern Ark. Hedge Fence Co. vs. Tanner*, 67 Ark., 156, 53 S. W., 886.

*Matthews vs. Kimball*, 70 Ark., 451, 66 S. W., 651; 69 S. W., 457.

*Sedgwick on Statutory Construction*, 2d Ed., 360, 361.

*Endlich on Interpretation of Statutes*, Secs. 400, 407.

*Sutherland on Statutory Construction*, Secs. 268-276.

This rule would confine "affidavit" and "other papers" to the specific class to which "complaint," "answer," "reply," "petition," and "demurrer" belong in a civil suit.

That the rule of *ejusdem generis* should be given application in the construction of this act is not only supported by the cases cited above, but is universally and overwhelmingly supported by the courts of this State and other States together with the best textbook writers on statutory construction. However, we here refer to Sections 423, 425, 427, 431, 432, Sutherland on Statutory Construction, for general illustrations of the application of the rule of *ejusdem generis*.

It is apparent under the provisions of this act that such machine or device does not come within the provisions of this act and is therefore not subject to the tax imposed by the act. You are, therefore, advised that the machine or device owned and operated by the Interstate Sales Agency is not subject to the payment of a tax imposed by Section 35, Article 7355, as amended by the Thirty-eighth Legislature at its Second Called Session.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2549, Bk. 59, P. 241.

PUBLICATION—NOTICE—PRICE OF PUBLICATION.

1. Chapter 179, General Laws, Regular Session, Thirty-fifth Legislature, on the subject of publication of the notices theretofore required to be posted, and fixing the rate of publication has no application to notices by publication of the sale of real property to be sold under execution mentioned in Article 3757 or to publication of notices in delinquent tax suits provided for in Article 7698.

2. Chapter 51, General Laws, Regular Session, Thirty-eighth Legislature, does not apply or govern as to the price to be charged for publication in the case of notices by publication in sales of real property or in delinquent tax suits mentioned in Article 3757 and Article 7698, respectively. The price of publication in both instances is governed by the old law, that is, Article 3757, as to sales of real property under execution and Article 7698 in respect to delinquent tax suits.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 23, 1924.

*Mr. J. F. Sutton, County Attorney, Tom Green County, San Angelo, Texas.*

DEAR SIR: Attorney General Keeling is in receipt of yours of March 19, 1924.

You request an opinion as to whether the compensation of newspapers for publishing notices of sale of real estate to be sold under execution is governed by Article 3757, Revised Civil Statutes, or by Chapter 179, General Laws, Regular Session, Thirty-fifth Legislature, or by Chapter 51, General Laws, Regular Session, Thirty-eighth Legislature.

We have this same inquiry from other sources, as well as the additional question whether the last mentioned act fixes the price to be charged for publication in newspapers of citations in delinquent tax suits. We are taking the liberty of dealing with both inquiries in the

same opinion. It is not necessary to dwell at length upon your first question, as this Department has already passed upon it. In a well-considered opinion prepared by Honorable John C. Wall of date October 15, 1917 (Opinion No. 1832, Report and Opinions, 1916-18, page 677), the Department held that the act of the Thirty-fifth Legislature, above mentioned, has no application to notices of the time and place of the sale of real estate under execution, order of sale or *venditioni exponsas*, but that these latter mentioned notices should be given in the manner provided in Article 3757 and that Article 3757 also controls as to the price of publication. That opinion also held that the act of the Thirty-fifth Legislature does not control in reference to notices to non-resident or unknown owners in delinquent tax suits; that in such cases citation should be made in the manner prescribed in Article 7698 and that the amount of the publication fee mentioned in said Article 7698 was the only price authorized by statute.

We see no reason for altering the former opinion, and I enclose herewith a copy of same.

The next question is, does the act of the Thirty-eighth Legislature control as to the price to be paid newspapers for publication of notices of sales of real estate under execution as are mentioned in Article 3757?

The Act of the Thirty-eighth Legislature (Chapter 51, page 97, General Laws, Regular Session, Thirty-eighth Legislature), is in the following language:

An Act to provide for the printing of all proclamations and legal notices, or other advertising matter, by the different institutions of the State, districts, counties and subdivisions thereof, and providing for maximum fees to be charged for said publications, and directing the manner of payment therefor, and repealing all laws and parts of laws in conflict therewith, and declaring an emergency.

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

SECTION 1. All proclamations of the Executive Department and all other notices required to be published by the State, or any department or institution thereof, or the Board of Control, and all publications or advertising of any department, institution, board, district, county, or subdivision thereof, which are to be paid for out of State, district or county funds, or that are required to be published under any law of the State of Texas and charged as costs or fees shall be published in the newspaper selected by the Secretary of State, if from the executive department, or in the newspaper selected by the department or institution or Board of Control or district, or county official issuing such notice, or charged with the publication thereof. The rate charged for such official publication shall not exceed the lowest rate accorded commercial advertisers for a like amount of space. Any newspaper carrying any such publication shall, upon the request of the Secretary of State, or the Board of Control or the department or institution or district or county official charged by law with the publication of such notice, file with such official, not later than ten days after request made therefor by him, a schedule of rates showing the rate then charged by such newspaper for space therein. And the Board of Control, Secretary of State or any district or county official charged with the publication of such notice may, at any time, require any further or additional information or proof necessary to insure the rigid compliance with the terms of this act. All bills for publication shall be accompanied by a certificate of the publisher, under oath, certifying the number of publications and the dates thereof, together with the clipping of said publication from an issue of said newspaper and said bill shall be audited by the Board of Control, or by the district or county official charged with the publication thereof.

SEC. 2. The Board of Control, or any district or county official charged with the publication of any notice required by law to be published is hereby fully

authorized and empowered to cancel and terminate any contract made by them, or either of them in the event such Board of Control or district or county official may ascertain or determine that a higher rate is being charged by said newspaper for similar space for like or advertising purposes.

SEC. 3. All laws, or parts of laws, in conflict herewith are expressly repealed.

SEC. 3a. All political advertising shall be done at the same rate as legal notices, and under the same supervision and regulations, and political advertising shall include the announcements for public office.

SEC. 4. The fact that there is now no adequate law fixing a proper and reasonable charge to (be) made for publication of the notices of the several departments of the State required to be published, and the further fact that such printing is being paid for at too high a rate in some sections and too low a rate in others for the service performed, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and the said rule is hereby suspended and this act shall take effect and be in force from and after its passage, and it is so enacted.

It will readily be admitted by all that these notices, at least in cases where the State, county, etc., is not a party, are not published or given by any institution of the State or any district, county or subdivision thereof. That being true, we are of the opinion that the act does not apply to them. It is true that in the body of the act we find this language: "Or that are required to be published under any law of the State of Texas and charged as costs or fees." But this language refers back, and is related to the language that goes before. It evidently means that all proclamations of the Executive Department and all other notices required to be published by the State or any department or institution thereof or the Board of Control and all publications or advertising of any department, institution, board, district, county or subdivision thereof that are required to be published under any law of the State of Texas and charged as costs or fees shall be published, etc.

Unless, therefore, it is a notice of the State or county, subdivision, etc., the act would not apply to it. The language referred to does not mean any and all notices required to be published under any law of the State of Texas and charged as costs or fees.

If it should be held to mean the latter, a grave constitutional question would arise. The caption of the act would be misleading, for it states explicitly that it is an act to provide for the printing of all proclamations and legal notices or other advertising matter *by the different institutions of the State, districts, counties, and subdivisions thereof*, and providing for maximum fees to be charged for *said publications* and directing the manner of payment, etc. If the body of the act applies to publications in addition to those enumerated in the caption, that portion of the act would probably be held to be unconstitutional. It would be a case where the title of the act did not express the subject of the act and was confusing and misleading. We keep clear of this by interpreting the act to apply to proclamations, notices, etc., of these various public agencies that are either (1) to be paid for out of State, district, or county funds or that (?) are required to be published under any law of the State of Texas and charged as costs or fees.

What has been said is assuming that the State, county, etc., are not parties. But suppose the State, county or some other of these public agencies mentioned in the act is a party, where the State is a party,

for instance, can it be said that one of these notices by publication is a notice required by law to be published by the State within the meaning of this statute? We think not. These notices issued in proceedings for the sale of real property are not notices of the State, in our opinion, in the sense of this act, but are rather in the nature of legal process. The same reasoning applies in the case of notices by publication in delinquent tax suits.

There is another reason that supports what we have said above. This act of the Thirty-eighth Legislature is an act of a general nature on the subject of publication of notices, etc., while Article 3757, as well as the provision in the delinquent tax law, is, in a sense, a special or particular statute dealing minutely and particularly with a particular subject. A general law will not be presumed to intend the repeal of such a particular statute in the absence of language unavoidably having that effect. This subject is discussed at length in the opinion before mentioned at page 677 of the 1916-1918 Report and Opinions, and we need not repeat the argument and citation of authorities contained in that opinion. We quote the following apt language, however, quoted in that opinion, taken from the case of *Folk vs. City of St. Louis (Mo.)*, 157 S. W., 75:

“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.”

It will be noted that this new act does not fix the price of publication, but only, in a very indefinite way, fixes a maximum. We do not believe the Legislature intended to leave it to the officer issuing notices in delinquent tax suits and forced sale of real estate suit to make contracts as to the rate of publication. There is no mention in the act of delinquent tax notices or notices under Article 3757. It has been the policy of the law to specifically and minutely prescribe the proceedings that shall be had in these suits and particularly as to the publication fee. There are notices to which this act can apply, such as proclamations, notices calling for bids, advertisements, etc., and these are evidently what were intended as distinguished from legal process such as is inquired about. In our opinion this act contemplates only:

(a) All proclamations of the Executive Department and all other notices required to be published by the State, or any department or institution thereof, or the Board of Control, and all publications or advertising of any department, institution, board, district, county or subdivision thereof, *which are to be paid for out of State, district or county funds.*

(b) All proclamations of the Executive Department and all other notices required to be published by the State, or any department or institution thereof, or the Board of Control, and all publications or advertising of any department, institution, board, district, county, or

subdivision thereof, *that are required to be published under any law of the State of Texas and charged as costs or fees.*

In conclusion, you are respectfully advised that the act of the Thirty-eighth Legislature has no application to publication of notices mentioned in Article 3757 or to notices by publication in delinquent tax suits mentioned in Article 7698.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2518, Bk. 59, P. 247.

RAILROAD COMMISSION—POWERS OF—HEALTH DEPARTMENT—POWERS OF—SALE OF FOOD.

The statutes of this State do not confer authority of the Railroad Commission to exercise control or jurisdiction in the matter of determining whether or not unwholesome, unclean or decayed food is being sold or offered for sale through the dining car service operated by certain railroads within this State.

The Legislature imposed the duty upon the Health Officer of this State to prevent the sale or offering for sale unwholesome, unclean or decayed foods in this State on dining cars or elsewhere.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 30, 1923.

*Honorable Clarence E. Gilmore, Chairman, Railroad Commission, Capitol.*

DEAR SIR: Your letter addressed to the Attorney General has been referred to me for attention. In such letter you request to be advised if, under the provisions made in Article 6675, Revised Civil Statutes of this State, it is within the jurisdiction and the duty of the Railroad Commission to inspect, through its agents, dining cars operated by certain railroads within this State and the food supplied thereon to the public, and if the Railroad Commission, through any member of the Commission or agency thereof, should determine that unwholesome, unclean or decayed food is being sold, or offered for sale, through such dining car service, is it within the jurisdiction of the Commission or its agents to take action provided by the statute for the purpose of punishing those selling, offering for sale, or possessing such food for the purpose of sale.

Article 66, Chapter 15, Title 115, Revised Civil Statutes of this State, makes it the duty of the Railroad Commission to see that the provisions of this chapter, and *all laws of this State* concerning railroads are enforced and obeyed. The language, "all laws of this State concerning railroads," is broad and sweeping in its meaning and effect. The need for strict and intimate governmental control over railroads for public protection very early became manifest. Abuses, both of inequality and the unreasonableness in charges, arose which grew to serious proportions. The control of rates and charges was for this reason removed from the arbitrary control of railroad companies and placed under the regulation of governmental agencies, known in this State as the Railroad Commission.

Article 6654, Chapter 15, Title 115, Revised Civil Statutes, in de-

fining the powers and duties of the Railroad Commission, makes it the duty of such Railroad Commission and authorizes such Commission to adopt all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs, the power to correct abuses and to prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

We are of the opinion that the Legislature in delegating authority to the Railroad Commission of the railroads in this State intended that such authority should apply to the adoption of rates, charges, regulations and the prevention of unjust discrimination in rates of freight and passenger tariffs on the various roads in the State and other duties of similar kind and character. An examination of Chapter 15, Title 115, Revised Civil Statutes, wherein the powers and duties of the Railroad Commission are defined and authorized, will disclose that the Legislature in no place expressly, or by implication, authorized or empowered the Railroad Commission to take any action for the purpose of enforcing the pure food laws of this State. That the enactment of suitable legislation to protect the public health against the use of impure food, is within the general scope of the police power, is not an open question.

Ex Parte Vaughn, 246 S. W., 373.

Howard vs. State, 192 S. W., 770.

Title 65, Revised Civil Statutes, confers upon the Health Department of this State the duty and authority to enforce all provisions of the statute relating to the public health of the inhabitants of this State. Article 4582, Chapter 6, Title 66, Revised Civil Statutes, conferred upon the Dairy and Food Commissioner of this State certain duties and powers relative to the enforcement of the pure food laws. The Thirty-seventh Legislature, Chapter 10, abolished the office of Dairy and Food Commissioner and transferred to the Health Officer all duties theretofore conferred upon the Dairy and Food Commissioner of this State. As the statutes exist today it is the duty of the State Health Officer, or any inspector or deputy appointed by him, to carefully inquire into the quality of the food and drug products manufactured or sold, exposed for sale or offered for sale in this State. Such officers having the authority to procure samples of such food or drugs and make careful examination and analysis of all or of any such food and drug products and discover if the same are adulterated, misbranded, impure or unwholesome, is in contravention of the statutes of this State pertaining thereto. It is further made the duty of such Health Officer to make complaint against the manufacturer or vender of such food or drug products, and cause proceedings to be commenced against any person for the violation of any of the laws relative to the sale, offering for sale or possessing for sale, such food or drug products.

Under the long established and recognized rule of law that where the Legislature specifically and in plain unambiguous terms confers certain duties, powers and authority to a governmental agency, such agency alone has the exclusive power and authority to act. Therefore, if in this we are correct, it is obvious that the enforcement for violations of the pure food and drug laws of this State rest upon the Health



Officer of this State and not upon the Railroad Commission. In further support of this conclusion, Chapter 2, Title 66, Article 4553a, Rule 57, makes it the duty of the Health Officer of this State to see that parlor, buffet and dining cars, and food boxes, refrigerators, closets, drawers and cupboards used in connection therewith, be cleaned, scalded, and treated with a solution containing two per cent formaldehyde or other approved disinfectant. Article 4553a imposes many other duties upon the Health Officer of this State relative to the healthful, cleanliness and sanitary condition of railroads and things incident to and necessary for their operation.

You are therefore advised that it is the opinion of this Department that the Railroad Commission is without authority to exercise control or jurisdiction in the matter of determining whether or not unwholesome, unclean or decayed food is being sold, offered for sale or possessed for the purpose of sale by and through the dining car service operated by the railroads within this State, but that such duty, power and authority is lodged with the State Health Officer of this State by and through virtue of the provisions made in Title 66 of the Revised Civil Statutes.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2523, Bk. 59, P. 382.

TORTS—STATE OFFICERS, AGENTS AND EMPLOYEES—APPROPRIATIONS  
—CONSTITUTIONAL LAW.

Where an inmate of the State Industrial School for Boys, a State institution and governmental agency, died from the effects of corporal punishment administered to him by an employee of said institution, the Legislature was without authority, in absence of a pre-existing statute making the State liable for the tortious or negligent acts of the employees of said institution, to make an appropriation, out of the public funds of the State, to pay the parents of said inmate for loss and damages sustained by the death of their son.

In the absence of a pre-existing statute making the State of Texas liable, the Legislature was without authority to make an appropriation, out of the public funds of the State, for the purpose of reimbursing a person who has voluntarily expended his private funds in assisting the State of Texas in the prosecution of a person charged with crime.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 25, 1923.

*Honorable Lon A. Smith, State Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: You have referred to this Department an account against the State of Texas in the sum of \$2500 in favor of T. W. Thames and Amelia S. Thames. This account, omitting formal parts, reads as follows:

“The State of Texas, Dr.,  
to

T. M. Thames & Wife, Amelia S. Thames, Cr.

“Expenses incurred and loss and damages sustained by reason of the injury and resulting death of Dell Thames, our son, which occurred at the State

Juvenile Training School at Gatesville, Texas, on or about September 25th, 1921, including all expenses incurred and paid by us in assisting the State of Texas in investigating the cause of the injury and death to our son and in prosecuting the accused employee of said training school for inflicting the injury which caused said death—\$2500.”

You desire to know if you may legally pass this account to voucher, under authority of Chapter 25, General Laws, passed at the Third Called Session of the Thirty-eighth Legislature, being an act making appropriations to pay miscellaneous claims against the State of Texas and authorizing payment of said claims. The pertinent part of said act reads:

“That the following sums of money or so much thereof as may be necessary, be and the same are hereby appropriated, to pay miscellaneous claims against the State as herein enumerated:

“To pay T. W. Thames and wife, Amelia S. Thames, for expenses incurred and loss and damages sustained by reason of the injury and death resulting from said injury to their son, Dell Thames, while an inmate of the Reformatory at Gatesville, Texas, the amount herein appropriated the full amount, and State is to be at no other expense . . . . . \$2500.00.”

The above appropriation has been made by the Legislature for substantially the purposes named in the account submitted. The account being regular, properly certified to by the claimants, and for the amount appropriated by the Legislature, there is no reason why you should not approve and pass the same to voucher, unless there is some provision in our State Constitution which will justify your refusal to do so. Before we look to that instrument for the purpose of determining whether it has placed a restraining hand upon the Legislature and withheld from that body the power to make appropriations, out of the public funds of the State, for such purposes as this, we must, from the appropriation act, the account submitted, and from such other reliable sources of information as may be available, ascertain the reasons which prompted the Legislature to make the appropriation under consideration. From all of these sources, it appears that the facts and circumstances out of which this claim arose are substantially as follows: Dell Thames, a boy about fifteen years of age, was by the Juvenile Court of Jefferson County adjudged a “delinquent child” and committed to the State Industrial School for Boys at Gatesville. A short time after his arrival at that institution, on or about September 25, 1921, he died. H. G. Twyman, military instructor for the institution, was charged with murder. He was subsequently tried upon this charge, found guilty, and sentenced to serve an indeterminate sentence of from five to ten years in the State penitentiary. From this judgment of conviction, Twyman appealed to the Court of Criminal Appeals of this State, where his case is now pending. It appears that on the day previous to the time on which occurred the death of the boy that he had been severely whipped with a “bat” and other corporal punishment administered to him by the said Twyman, because of his refusal to do drill duty. Upon the morning of the day of his death he again refused to drill either through stubbornness or because of his inability to drill due to his weakened condition, and that because of this failure Twyman again administered corporal punishment to him, and while so administering the punishment, the boy died.

T. W. Thames and wife, Amelia S. Thames, the father and mother of Dell Thames, were active in the prosecution of Twyman. They claim to have spent considerable money in their efforts to secure his conviction. They employed special counsel to assist the State in the prosecution of its case against Twyman and alleged to have been at considerable expense in gathering testimony for the State and for other purposes which were beneficial to the State in its efforts to convict Twyman for the murder of their son. Just how much expense was incurred in the manner stated above, by the claimants, is not known to them. It was to partially remunerate claimants for these expenses, as well, we presume, as for the loss of the services of their son, that the Legislature made the appropriation under consideration to them. If, as heretofore stated, the Legislature had the authority, under our Constitution, to make the appropriation, out of the public funds of the State, then you should pass the account to voucher. The question before us then is: Did the Legislature transcend its power in making this appropriation?

Neither the act making the appropriation, nor the account submitted, are altogether clear as to the basis of the claim asserted, but we believe that it may be stated with a reasonable degree of certainty that it was the intention of the Legislature in making this appropriation to (1) compensate the claimants for the loss of service of their minor son occasioned by his death at the hands of an employee of the State; (2) for expenses voluntarily incurred in the prosecution of the State's employee for having unlawfully caused the death of their son.

The rule is well established that a State is not liable for the negligence or misfeasance of its officers or agents, except when such liability has been voluntarily assumed by its Legislature. The doctrine of *respondeat superior* does not prevail against the sovereign, in the necessary employment of public agents. The exemption is based upon the sovereignty of the State and its agencies, and upon the absence of obligation, and not on the ground that no remedy has been provided. 25 Ruling Case Law, pages 407-8, and authorities there cited.

The authorities are agreed that the State cannot be made to respond in damages to an inmate of its penitentiaries or reformatories because of the negligence, misconduct or tortious acts of its officers, agents or employees, unless there is a pre-existing statute making it so liable. *Clodfelter vs. State*, 86 N. Car., 51, 41 Am. Rep., 440; *Williamson vs. Louisville Industrial School of Reform*, 95 Ky., 251, 44 Am. St. Rep., 243; *Lewis vs. State*, 96 N. Y., 75, 48 Am. Rep., 607; *Riddock vs. State*, 123 Pac., 450, Am. Ann. Cases, 1913E, 1035, and authorities there cited; 25 Ruling Case Law, pages 407-408, and authorities there cited; 13 Corpus Juris, page 922, and authorities there cited.

The State Industrial School for Boys is a State institution, a governmental agency. It is a creature of the State controlled and managed by the State Board of Control. It is supported by the State from its public funds. To this institution are sent boys under the age of seventeen years who have been convicted of crime of the grade of felony. Boys of like age are also sent here when adjudged by a Juvenile Court to be "delinquent" as that term is defined by Article 1197 of the Code of Criminal Procedure, Complete Texas Statutes, 1920.

The State of Texas had not prior to the time the injuries were re-

ceived by Dell Thames, which resulted in his death, passed any law whereby the State had voluntarily assumed any liability for the negligent acts of its officers, agents, or employees at said institution, nor has it passed any laws since said time to this effect. The State has therefore never assumed any liability for the tortious acts of such officers, agents, or employees. That the Legislature cannot subsequent to the time this boy received his injuries pass a law which would bind the State to respond in an action for damages for such acts is, we think, too clear for argument. To pass such a law would clearly be in contravention of Section 18 of Article 1 of our State Constitution, which inhibits the Legislature from passing retroactive laws. Especially is this true in view of those provisions of our Constitution which inhibit the Legislature from making appropriation to individuals for private purposes. As was said in the case of Chapman vs. State, 38 Pac., 457:

“It is well settled that, in the absence of a statute voluntarily assuming such liability, the State is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the State. It is also true that under Section 31 of Article 4 of the Constitution of this State, which forbids the Legislature from making any gift of public money or other thing of value to any person, the Legislature has no power to create a liability against the State for any past act of negligence upon the part of its officers; and a statute undertaking to assume a liability upon the part of the State for the negligence of its officers in cases where, under the general rules of law, a master would have to respond for the negligent act of his servant, would only be valid in so far as it might relate to future acts of negligence. If, therefore, the present action is to be regarded as one for the recovery of damages arising out of the negligence of the officers of the State in the discharge of a strictly governmental duty, it cannot be sustained.”

The expenses incurred by claimants in the matter of the prosecution of Twyman were voluntarily made. There was no law of this State at the time these expenses were incurred under which these claimants could have legally asserted a claim against the State for the amount of such expenditures. The State has prosecuting officers to represent it in the trial of criminal cases. It has grand juries to investigate and inquire into all crimes committed within the State. There are sheriffs and other peace officers of the State with duties imposed upon them by law to suppress crime and ascertain facts pertaining to crimes committed. The State is under no legal obligation to pay this claim. Much might be written upon this subject, if we had the time to do so, but we will content ourselves by concluding that the claim submitted, and for which the Legislature appropriated public funds to pay, cannot be by you legally passed to voucher because the act of the Legislature making the appropriation for that purpose is, in our opinion, in contravention of the following provisions of our State Constitution, to wit:

First, Section 51, Article 3, providing that “The Legislature shall have no power to make any grant \* \* \* of public money to individual \* \* \* whatsoever.”

Second, Section 6, Article 16, where it is provided that “No appropriation for private or individual purposes shall be made.”

Third, Section 44, Article 3, reading: “The Legislature \* \* \* shall not 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."

I am herewith returning the verified claim of T. W. and Amelia S. Thames, together with two letters addressed to you by Mr. R. E. Masterson, Beaumont, Texas.

Very truly yours,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2466, Bk. 58, P. 352.

ALIENS—LANDS.

All aliens now owning lands in the State of Texas and all aliens hereafter purchasing, or in any manner acquiring lands located in Texas, must make the "Report of Alien Ownership" provided for in Article 21(d) of Title 3, Revised Civil Statutes of 1911, as amended by Chapter 134, General Laws, passed at the Regular Session of the Thirty-seventh Legislature, except as to those classes of lands and aliens specifically exempted by the provisions of Article 16 of said Title 3, as amended.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 2, 1922.

*Honorable Murphy W. Townsend, Attorney at Law, Dallas, Texas.*

DEAR SIR: Your letter of October 17th addressed to the Attorney General has been received. It reads:

"Chapter 134 of the General Laws, passed at the Regular Session of the Thirty-seventh Legislature, deals with the subject of ownership of lands in Texas by aliens and the filing of certain written reports by aliens with the county clerks. Article 16 of this act provides that 'This title shall not apply to \* \* \* the following classes of aliens, who are, or who shall become, bona fide inhabitants of this State, so long as they shall continue to be such bona fide inhabitants of the State of Texas'; and then names four classes of aliens, the first of which is designated as 'Aliens who were bona fide inhabitants of this State on the date on which this act becomes a law.'

"Article 21(d) of the act provides that 'All aliens now owning lands in the State of Texas shall, on or before the first day of January, 1923, file a written report, under oath, with the clerk of the county court of the county in which such alien is located, giving the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, etc.' The second paragraph of Article 21(d) provides that 'Any alien who may now own land in Texas, or who may hereafter acquire any land in Texas, by purchase or otherwise, who does not, within the time prescribed in this article, file the reports herein provided for, shall be subject to have such lands forfeited or escheated to the State of Texas.'

"I have a client who is a subject of Great Britain but is and has been for many years a bona fide resident of Dallas County. He owns a good deal of land in Texas. We cannot take any chance of violating the provisions of this act and thus make his lands subject to forfeiture and escheat, but he does not wish to file the report unless the law requires it. It is very important to my client and doubtless to thousands of aliens who reside in Texas, to know whether this act requires them to file the reports provided for in Article 21(d). I shall be greatly obliged if you will advise me whether in the opinion of the Attorney General's Department, Article 21(d) should be construed as applying to all aliens or as applying only to such aliens as are not within the four excepted classes designated in Article 16."

In reply to the same, beg to advise that the law inhibits this De-

partment from giving legal advice or information to anyone except to certain public officials, but the importance of the question submitted by you is so great that the Department has concluded to answer your inquiry for your information and the information of the public generally. However, in order to answer your inquiry, it will be necessary to review the provisions of Title 3, Revised Civil Statutes of 1911, as amended by the Act of 1921, Chapter 134, General Laws, passed at the Regular Session of the Thirty-seventh Legislature.

Title 3, prior to the amendment of 1921, embraced Articles 15 to 21, inclusive. The amendment of 1921 omitted Article 21, and added Articles 21(a), 21(b), 21(c) and 21(d). Article 15, among other things not pertinent to the question under consideration, inhibits aliens from acquiring title to, or owning land, or any leasehold or other interest in land, within this State, except as may be provided elsewhere in the act. The exceptions referred to are found in Articles 16 and 17. These articles read, respectively, as follows:

"Article 16. This title shall not apply to any land now owned in this State by aliens, not acquired in violation of any law of this State, so long as it is held by the present owners; nor to lots or parcels of land owned by aliens in any incorporated town or city of this State, nor to the following classes of aliens, who are, or who shall become, bona fide inhabitants of this State, so long as they shall continue to be such bona fide inhabitants of the State of Texas:

"(1) Aliens who were bona fide inhabitants of this State on the date on which this act becomes a law.

"(2) Aliens eligible to citizenship in the United States who shall become bona fide inhabitants of this State, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States.

"(3) Aliens who are natural born citizens of nations which have a common land boundary with the United States.

"(4) Aliens who are citizens or subjects of a nation which now permits American citizens to own land in fee in such country; and any resident alien who shall acquire land under the provisions of this article shall have five years after he shall cease to be a bona fide inhabitant of this State in which to alienate said land.

"Article 17. The provisions of this title shall not prevent aliens from acquiring lands, or any interest therein, in the ordinary course of justice in the collection of debts; nor from acquiring liens upon real estate, or any interest therein; nor from lending money and securing the same upon real estate, or any interest therein; nor from enforcing any such lien; nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured."

Under the provisions of Article 16, lands now owned by aliens, not acquired in violation of any law of this State, so long as it is held by present owners, and lots or parcels of land owned by aliens in any incorporated town or city of this State, are specifically excepted from the provisions of Title 3. Under these exceptions, it is immaterial whether such alien owners be residents of this State, or not. The first clause of this article deals with lands of a certain kind as forming the subject of the exceptions, to wit:

(a) Land now legally owned by aliens.

(b) Lots or parcels of land owned by aliens in any incorporated city or town.

The remaining portion of Article 16 deals with certain classes of aliens as the basis of the exception. The enumerated classes of aliens

may own land in Texas so long as they may reside within this State, and if land is acquired by a resident alien, after this act becomes effective, such land must be alienated within five years after the alien purchaser has ceased to be an inhabitant of this State.

Article 17 permits aliens to acquire lands, or interest therein, under certain enumerated conditions and circumstances, but lands so acquired are held subject to the limitations set out in Article 18.

Article 18 permits all aliens prohibited from owning land in this State under the provisions of this title, who shall hereafter acquire real estate in this State by devise, descent or by purchase, as permitted by this title, to hold the same for five years; and if such alien is a minor, he may hold same for five years after attaining his majority, and if of unsound mind, he may hold same for five years after the appointment of a legal guardian.

Article 19 permits any alien who shall hereafter hold lands in Texas in contravention of the provisions of this title, to, nevertheless, convey the fee simple title thereof at any time before the institution of escheat proceedings, but provides that if any such conveyance be made by such alien, either to an alien or to a citizen of the United States, in trust, and for the purpose and with the intention of evading the provisions of this title, such conveyance shall be null and void; and such land so conveyed shall be forfeited and escheated to the State absolutely.

Article 20 makes it the duty of the Attorney General, or the district or county attorney, to institute suit in behalf of the State of Texas in the district court of the county where such land as may be held in contravention of the provisions of this title may be situated, to escheat the same to the State, as in case of estates of persons dying without devise thereof and having no heirs.

Article 21(a) inhibits the appointment or qualifying of an alien, who is not permitted to own land in this State, as guardian of the estate of any minor or person of unsound mind, or as the executor or administrator of the estate of any decedent in this State.

Article 21(b) inhibits any corporation in which the majority of the capital stock is legally or equitably owned by aliens prohibited by law from owning lands in the State of Texas, from acquiring title to or owning any lands in the State of Texas, or any leasehold or other interests in such lands, and provides that lands so owned shall be subject to escheat under the provisions of this title as though owned by a non-resident alien.

Article 21(c) declares that land owned in trust, either by an alien, or by a citizen of the United States, for the beneficial use of any alien, or aliens, or any corporation prohibited from owning land in this State under the provisions of this title shall be subject to forfeiture as though the legal title thereto was in such alien or corporation.

Article 21(d) provides for a comprehensive system of registration by *all* aliens *now* owning lands in this State, or who may hereafter acquire any lands in this State. It is also provided that failure to register such land within a certain time shall subject such land to forfeiture and escheat to the State of Texas.

Title 3, prior to the amendment of 1921, made no provisions for aliens to register lands owned by them, as alien owned lands. The

registration feature of this title was added by the amendment of 1921, and by the provisions of Article 21(d), it is provided:

"All aliens now owning lands in the State of Texas shall on or before the 1st day of January, 1923, file a written report under oath, with the clerk of the county court of the county in which such land is located, giving the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date and place of arrival of said alien in the United States, and his or her present residence and postoffice address, and the length of time of residence in the State of Texas, the foreign prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject, and the number of acres of land owned by such alien in such county, the name and number of the survey, the abstract and certificate number, the name of the person or persons from whom acquired, the date when acquired, and shall either describe said land by metes and bounds, or refer to recorded deed in which same is so described, which report shall be known as 'Report of Alien Ownership.' Provided further, that all aliens hereafter purchasing, or in any manner acquiring lands located in Texas, shall within six months after such purchase, or acquisition, file with the county clerk of the county in which such land is located, a 'Report of Alien Ownership,' in terms as above required."

This article further provides that "any alien who may now own land in Texas, or, who may hereafter acquire any land in Texas, by purchase or otherwise, who has not, within the time prescribed in this article, filed the reports herein provided for, shall be subject to have such land forfeited and escheated to the State of Texas."

This article, when considered alone, clearly applies to *all* aliens who own land in this State. It makes no distinction between that class of aliens which is permitted to own land in Texas without any restrictions whatever, and that class of aliens which may only own land in this State under certain conditions, or for a limited time only. Neither does it make any distinction as to the character of land owned by aliens, with reference to location, or when such land was acquired. Its provisions are general in their application. It is the last article of the act and is supposed to have been that part of the act last considered by the Legislature, the intent of which we are endeavoring to ascertain. However, all parts of a statute must be construed together and its parts made to harmonize, if possible, and we must construe this article in connection with Article 16, which declares that this title shall not apply to any land now owned in this State by aliens, with provisos, nor to lots or parcels of land situated in incorporated cities and towns, owned by aliens, nor to certain enumerated classes of aliens. This article is clearly in conflict with the provisions of Article 21(d), but the conflict is only partial; therefore, the provisions of Article 16 must be treated as an exception to the general provisions of Article 21(d). The presumption is that the Legislature intended both articles, being in the same act, to operate.

We, therefore, conclude that the general provisions of Article 21(d) do not apply to those classes of alien-owned lands, or lands owned by those certain classes of aliens enumerated in Article 16, to wit:

(a) Land now owned in this State by aliens, not acquired in violation of any laws of this State, and so long as it is held by the present owners.

(b) Lots or parcels of land owned by aliens in any incorporated city or town in this State.

(c) Aliens who were bona fide inhabitants of this State on the



date on which this act became a law, so long as they shall continue to be such bona fide inhabitants.

(d) Aliens eligible to citizenship in the United States who are, or who shall become, bona fide inhabitants of this State, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States, so long as they shall continue to be such bona fide inhabitants of this State.

(e) Aliens who are, or shall become, bona fide inhabitants of this State and who are natural born citizens of nations which have a common land boundary with the United States, so long as they shall continue to be such bona fide inhabitants of this State.

(f) Aliens who are, or who shall become, bona fide inhabitants of the State of Texas and who are citizens or subjects of a nation which now permits American citizens to own land in fee in such country, so long as they shall continue to be such bona fide inhabitants of this State.

It is the opinion of this Department, and you are so advised, that lands falling within, or belonging to, any of the above enumerated classes numbered (a) to (f), inclusive, are not required to be reported or registered under the provisions of Article 21(d), Title 3, Revised Statutes, 1911, as amended by the Act of 1921.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

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Op. No. 2461, Bk. 58, P. 252.

CITIZENS—NEGRO SLAVES—ESCAPED TO FOREIGN COUNTRY—THEIR  
DESCENDANTS—RETURN TO UNITED STATES.

1. Negro slaves, born in the United States prior to 1832, who left this country about that time and went to and became permanent residents in the Republic of Mexico, and who continued to reside there and never returned to the United States, were not and never became citizens of the United States.

2. That neither the children born in the Republic of Mexico, of which such negro slaves were the fathers, although such children after becoming of age came to and have remained permanently in and are now residents of this country; nor the children of such children, of which the latter are the fathers, who were also born in the Republic of Mexico, although brought to this country while minors by their parents, and although they may have since that time remained permanently in and are now residents of this country, are not citizens of the United States within the provisions of Section 2 of Article 6 of the Constitution of this State, so as to entitle them to vote at any election in this State.

3. Descendants, born in the United States, of such negro slaves are citizens of the United States and entitled to vote at any election in this State, if otherwise qualified, although their fathers may not have been, or may not be, citizens of the United States.

4. This opinion is not intended, in any way, as passing upon the citizenship of any woman who is, or may have been, married.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 26, 1922.

*Hon. J. M. Slaton, Jr., County Attorney, Brackettville, Texas.*

DEAR SIR: The Attorney General is in receipt of two letters from

Mr. Frank Lane, Chairman of the Democratic Executive Committee of Kinney County, dated the 11th and 16th inst., respectively, requesting the opinion of the Attorney General as to the status as citizens of certain negroes in that county. We are taking the liberty of addressing our answer to you and of enclosing a copy of same to Mr. Lane.

The substance of the facts stated by Mr. Lane are embodied in the second paragraph of his letter of the 16th inst., which reads as follows:

"The grandparents of the negroes in question ran away from their Southern masters prior to the year 1832 and took refuge with the Seminole Indians, who were living in Florida at that time. About the year 1832 the parents of the negroes under consideration moved into the Republic of Mexico and remained there until the year 1872. While they were residing there the negroes inquired about were born, and after the issuance of the Proclamation of Emancipation. In the year 1872 their parents came to Fort Clark, Kinney County, Texas, as Seminole negro Indian scouts, under the employment of the United States War Department, and during the minority of the negroes in question. They have lived in this county since that time and are qualified voters under the Constitution and laws of Texas if their parents were citizens of the United States."

The matter of citizenship is calculated to raise many questions, some of which have been proven to be both delicate and difficult, raising, as it does, not only the right of suffrage in this State, but questions of inheritance, alien ownership of lands in this State, international relations and comity, liability to military service, and numerous civil obligations and duties in this and foreign countries, and the like, and this opinion must be taken only as announcing the general rules upon which the citizenship of these negroes should be determined and not as expressing the opinion of the Attorney General as to the citizenship of any particular person or persons, and this for the reason that neither Mr. Lane's letters afford sufficiently full and accurate information to enable us to determine with sufficient certainty the citizenship or non-citizenship of any one or more of the individual negroes here inquired about. It is believed, however, that this opinion will enable you to do this.

One not a citizen of the United States is not entitled to vote at any election in this State, as is clear from the provisions of Sections 1 and 2 of Article 6 of our State Constitution as amended July 23, 1921, and it is with respect to the right of suffrage that this inquiry is made. It will also be noted that the question of citizenship must be determined by the Constitution and laws of the United States and the facts of each particular case, and not by any State Constitution or statute.

The exact question presented by this inquiry has never been passed upon by the courts of this State, nor by this Department, nor, as far as we have been able to find, by any of the appellate courts, or the Supreme Court of the United States, nor by any of the departments of the executive branch of the United States government. We find, however, that almost an identical state of facts was before the Supreme Court of the State of Michigan in a case involving the citizenship of John Hedgman, a negro born in Canada, whose father left this country and went to Canada in 1834 and who never returned to this country, but continued permanently to reside in Canada. This is the case of *Hedgman vs. Registration Board*, 26 Mich., 51. This decision was rendered October 23, 1872, upon an application by John Hedgman for a mandamus to compel the Registration Board of the State of Mich-

igan to register him as a voter in that State. The statement by the court of the facts shows that the father of John Hedgman was a negro, born in Virginia, and was held as a slave until 1834, when he went to Canada and never returned to the United States. About thirty-five years before this decision was rendered, or about the year 1837, John Hedgman was born in Canada, where he continued to reside until he was about twenty years of age, when he removed to the State of Michigan. He continued to reside in that State until he was about thirty-five years of age, when he was denied the right to register as a voter, upon the ground that he was not a citizen of the United States. It is clear that Hedgman could not claim citizenship from having been born in the United States, and his only claim to citizenship was based upon the contention that his father was a citizen of the United States, this contention being based upon the acts of April 14, 1802, and February 10, 1855, now Section 1993 of the Revised Statutes of the United States (Fed. St. Ann., 2d Ed., p. 116, 2 Stat. L., 155, 10 Stat. L., 604), which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The only theory upon which it was claimed that his father was a citizen of the United States was the fact that he was born in the United States and that he became or was made a citizen of the United States under and by virtue of the adoption of the Fourteenth Amendment to the Constitution of the United States, declared to have become a part of the Constitution of the United States on July 28, 1868.

The court held that Hedgman's father, being held as a slave prior to and at the time of his going to Canada, and never having returned to the United States, was not and could not have been a citizen of the United States at any time prior to the adoption of the Fourteenth Amendment. This holding is clearly in accord with the decision of the Supreme Court of the United States in the case of *Dred Scott vs. Sandford*, 19 How., 393, commonly referred to as the *Dred Scott* decision, decided in December, 1856, and substantially affirmed in the *Slaughter-House Cases*, 16 Wall. (83 U. S.), 36 (73). The court further held that under the facts the father of John Hedgman did not become, or was not made, a citizen of the United States by the Fourteenth Amendment. In discussing the case the court, among other things, says:

"We have no information concerning the reasons which induced the relator's parents to abandon the State of their birth and go to Canada, but the inference from the record is a legitimate one, that they went to escape from bondage to freedom. They did not go as representatives of the United States, proud of its flag and its liberties, but as fugitives from the United States, fearing its flag and hating its oppression. They did not carry citizenship with them, but they fled from slavery. They abandoned a country to which they admitted no obligations, because its laws denied them all rights. So far from extending to them its protection, the laws of the country they left, volunteered the assistance of its officers in seeking out and seizing them, if they should venture to seek liberty, in order that they might be restored to a bondage which promised to be perpetual to them and their descendants. What possible obligation could the mere fact of birth upon the soil of America impose upon a person thus con-

demned by its laws to be the hopeless slave, the mere chattel, subject to be bought and sold, in his person and posterity, at the will of another? \* \* \*

"It follows, therefore, that the parents of the relator were never citizens of the United States prior to the adoption of the Fourteenth Amendment. That amendment, it is clear, does not make them such. It declares that, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.' These persons are not subject to the jurisdiction of the United States. They have chosen another jurisdiction, and cannot have our citizenship forced upon them. The Fourteenth Amendment makes the offer of citizenship, but, if they come within the offer, they can accept it only by bringing themselves within the jurisdiction, which hitherto they have not chosen to do. The relator himself does not come within the terms of the Fourteenth Amendment, because he was not born within the United States. If he is not a citizen by virtue of his parents having been such, then, allegiance by birth, so far as it exists at all, must be due from him to the British government, under which he was born, and he might at any time return and claim the rights of a British subject. Such, we think, is his position." (26 Mich., 51.)

It is our opinion, therefore, and you are advised:

1. That negro slaves, born in the United States prior to 1832, who left this country about that time and went to and became permanent residents in the Republic of Mexico, and who continued to reside there and never returned to the United States, were not and never became citizens of the United States.

2. That neither the children born in the Republic of Mexico, of which such negro slaves were the fathers, although such children after becoming of age came to and have remained permanently in and are now residents of this country; nor the children of such children, of which the latter are the fathers, who were also born in the Republic of Mexico, although brought to this country while minors by their parents, and although they may have since that time remained permanently in and are now residents of this country, are not citizens of the United States within the provisions of Section 2 of Article 6 of the Constitution of this State, so as to entitle them to vote at any election in this State.

3. That the descendants, born in the United States, of such negro slaves are citizens of the United States and entitled to vote at any election in this State, if otherwise qualified, although their fathers may not have been, or may not be, citizens of the United States.

Nothing herein is intended as expressing any opinion as to the status as citizens of women who are or may have been married. The status of such women as citizens has been materially changed by a recent Act of the United States Congress, approved July 22, 1922 (H. R. 12,022, Sixth-seventh Congress, Public Document No. 346), a copy of which is enclosed herewith.

As bearing upon this question, we cite the following:

Articles 13, 14, 15 and 19 of the Constitution of the United States.  
Sections 1992 to 1999, Revised Statutes, U. S. (Fed. St. Ann., Vol. 2, pp. 115-120).

Act of Congress of March 2, 1907, Chapter 2534, 34 St. L., 1228 (Fed. St. Ann., 2nd Ed., Vol. 2, pp. 122-125).

Section 2 of Article 6 of the Constitution of Texas as amended July 23, 1921.  
Hedgman vs. Registration Board, 26 Mich., 51.

Slaughter-House Cases, 16 Wall. (83 U. S.), 36.

Dred Scott vs. Sandford, 19 How., 393.

United States vs. Wong Kim Ark, 169 U. S. 649.

Albery vs. United States, 162 U. S., 499.  
 Hall vs. DeCuir, 5 Otto (95 U. S.), 485.  
 Opinions, Atty. Gen. (U. S.), Vol. 9, p. 373; Vol. 10, pp. 321, 329 and 382;  
 Vol. 13, pp. 89, 397; Vol. 15, pp. 154, 295; Vol. 28, p. 504.  
 Benton vs. Williams, Dallam, 496.  
 Graves vs. Campbell, 74 Texas, 576, 12 S. W., 238.  
 Hardy vs. De Leon, 5 Texas, 211.  
 Mills vs. Alexander, 21 Texas, 154.  
 Sabriego vs. White, 30 Texas, 576.  
 Johnson vs. United States (1893), 29 Ct. Cl., 1.  
 Mackenzie vs. Hare (1913), 134 Pac., 715, 165 Col., 776; Ann. Cas. 1915B,  
 261, 339 U. S., 299.  
 People vs. Newell (N. Y., 1884), 1 How. Pr. (U. S.), 8.  
 People vs. Newell (N. Y., 1885), 38 Hun., 78.  
 Criswell vs. Noble (1908), 113 N. Y. Supp., 954, 61 Mic. Rep., 483.  
 Cane vs. McCarthy (1869), 63 N. C., 299.  
 United States vs. Willimans D. C. (1909), 173 Fed., 626.  
 In re Nicolo (1911), 184 Fed., 322, 106 C. C. A., 464.  
 In re Moratorano, 159 Fed., 1010.

Very truly yours,

W. W. CAVES,  
 Assistant Attorney General.

Op. No. 2462, Bk. 58, P. 259.

CITIZENSHIP—ALIENS—NATURALIZATION—NATURALIZATION OF  
FATHER.

1. A man not born in the United States or under its jurisdiction, of parents not citizens of the United States, if neither of his parents became a citizen of the United States by naturalization while he was a minor, and if he himself has not become and is not a citizen of the United States by naturalization, is an alien.

2. An alien man, although he may have declared his intention to become a citizen of the United States, who may not have taken out final naturalization papers before the expiration of seven years from the date of his declaration to become a citizen, or before the expiration of seven years from June 29, 1906, if his declaration was made prior to that time, remains and is an alien.

3. An alien man, although he may have declared his intention of becoming a citizen of the United States, and although seven years may not have expired since the date of such declaration, if he has not taken out final naturalization papers, remains and is an alien.

4. An alien man does not become a citizen of the United States upon and by virtue of a declaration of his intention to become such, but remains an alien until he has been granted citizenship by final naturalization.

ATTORNEY GENERAL'S DEPARTMENT,  
 AUSTIN, TEXAS, November 6, 1922.

*Honorable R. Oosterveen, County Attorney, Rio Grande City, Texas.*

DEAR SIR: The Attorney General has yours of the 1st instant, requesting his opinion as to the status of certain persons as citizens within the meaning of Section 43 of Chapter 157, page 289 (298), General Laws, Regular Session, Thirty-sixth Legislature. This section reads as follows:

"It shall be unlawful for any non-resident of this State or alien to hunt in this State without first having secured from the Game, Fish and Oyster Commissioner, or his deputy, or county clerk, a license to hunt for which he shall pay the sum of fifteen (\$15) dollars; three dollars of which amount shall be

retained by said officer as his fee for collecting, and if any non-resident of this State or alien shall hunt in this State without securing a license as provided he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not less than ten (\$10) dollars nor more than one hundred (\$100) dollars."

Your first question is stated by you as follows:

"A. was born in Mexico of Mexican parents (Mexican citizens) but his parents moved to Texas bringing A. with them when A. was only about six months old, by that time Texas being a State of the American Union; A. is now about 45 years old, has resided here ever since he came from Mexico; has never registered with the Mexican consul, or in any other way evinced his intention to be, or consider himself, a Mexican citizen, but on the contrary, without even ever having declared his intention to become an American citizen, has exercised a 'right' of suffrage by participating at several primary, general and special elections in Starr County; besides, he is a record property owner and pays his poll tax, as well as taxes on his property yearly. Query: Under the foregoing statement of facts is A. considered under the provisions and for the purposes of such Section 43 of House bill 457, an American citizen or an alien subject to the payment of a \$15 license a year in order to enjoy the right and privilege to hunt in this State?"

You do not state sufficient facts to enable us to answer definitely whether the man you refer to is a citizen of the United States or not. For this reason, we are stating the general rule from which you can doubtless determine whether or not this man is a citizen of the United States.

A man not born in the United States or under its jurisdiction, or parents not citizens of the United States, if neither of his parents became a citizen of the United States by naturalization while he was a minor, and if he himself has not become and is not a citizen of the United States by naturalization, is an alien.

If such are the facts concerning the man you refer to, you are advised that he is an alien and that it would be unlawful for him to hunt in this State without first having secured a license and paid the fee therefor as provided by said Section 43.

That such man may have been brought to this country by his parents when an infant and may have continued to reside in this country and may have been a resident of this country for any length of time, and may never have registered with a consul of the country of his birth or otherwise evidenced an intention to remain or that he considered himself a citizen of the country of his birth, and may have voted and paid property and poll taxes in this country, and the like, do not make him a citizen of the United States. Aside from and notwithstanding all these things, if neither of his parents became a citizen of the United States by naturalization during his minority, or if he himself has not become such citizen by naturalization, he remains and is an alien.

In answer to your second question, you are advised that an alien man, although he may have declared his intention of becoming a citizen of the United States, if he did not take out final naturalization papers before the expiration of seven years from the date of such declaration, or before the expiration of seven years from June 29, 1906, if his declaration was made prior to that time, remains and is an alien. Such person is an alien and it would be unlawful for him to hunt in this State without first having secured a license and paid the fee therefor as provided for by said Section 43.

In answer to your third question, you are advised that an alien man, although he may have declared his intention of becoming a citizen of the United States, and although seven years may not have expired since the date of such declaration, if he has not taken out final naturalization papers, remains and is an alien; that is to say, an alien man does not become a citizen of the United States by a declaration of his intention to become such, but remains an alien until he has been granted full citizenship by final naturalization papers. Such person is an alien and it would be unlawful for him to hunt in this State without first having secured a license and paid the fee therefor as provided for by said Section 43.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2478, Bk. 58, P. 439.

PENSION—CONFEDERATE SOLDIER—INDIGENCY.

A man who, as the head of a family, is claiming, holding, occupying and using as a homestead, under his right to do so as the head of a family, land valued at eighteen hundred (\$1800) dollars, although such land is community property, one-half of which belongs to children of himself and deceased wife, is to all intents and purposes the owner of such land within the meaning of Article 6272 of the Revised Civil Statutes, as amended, is not indigent within the meaning of said article, and is not entitled to a pension under the Constitution and laws of this State as a Confederate soldier.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 7, 1923.

*Hon. Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 6th instant, stating that J. L. Stewart, a Confederate soldier, is assessed on the tax rolls with a homestead at the value of eighteen hundred (\$1800) dollars, and no other property, that he claims that one-half of this property belongs to his children, and requesting an opinion from the Attorney General as to whether or not, as far as his ownership of property is concerned, Mr. Stewart is entitled to receive a pension as a Confederate soldier. We also note the letter addressed to you by Hon. Jeff T. Kemp, county judge of Cameron County, and transmitted by you to the Attorney General. From this letter it further appears that one-half of this land rendered by Mr. Stewart for taxation belongs to his children.

Section 4 of Chapter 188, page 411, General Laws, Regular Session, Thirty-fifth Legislature, approved April 3, 1917, which now appears as Article 6272 of Vernon's Texas Civil and Criminal Statutes, 1918 Supplement, on this point reads as follows:

"To constitute indigency within the meaning of this act, neither the applicant nor his wife, if the applicant be a married man, nor both together, nor the widow, if the applicant be a widow, shall own property, real or personal, exceeding in value \$1000, exclusive of the homestead, and if its value be not in excess of \$1000, and exclusive of household goods and wearing apparel. \* \* \*"

Under the facts of this case, we understand that the land rendered

by Mr. Stewart for taxation is community property of himself and wife, that his wife is dead and that her undivided one-half, as a matter of law, has vested in their children, and that it is for this reason Mr. Stewart claims to be the owner of land valued at less than one thousand (\$1000) dollars; that is, that the undivided one-half of this land owned by him is all the property he owns, and that his undivided one-half of same is valued at less than \$1000.

Notwithstanding this, however, if Mr. Stewart is in fact claiming, holding, occupying and using the whole of this land as a homestead under his legal right to do so under the Constitution and laws of this State, as the head of a family, it is our opinion that he is, to all intents and purposes, the owner of same within the meaning of said Article 6272, and that in such case, said homestead being valued in excess of one thousand (\$1000) dollars, Mr. Stewart is not and will not be entitled to a pension as a Confederate soldier so long as he so claims, occupies and uses this land.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2458, Bk. 58, P. 432.

PENSIONS—CONFEDERATE HOME—CONFEDERATE WOMAN'S HOME—  
ABSENTEES.

One who has been admitted into the Confederate Home, or into the Confederate Woman's Home, remains an inmate of such home within the meaning of Article 6278 of the Revised Civil Statutes of 1911, as amended by Chapter 74, page 144, General Laws, Regular Session, Thirty-seventh Legislature, during his or her absence therefrom on a furlough or other leave of absence, and during such absence, in like manner as during the time such person may be actually present in such home, such person is entitled to only one-half of the amount of the pension such person would be entitled to if he or she had not been admitted into such home.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 9, 1922.

*Honorable Lon A. Smith, Comptroller, Austin, Texas.*

DEAR SIR: The Attorney General has yours of October 27, 1921, in which you propound to him the following question:

"I am asking you for an opinion as to whether a Confederate soldier or widow of a Confederate soldier who is an inmate of the home would be entitled to draw the full amount (\$24) quarterly when on a year's leave of absence from said home."

Prior to its amendment at the Regular Session of the Thirty-seventh Legislature, Article 6278 of the Revised Civil Statutes, in so far as it bears upon this question, read as follows:

"No person shall, while an inmate of the Texas Confederate Home \* \* \* receive a pension under this chapter; and any person having been granted a pension under the provisions of this chapter, and afterwards become an inmate of said home \* \* \* shall, while such inmate, forfeit his pension, it being intended that no person shall at the same time receive benefits from both sources. \* \* \*"



As amended by Chapter 74, page 144, General Laws, Regular Session, Thirty-seventh Legislature, this article now provides:

“\* \* \* That any person who has been granted a pension under this chapter, and who is thereafter admitted as an inmate in the Confederate Home, or is thereafter admitted as an inmate of the Confederate Woman’s Home of this State, shall hereafter be entitled to receive pension payments to the amount of one-half of the pension that such person would be entitled to receive if not an inmate of such home.”

It is our opinion that under this amendment one who has been granted a pension under the law of this State as a Confederate soldier, or as the widow of a Confederate soldier, and who is thereafter admitted into either of these homes, respectively, is thereafter entitled to receive a pension equal in amount to one-half of the pension that such person would have been entitled to had such person not been admitted to such home, and that the fact that such person may be absent from such home for a period of time on a furlough or other leave of absence would not entitle such person to receive full pension, but in such case such person would be entitled to receive one-half pension, during such absence. We mean to say that a pensioner who has been once admitted into either of these homes is thereafter entitled to receive only one-half the amount of pension that such person would have been entitled to if not admitted to such home, and this notwithstanding the fact that such person may be temporarily absent from such home on a furlough or other leave of absence.

Under the law and the rules and regulations governing these homes, those who may be temporarily absent on a furlough or other leave of absence are, nevertheless, entitled to receive, and do receive, certain benefits of the home, such as clothing, burial benefits, and the like, and it would hardly be fair and equitable to permit them at the same time to receive a full pension, and we do not believe that either the language or intent of this amendment so authorizes.

Of course, one who may have been admitted to either of these homes and who may be thereafter permanently discharged therefrom, and therefore not entitled to receive any of the benefits of these homes, would, from the date of such discharge, be entitled to receive full pension, if otherwise entitled to a pension under the law.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2498, Bk. 58, P. 412.

BOARD OF PRISON COMMISSIONERS—FACTORY—CONVICTS—CONVICT  
LABOR.

A proposed contract purporting to provide for the establishment and operation of a factory by the Board of Prison Commissioners, held not to be such, and held to be violative of Article 6174 of the Revised Civil Statutes of 1911, as amended by Chapter 32, page 49, General Laws, First and Second Called Sessions, Thirty-fifth Legislature, prohibiting the sale of convict labor.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 9, 1923.

*Senator H. L. Lewis, Chairman, Austin, Texas.*

DEAR SENATOR: We have before us a proposed contract to be entered into between the Board of Prison Commissioners as party of the first part and the Reliance Manufacturing Company of Chicago, Illinois, as party of the second part, dated April 9, 1923, and a proposed supplement thereto dealing particularly with the eighth paragraph of same, also dated April 9, 1923, pertaining to the establishment and operation of a factory for the purpose of manufacturing with convict labor work shirts, house dresses or aprons and children's play suits, with your verbal request for an opinion as to whether or not the use or employment of convicts and convict labor as provided for by this proposed contract and supplement will or would be violative of Article 6174 of the Revised Civil Statutes of 1911, as amended by Chapter 32, page 49, General Laws, First and Second Called Sessions, Thirty-fifth Legislature.

Permit us to refer, first, to our letter of the 11th ultimo addressed to the Governor on this subject and to say that most of the principal objections of the proposed contract then before us as stated in that letter may also be urged against this one.

In this connection we also wish to note that the supplemental proposed agreement herewith submitted by you which further deals with the eighth paragraph of this proposed contract was not before us and had not been submitted to nor considered by us, and we knew nothing of its existence, at the time we wrote our letter of the 11th ultimo to the Governor.

As stated, this matter is now before us, as we understand it, on the sole question, submitted verbally, as to whether or not the use or employment of convicts and convict labor, as provided for by this proposed contract and supplement thereto, will or would be violative of Article 6174 of the Revised Civil Statutes of 1911, as amended by Chapter 32, page 49, General Laws, First and Second Called Sessions, Thirty-fifth Legislature. As amended this article reads as follows:

"It is hereby declared the policy of this State to work all prisoners within the walls and upon the farms owned or leased by the State, and in no event shall the labor of a prisoner be sold to any contractor or lessee nor shall any prisoner be worked on any farm not owned or leased by the State or otherwise upon shares."

It is our opinion that this proposed contract and supplement are at least evasive if not directly violative of this statute.

Taking this proposed contract as a whole, including the supplement, or whether including the supplement or not, it does not provide for nor contemplate the establishment and operation by the Board of Prison Commissioners of a factory as authorized and provided by Articles 6183 and 6187 of the Revised Civil Statutes of 1911, as amended by Chapter 141, page 259, General Laws, Regular Session, Thirty-sixth Legislature. On the contrary, it provides, in effect, for the establishment and operation by the Reliance Manufacturing Company, within and upon property belonging to the State and devoted to prison purposes, of a manufacturing enterprise with convict labor and for payment by the Reliance Manufacturing Company to the Board of

PRISON Commissioners of a stated sum per dozen for the articles so manufactured as compensation for such use or employment of convicts and convict labor.

This is evident to our minds, not only from a consideration of the proposed contract and supplement as a whole, but on this point we beg to call your attention to the following particular provisions:

1. Paragraph first of the contract states that "the Board of Prison Commissioners will establish in the State prison at Huntsville, Texas, a plant for the manufacture" of certain articles. The eighth paragraph provides that the Board of Prison Commissioners "agree to purchase, or lease, and install in said plant at its own expense" certain machinery, tools and equipment, but only such as may be designated by the Reliance Manufacturing Company, and that the Board of Prison Commissioners "will replace any such machinery, tools and equipment that the party of the second part (Reliance Manufacturing Company) may designate as damaged or useless." This provision clearly makes the Board of Prison Commissioners a mere agent or agency of the Reliance Manufacturing Company for doing the things here provided for. Not only so, but the proposed supplemental agreement, after quoting said eighth paragraph, plainly and in express terms provides that the Reliance Manufacturing Company shall "furnish, install, replace when necessary, and keep in repair all machinery, tools and equipment set out in said paragraph eight," and that same shall "remain the property of the" Reliance Manufacturing Company "and same may be removed at the termination of said contract referred to, or any renewal thereof, by" the Reliance Manufacturing Company. It is thus seen that the whole matter of selecting, acquiring and installing the machinery contemplated by this contract are in the hands of and at the discretion of the Reliance Manufacturing Company, that same remains the property of the Reliance Manufacturing Company, and that the Board of Prison Commissioners acquires no title to same and has little or nothing more to say or do with or concerning same than to furnish such convicts and convict labor as may be necessary in accomplishing the purposes of this paragraph. We do not understand that this will or would constitute the establishment of a factory by the Board of Prison Commissioners within the meaning of our statute on that subject.

2. The seventh paragraph provides that the Board of Prison Commissioners will purchase and utilize in the manufacture of articles to be manufactured such materials, and in such quantities as may be required by the Reliance Manufacturing Company. The ninth paragraph provides that the Reliance Manufacturing Company "shall have the right to specify the number of foremen and instructors to be employed" by the Board of Prison Commissioners "and to pass upon the skill, experience, capacity and qualifications of any such foremen and instructors that may be employed" by the Board of Prison Commissioners, and that the Board of Prison Commissioners "will not employ or keep in its employment any foreman or instructors" that the Reliance Manufacturing Company "shall say are not necessary, or are without sufficient skill, experience, capacity or qualifications to properly manufacture said merchandise," and "will discharge such men and employ others in their stead." It is thus seen that the Board of Prison

Commissioners has little or nothing to do with the conduct and operation of this proposed factory further than to furnish such convicts and convict labor as may be necessary to operate same at the discretion of and in accordance with the wishes and requirements of the Reliance Manufacturing Company. In our opinion, such was not contemplated by and does not meet the provisions of our statutes pertaining to the establishment and operation of a factory by the Board of Prison Commissioners.

3. Without further analyzing this proposed contract and supplement, it is our opinion that same does not provide for nor contemplate the establishment and operation by the Board of Prison Commissioners of a factory as authorized and provided by Articles 6183 and 6187 of the Revised Civil Statutes of 1911, as amended by Chapter 141, page 259, General Laws, Regular Session, Thirty-sixth Legislature, but, on the contrary, provides, in effect, for the establishment and operation by the Reliance Manufacturing Company, within and upon property belonging to the State and used by it for prison purposes, of a manufacturing enterprise, and the use and employment in so doing of the convicts and convict labor of this State and the payment by the Reliance Manufacturing Company to the Board of Prison Commissioners, as a consideration for the use of such convicts and convict labor, of a stated price per dozen of the articles manufactured, and that same, if carried into effect, would not only not constitute the establishment and operation of a factory by the Board of Prison Commissioners within the meaning of our statutes on that subject, but would be violative of Article 6174 of the Revised Civil Statutes of 1911, as amended by Chapter 32, page 4, General Laws, First and Second Called Session, Thirty-fifth Legislature, hereinbefore quoted.

This inquiry was handed to us only this morning and we have had but a few hours in which to consider same and have not had time to give full consideration to this proposed contract as a whole.

We are returning to you herewith the contract and supplement handed to us with your inquiry and herein discussed, retaining copies of same for our files.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2481, Bk. 58, P. 418.

PRISON SYSTEM—AUDITOR—APPOINTMENT—TERM OF SERVICE—  
COMPENSATION.

The term of office of the auditor for the prison system, and his right to the compensation provided by law, begins with the date of his acceptance of the appointment to that office upon beginning the discharge of the duties of that office within a reasonable time thereafter.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 25, 1923.

*Board of Prison Commissioners, Huntsville, Texas.*

GENTLEMEN: This is in reply to your inquiry addressed to the Attorney General, which is as follows:

"The Prison Commission would like an immediate opinion from your office as to who should receive pay as auditor for the prison system for the month of April. The former auditor, Mr. C. H. Arnold, was at Huntsville the early part of the month and up until the 15th of the month, and he claims the pay for the entire month, claiming that he had already done the work necessary to entitle him to such pay.

"The new auditor, Mr. Folbre, has just arrived and he informs the Commission that he will expect to be paid for half of the month, beginning April 15th. He has just arrived, as above stated, and will begin work this morning. \* \* \* We will be glad to have you advise us \* \* \* whether Mr. Arnold should be paid for the entire month, or whether he should be paid for half of the month, or whether the new auditor shall be paid from April 15th, or from April 26th when he commences his duties."

The auditor for the prison system is provided for by Article 6193 of the Revised Civil Statutes of 1911, which reads as follows:

"On the taking effect of this act, and annually thereafter, there shall be appointed by the Comptroller of Public Accounts, the Attorney General and the State Treasurer, a permanent auditor for the prison system, who shall hold his office for a term of one year, subject to discharge at any time, as hereinafter provided. It shall be the duty of such auditor to audit all accounts, vouchers, payrolls and all other business transactions of the prison system, and to check all property, material and supplies received and disposed of by or distributed within the prison system, and he shall make a full report thereof to the Governor on the first day of January of each year. Such auditor shall be subject to discharge at any time by the Comptroller of Public Accounts, Attorney General, and State Treasurer, or by a majority of said officers, for any incompetency, neglect, failure or refusal to discharge the duties of his office, or for any wrongful conduct that, in the judgment of the Comptroller of Public Accounts, Attorney General, and State Treasurer, renders him unfitted for said office; and, in the case of the discharge or resignation of any auditor, another shall be appointed by said officers or a majority of said officers. During the term of his services, such accountant shall be paid monthly a salary of two hundred dollars per month and all actual and necessary traveling expenses, to be paid at the end of each month, out of any moneys belonging to the prison system, such traveling expenses to be evidenced by an itemized sworn statement by the auditor filed with the board."

The minutes of the board provided for by this statute show only the following orders pertaining to Mr. Arnold and Mr. Folbre, as auditors for the prison system:

"Austin, Texas, February 12, 1919.

"On the above date the board to elect an auditor for the State penitentiary system of Texas met in the office of the State Treasurer with the following members present, viz:

"Hon. H. B. Terrell, Comptroller, Chairman.

"Hon. C. M. Cureton, Attorney General.

"Jno. W. Baker, State Treasurer, Secretary.

"On motion of Jno. W. Baker, seconded by C. M. Cureton, C. H. Arnold of San Antonio, Texas, was duly elected auditor of the State penitentiary system.

"No further business requiring attention the meeting adjourned.

JNO. W. BAKER,  
Secretary.

.....  
Chairman."

"Austin, Texas, April 12, 1922.

"On the above date the board to elect an auditor for the State penitentiary system of Texas met in the office of the State Comptroller with the following members present, viz:

"Hon. Lon A. Smith, Comptroller, Chairman.

"Hon. W. A. Keeling, Attorney General; and

"Hon. C. V. Terrell, State Treasurer, Secretary.

"On motion of Hon. C. V. Terrell, and seconded by Judge W. A. Keeling, G. L. Folbre of Austin, Texas, was duly elected auditor of the State penitentiary system.

"No further business requiring attention, the meeting adjourned.

C. V. TERRELL,  
Secretary.

LON A. SMITH,  
Chairman."

It will be noted that the statute provides that the auditor appointed under it "shall hold his office for a term of one year, subject to discharge at any time, as hereinafter provided," but does not say that he shall hold his office until his successor has been appointed. Assuming, however, that the position of auditor provided for by this statute is an office, and that the person appointed auditor is an officer, it would seem that Section 17 of Article 16 of our State Constitution would be applicable.

"All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

We assume that Mr. Arnold's term as auditor began on February 12, 1919, as the order appointing him shows that he was appointed on that day. This being true, his term of office as fixed by the statute expired on February 12, 1920, and his continuing after that date as auditor was under this provision of the Constitution continuing him in that office until the appointment of his successor, and it cannot be said that his term of office as such was terminated by the appointment and acceptance of the office by his successor at any time after February 12, 1920. His term had expired on that date and his continuing in the office was a matter of law for the time being pending the appointment of a successor. For this reason there was no occasion for the board to discharge Mr. Arnold in the manner and for the reasons provided for by this statute in order that his right to the office or to the salary or compensation therefor might be terminated. But if it would seem that Mr. Arnold should have been formally removed from office before the appointment of a successor the answer is that the action of the Board in appointing a successor operated as a removal of Mr. Arnold from office. As stated by our Supreme Court in the case of Keenan vs. Perry, 24 Texas, 253 (262), in passing upon a statute similar to this one:

"In so far as concerns the fact of removal, or what shall be evidence of the exercise of the power, it is not perceived that it can make any difference, whether the power exists, as an incident to the power of appointment, unqualified, as under the Act of 1856, or as qualified by the expression of the causes for which it may be exercised, by the Act of 1858. The power still resides in the Governor, and there is no prescribed form to be observed in its exercise. No public declaration of the fact is prescribed, and on general principles it would seem that no other manifestation of the exercise of the power is necessary, than the making of a new appointment. The new appointment is a revocation of the former appointment, and necessarily, a removal of the prior incumbent. There cannot be two incumbents of the office at the same time. The Governor has the exclusive power of appointment and removal; there is no mode prescribed by law for the exercise of the power; a new appointment is necessarily a revocation of the first, and a removal of the incumbent. This seems clear on principle, and it has been expressly so adjudged, both in England and in this country."

The rule is that the term of office of an officer, in case of appointive offices, begins on the date of the appointment, except where the statute

otherwise provides, or where under the statute the person appointed has a certain time within which to qualify, unless the appointing authority otherwise designates, or the person appointed delays acceptance of the appointment. *State vs. Wentworth*, 55 Kan., 298, 40 Pac., 648; *Verner vs. Seibels*, 60 S. C., 512, 39 S. E., 274; *Brodie vs. Campbell*, 17 Cal., 11; *Haight vs. Love*, 39 N. J. L., 14; 39 N. J. L., 476, 23 Am. Rep., 234.

Appointment consists in the choice by the appointing power of the person to be appointed and the naming and designation of such person in some proper way as the person selected for such appointment (*Johnson vs. Wilson*, 2 N. H., 202, 9 Am. Dec., 50), and where the issuance of a commission is not made by law a necessary part of the appointment, the appointment is complete when the choice and designation by the appointing authority has been made. *State vs. Barbour*, 53 Conn., 76, 22 Atl., 686, 55 Am. Rep., 65; *Speed vs. Detroit*, 97 Mich., 198, 56 N. W., 570.

These rules seem well established by these authorities, and since this statute does not prescribe when the term of an auditor appointed under it shall begin, and does not prescribe a time within which he shall qualify, nor require the issuance of a commission as a prerequisite to the effectiveness of the appointment, and since the appointing authority did not designate a different date, we conclude that Mr. Folbre's term of office as auditor began on April 12, 1922, the date on which he was appointed, unless delayed by his failure to accept the office until a later date. Indeed, this would seem to be the reasonable rule deducible from the quotation herein from the case of *Keenan vs. Perry* by our Supreme Court.

As to the acceptance of the appointment by Mr. Folbre, the facts are that he signified his acceptance of the appointment at the time it was made and to that end resigned the position he then held in the office of the Secretary of State to become effective on April 15, 1922, to which time he received compensation as such employe. True, he did not actually appear at the office of the Board of Prison Commissioners to begin his duties as auditor until April 26, 1922, but the nature of the duties devolved by law on the auditor provided for by this statute are such that we do not believe that this short delay on the part of Mr. Folbre in beginning his duties as such auditor is a sufficient ground, under the other facts and the rules of law hereinbefore stated, for concluding that his term of office did not begin until that time. His work necessarily reached back to and covered from April 15, 1922, or to and from the time to which the auditing by Mr. Arnold had been done.

From the foregoing we conclude that Mr. Folbre's term of office began on April 16, 1922, the date on which he accepted the appointment, and that Mr. Arnold, the former auditor, is entitled to compensation up to and including April 15, 1922, at the rate of two hundred dollars a month, and that Mr. Folbre's compensation as such auditor should begin with April 16, 1922, at the rate of two hundred dollars a month.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2507, Bk. 58, P. 374.

## MINES AND MINING—BOARD OF PRISON COMMISSIONERS—PENITENTIARY LANDS—CONTRACT OR LEASE.

Subject to certain limitations, the Board of Prison Commissioners, with the approval of and when so directed by the Governor, is authorized to execute a proper lease or contract providing for prospecting for and mining the oil, gas and other minerals that may be acquired and owned by the State for penitentiary farm purposes, such leases or contracts to be approved by the Attorney General.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 22, 1923.

*Board of Prison Commissioners, Huntsville, Texas.*

GENTLEMEN: We have your oral request, through Mr. S. J. Dean, one of your members, for an opinion as to whether or not, under the direction and approval of the Governor, you are authorized under the statutes to execute in behalf of the State a certain instrument purporting to provide for prospecting for, mining and marketing such oil, gas and other minerals as may be in a certain tract of about nine thousand (9000) acres of land constituting a part of what is commonly known as the Eastham State Farm, situated on the east side of the Trinity River in Houston County, Texas, same having been acquired by the State for prison farm purposes and now constituting a part of the penitentiary system of the State. The proposed contract here referred to is as follows:

State of Texas,  
County of Walker.

This agreement made and entered into this .....day of ....., 1923, by and between the Board of Prison Commissioners of the State of Texas, composed of J. A. Herring, S. J. Dean and H. W. Sayle, Commissioners, all of the County of Walker and the State of Texas, party of the first part, hereinafter called lessor, and A. G. Kazabeer of the City and County of San Francisco, State of California, party of the second part, hereinafter called lessee:

Witnesseth: That the said lessor for and in consideration of the sum of ten dollars cash in hand paid, receipt for which is hereby acknowledged, and of the covenants hereinafter contained on the part of lessee to be paid, kept and performed, has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee for the sole and only purpose of mining and operating for oil, gas and other minerals in, on, or under the tracts of land hereinafter described, together with all the other rights herein set out, said tracts of land being situated in the County of Houston, State of Texas, and being more particularly described as follows, to-wit:

Nine thousand acres of land to be taken out of what is known as the Eastham State Farm in Houston County, Texas, on the east side of the Trinity River, said farm being composed of approximately 13,500 acres; which said Eastham State Farm is composed of the following several tracts and parcels of land, to-wit:

In the County of Houston, State of Texas, being all of the R. J. Camp survey, the Mary Jane Ledbetter survey, C. E. Milon survey, the Edward Fitzsimmons survey, the Burleson or Mrs. Delha Eastham survey, the two Wm. Ford surveys, C. Collett survey, George Robbins league, a part of the John Cochran survey, the Henry Goldman survey, the Gordiana Badillo grant and Chas. Richards league, situated about twenty-six miles southwest from the town of Crockett, said lands being described by metes and bounds in four several tracts, one tract containing according to the field notes in the deed of conveyance 12,650 acres, and one tract a part of the Henry Goldman survey containing 149 acres, another tract a part of the Henry Goldman survey con-



taining 120 acres and another tract a part of the Chas. Richards league containing 120 acres, all of said tracts containing according to a resurvey thereof approximately 13,500 acres, and being the same lands heretofore purchased by the Prison Commission of the State of Texas from W. A. Eastham, D. D. Eastham and Luther Eastham, Jr., as per deeds fully recorded in the deed records of Houston County, Texas, to which reference is made for further description.

The said 9000 acres is more particularly described and designated by the field notes and survey, as shown by the plats and maps which are made a part hereof; reserving, however, to the grantor 100 acres around Prison Camp No. 1 and 100 acres around Prison Camp No. 2.

To have and to hold unto the said lessee, his heirs, executors, administrators, successors and assigns, said minerals and rights, to be held by said lessee for the period of five (5) years from date hereof, and for such other and further period of time as any such minerals are produced from said land; provided, if, prior to the expiration of said period, lessee shall have begun the drilling of a well or wells on said premises to find oil, gas or other minerals, then he shall have the right to hold this lease and to continue his drilling operations with reasonable diligence, and also to make as many additional attempts to find oil, gas or other minerals in paying quantities as he pleases, even though such operations extend beyond the expiration of said five (5) year term; provided, however, that these operations so extending the lease beyond such five (5) year term must be prosecuted with reasonable diligence, and the attempts to find oil must be successive in the sense that, until oil, gas or other minerals be found in paying quantities, not more than thirty (30) days shall elapse between the cessation or abandonment of work on one well and the beginning of operations for drilling another; and if oil, gas or other minerals be found as a result of such attempts, this lease shall continue in force for such further period of time as any of said minerals are produced from said land.

First.—While this lease is in force, lessee shall have, and lessor hereby grants to said lessee, the exclusive right of exploiting and searching on said land for oil, gas and other minerals, and of drilling and operating thereon for and producing same; and to carry out the purposes of this instrument, the following rights are granted—namely, lessee shall have the right of ingress in and upon, and egress from said land; to produce, save, store and remove said minerals, or any of them, if found, and to conduct all operations and erect and use thereon all such buildings, derricks, tanks, structures, machinery and equipment as may be necessary or proper for said purposes; to have rights of way on said land for and the right to lay and operate thereon, pipe lines to convey oil, gas, water and steam, and to erect and operate telephone and telegraph lines for use in lessee's business conducted thereon, and on other lands operated by it; to repair and remove from said land any of lessee's properties thereon, including the drawing and removing of any casing of any well drilled by lessee, to have and to use free of charge sufficient water (but not to use water from lessor's wells without his consent), oil, gas and coal from the premises for light, heat and as fuel for lessee's operations on the premises, also water for lessee's operations on adjoining premises, if there is enough for both purposes; and to have and enjoy such other rights and privileges as are reasonably required for conducting such operations.

Second.—The lessee agrees that he will begin the drilling of a test well upon some part of the herein described premises and actual drilling operations shall be begun within forty-five (45) days from date hereof and with said drilling operations so begun it shall be prosecuted diligently and continuously thereafter until the minimum depth of 3000 feet is attained, unless oil, gas or other minerals in paying quantities shall be discovered at a lesser depth, failing to do so, this lease shall become null and void.

Should oil, gas or other minerals in paying quantities be produced from said first well, then and in that event the lessee agrees that he will, within six months after the completion of said well, and every producing well thereafter, begin the drilling operation of another well upon some part of the herein described premises. In default whereof, the lessee shall forfeit all rights to this grant save and except such rights hereinafter provided.

Should the first well drilled on the above described premises be a dry hole, then and in that event if a school well is not commenced on some portion of said land within twelve months from the date hereof, this lease shall terminate as to both parties unless the lessee on or before that date shall pay or tender to the lessor or lessor's credit in the Huntsville State Bank at Huntsville, Texas, or its successors, which shall continue as depository regardless of change in the ownership of said land, the sum of 50 cents per acre per year which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon like payment or tender, the commencement of any subsequent well (before the discovery of oil, gas or other minerals in paying quantities) may be further deferred for like periods of the same number of months consecutively. It is hereby agreed and understood that the life of this lease shall in no manner be extended by rental payment beyond a period of five (5) years from the date hereof; but lessee has the right for such period extended under the condition hereinbefore set forth, and as long thereafter as oil, gas or other minerals are produced, without the payment of any sum or anything other than the royalties herein agreed upon and specified.

Third.—The royalties reserved by the lessor, and which shall be paid by lessee, free of cost to the lessor, are: A quantity or sum equal to one-eighth of all the oil and gas produced and saved from said premises, after deducting that used for light, heat and operations on the premises, the same to be delivered at the wells or to the credit of lessor in the pipe lines with which the wells may be connected.

If, as a result of any exploration under this contract, any minerals other than oil or gas shall be found in quantities deemed by the lessee to be paying, then lessee shall have the exclusive right to mine for and produce the same with all incidental rights, including that of ingress and egress, during the period of this contract, or any extension thereof granted under its terms, and as much longer thereafter as such mineral or minerals may be produced, and shall pay the lessor a royalty of one-eighth of all such minerals so mined, saved and sold.

Should the interest owned by lessor in said land prove to be an undivided interest in the tract less than the whole, the royalties and rentals to be paid hereunder shall be delivered or paid to the lessor in the proportion only that the undivided interest of the lessor bears to the entire interest, or whole. Or, if it should be proven that lessor has no title to a portion of the land no royalties shall be paid from or rentals for such portion.

Fourth.—No well shall, without lessor's consent, be drilled within two hundred (200) feet of any building now on the land. On lessor's request all pipe lines laid across any of said land to be tilled shall be placed below plow depth, and lessee shall pay reasonably for any damages done to crops, fences or other improvements belonging to lessor by reason of operations hereunder. The use of the surface of the land is hereby granted only so far as may be necessary to conduct said drilling or mining operations hereunder, including the searching for, producing, saving, storing and transporting of said minerals.

Fifth.—After oil or gas in paying quantities has been discovered by lessee on said premises the lessee shall be exempt from loss or forfeiture in whole or in part of this lease, except after judicial ascertainment of forfeiture, and a reasonable opportunity to save the lease after such ascertainment, or at the election of the lessee, to save twenty (20) acres for each producing oil well and fifty (50) acres for each producing gas well to be designated, as aforesaid, by lessee.

Sixth.—If this lease be surrendered in whole or in part, or expires by its own terms, lessee shall at his cost prepare and cause to be recorded a proper release thereof. Lessee shall notify lessor in person, or by mail, of the execution of a release and pay to the lessor anything due hereunder whereupon all further rights and liabilities under this contract shall cease; provided, that any sum due either party that has arisen or accrued out of this contract prior to such surrender or expiration shall be paid.

Seventh.—Lessor hereby does not warrant or agree to defend the title to the lands herein described above, but agrees to pay and discharge all liens and

taxes (including such proportion of any gross receipts tax against the production from said land while subject to this contract as the royalty paid to the lessor may be of the entire production therefrom) and assessments, charges and incumbrances that are now against or that may hereafter accrue, be levied, or assessed against the said premises before the same become delinquent.

Eighth.—When drilling or other operations are delayed or interrupted by storm, flood, or other acts of God, by fire, war, rebellion, insurrection, riot, strikes, differences with workmen, or failure of carriers to transport or furnish facilities for transportation, or as the result of some order, requisition, or necessity of the government, or as a result of any cause whatsoever beyond the control of the lessee, the time of such delay or interruption shall not be counted against lessee, anything in this lease to the contrary notwithstanding.

Ninth.—It is further agreed that all the conditions and terms hereof shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto, respectively, and the privilege of assigning in whole or in part is expressly conceded by each party to the other; but it is expressly understood that no change of ownership of a part of the land, or partition thereof, shall impose any additional drilling or other operating obligation on the lessee. Any change of ownership of a part of the land whether effected by conveyance, will, partition, or otherwise, shall entitle the respective owners only to the proportionate rentals due for their respective segregated tracts and to the royalties arising from the operations thereon.

Tenth.—All payments to the lessor made under the terms of this contract shall be deposited in the Huntsville State Bank, Huntsville, Texas, for the credit of lessor; and all payments made to lessor or to said bank for the credit of lessor, shall be binding on lessor's successors in title. All written notices to be given to lessor may be addressed to lessor by mail at Huntsville, Texas.

It is further expressly agreed and stipulated hereby that this lease shall not become effective until the same shall have been submitted to and approved by Hon. Pat M. Neff, Governor of the State of Texas.

In witness whereof, the parties hereto have hereunto set their hands this .....day of....., 1923.

BOARD OF PRISON COMMISSIONERS.

.....  
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.....  
Commissioners,  
Party of the First Part.

Attest:

.....  
Secretary.

.....  
Party of the Second Part.

Approved this.....day of....., 1923.

.....  
Governor of Texas.

The State of Texas,  
County of Walker.

Before me, the undersigned authority, on this day personally appeared J. A. Herring, S. J. Dean and H. W. Sayle, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated, and as the act and deed of the Board of Prison Commissioners of the State of Texas.

Given under my hand and seal of office this the.....day of....., 1923.

.....  
Notary Public, Walker County, Texas.

State of California, )  
City and County of San Francisco. ) ss.

Before me, the undersigned authority, on this day appeared A. G. Kazebeer, known to me to be the person whose name is subscribed to the foregoing in-

strument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the.....day of....., 1923.

.....  
Notary Public in and for the City and County of San  
Francisco, State of California.

We refer to Article 6187 of the Revised Civil Statutes of 1911, as amended by Chapter 141, page 259, General Laws, Regular Session, Thirty-sixth Legislature, which, among other things, provides that the Board of Prison Commissioners

“\* \* \* may, with the approval of the Governor, lease any real estate or other fixed property and appurtenances belonging thereto upon such terms as to them seem best. The Prison Commission shall not have authority to sell any real estate, except as they are directed by the Governor, and when directed by the Governor to sell any real estate, they shall have power to execute proper conveyance to the title thereto, such instruments of conveyance shall be prepared and approved by the Attorney General; \* \* \* provided, that no lands shall be sold for less price than its fair market value.”

In this connection, however, your attention is called to Article 6174 as amended by Chapter 32, page 49, General Laws, First Called Session, Thirty-fifth Legislature, declaring it to be the policy of the State “to work State prisoners within the walls and upon the farms owned or leased by the State,” and to other statutes of a similar import, clearly indicating the policy of the State to own and operate these lands as farms for the use and employment thereon of convict labor. We take it that these statutes should be regarded as limiting the otherwise broad and general provisions of Article 6187, at least to the extent of indicating a legislative intent that these lands so acquired and owned by the State in carrying into effect this declared policy, should not be leased or sold in such a manner, or to such an extent, as to place a limitation on, or to restrict or interfere with, the carrying out of this policy.

You are advised that you would not be authorized, under any appropriation heretofore made by the Legislature, to expend any prison funds or other money coming into your hands either by direct appropriation or arising from the operation of the prison system, in effecting the execution or in carrying out the terms and provisions of, or in any manner with respect to, any lease or contract pertaining to prospecting for or mining such oil, gas or other minerals as may be in these lands, nor to incur any debt or financial obligation, nor to use or employ convicts or convict labor in so doing.

Subject to these limitations, it is our opinion that you are authorized, under present statutes, with the approval of and when so directed by the Governor, to execute proper leases or contracts providing for prospecting for and mining the oil, gas and other minerals that may be in lands acquired and owned by the State for penitentiary farm purposes, such leases or contracts to be prepared or approved by the Attorney General.

Referring to the particular lease or contract here under consideration, you are advised as follows:

1. That so much of paragraph seventh at page 3 of the proposed lease or contract as pertains to the payment of taxes should be eliminated.



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and one hundred acres around Prison Camp No. 2, described as follows:

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It is agreed that this lease shall remain in full force for a term of five years from this date and as long thereafter as oil or gas or either of them is produced from said land by the lessee, subject to the terms and provisions hereof.

In consideration of the premises, the said lessee covenants and agrees:

To begin the actual drilling of a test well upon some part of the above described premises within forty-five days from the date hereof and to prosecute said drilling operations diligently and continuously to a minimum depth of three thousand feet, unless oil or gas is found in paying quantities at a lesser depth and the failure to so begin actual drilling operations within forty-five days and to prosecute the same diligently and continuously or either the failure to begin or to so prosecute said operations shall constitute a forfeiture of this lease and the same shall be null and void, and it is hereby further agreed and understood that unless oil or gas is discovered in the first well or unless the same be completed to a minimum depth of three thousand feet within twelve months from the beginning of operations, then this lease shall be null and void.

Should oil or gas be discovered in the first well in paying quantities lessee agrees within thirty days from the date of such discovery and the bringing in and completion of said well to begin actual drilling operations on another well not less than six hundred feet distant from the first well so completed and to prosecute said operations continuously and diligently to a depth of three thousand feet unless oil and gas is found in paying quantities at a lesser depth, and such lessee shall in like manner and time after the completion of each well producing oil in paying quantities, begin actual drilling operations on another well within not less than six hundred feet of one of the producing wells on said lease and the failure to so begin said drilling operations on a new well within thirty days after the completion of each well and the failure to prosecute said drilling operations diligently or either such failure to commence or to prosecute same diligently shall constitute a forfeiture of this lease and the same shall be null and void.

Should the first well drilled on the above described premises be a dry hole, then and in that event lessee shall begin the drilling of a second well on some portion of said premises above described within three months from the date of the bringing in of said dry hole and shall prosecute the drilling of said well diligently and continuously to a depth of three thousand feet unless oil or gas is discovered in paying quantities at a lesser depth, and said lessee shall so in like time and manner after the completion and bringing in of each dry hole begin and prosecute diligently another well within three months from the date of the bringing in and completion of said dry hole and the failure to commence the drilling of another well within three months from the time of the bringing in of the dry hole and the failure to prosecute drilling operations on same diligently and continuously or either the failure to so begin or to so prosecute said operations diligently and continuously within the said three months shall constitute a forfeiture of this lease and same shall be null and void.

Lessee agrees as a part of the consideration to deliver to the credit of lessor free of cost in the pipe line to which he may connect his wells, the equal of one-eighth of all the oil and gas produced or saved from said leased premises.

Lessee agrees that if at any time during the life of this lease oil and gas or oil or gas shall be discovered in paying quantities on any land adjacent to and joining the land herein described, not owned or controlled by the lessors herein, said lessee shall within thirty days from the date of the discovery of oil and gas or oil or gas as above begin the drilling of an offset well on the premises above described offsetting the well on the adjacent premises in which oil and gas or oil or gas has been discovered in paying quantities if the said well on the adjacent premises is within six hundred feet of the boundary line or any of the boundary lines of the above described premises.

If lessor owns a less interest in the above described land than the entire and undivided fee simple therein, then all royalties and rentals herein provided shall be paid to the lessor only in the proportion which their interest bears to the whole and undivided fee.

Lessee shall have the right to ingress and egress to the premises above described and to the free use of gas, oil and water produced on said lands for its operations, except water from the wells of lessor.

All pipe lines shall, when requested by the lessor, be buried below plow depth.

No wells shall be drilled nearer than two hundred feet to the houses or barns now on said premises without the written consent of the lessor.

Lessee shall pay for damages caused by its operations to growing crops on said land.

After oil or gas in paying quantities has been discovered by lessee on said premises the lessee shall be exempt from loss or forfeiture in whole or in part of this lease, except after judicial ascertainment of forfeiture, and a reasonable opportunity to save the lease after such ascertainment, or at the election of the lessee, to save twenty (20) acres for each producing oil well and fifty (50) acres for each producing gas well to be designated, as aforesaid, by lessee.

If this lease be surrendered in whole or in part, or expires by its own terms, lessee shall at his cost prepare and cause to be recorded a proper release thereof. Lessee shall notify lessor in person, or by mail, of the execution of a release and pay to the lessor anything due hereunder whereupon all further rights and liabilities under this contract shall cease; provided, that any sum due either party that has arisen or accrued out of this contract prior to such surrender or expiration shall be paid.

When drilling or other operations are delayed or interrupted by storm, flood, or other acts of God, by fire, war, rebellion, insurrection, riot, strikes, differences with workmen, or failure of carriers to transport or furnish facilities for transportation, or as the result of some order, requisition, or necessity of the government, or as a result of any cause whatsoever beyond the control of the lessee, the time of such delay or interruption shall not be counted against lessee, anything in this lease to the contrary notwithstanding.

It is further agreed that all the conditions and terms hereof shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto, respectively, and the privilege of assigning in whole or in part is expressly conceded by each party to the other; but it is expressly understood that no change of ownership of a part of the land, or partition thereof, shall impose any additional drilling or other operating obligation on the lessee. Any change of ownership of a part of the land whether effected by conveyance, will, partition, or otherwise, shall entitle the respective owners only to the proportionate rentals due for their respective segregated tracts and to the royalties arising from the operations thereon.

It is further expressly agreed and stipulated hereby that this lease shall not become effective until the same shall have been submitted to and approved by the Hon. Pat M. Neff, Governor of the State of Texas.

In witness whereof, the parties hereto have hereunto set their hands this ... day of ....., A. D. 1923.

BOARD OF PRISON COMMISSIONERS.

.....  
.....  
.....

Commissioners,  
Party of the First Part.

Attest:

.....  
Secretary.

.....  
Party of the Second Part.

Approved this.....day of....., A. D. 1923.

.....  
Governor of Texas.

Thence N. with Ledbetter's W. B. line 450 vrs, to her North corner;  
Thence S. 45-11 E. 2777 vrs. to her East corner on the N. W. B. line of the Gordiana Badilla 4-League Grant;

Thence E. 54-11 W. with Badilla and Ledbetter's line 1918 vrs. to a stake for corner a P. O. 26 in. dia. mkd. X brs. S. 78 E. 20-6/10 vrs;

Thence S. 16-04 E. 2556-4/10 vrs. to a stake for corner a P. O. 10 in dia. mkd. X brs. N. 30 W. 25-1/2 vrs;

Thence S. 46-30 E. 692-3/10 vrs. to a stake for corner on the South side of the Crockett and Huntsville Road;

Thence S. 23-30 W. with said road 60 vrs. to a stake for corner;

Thence S. 55-30 W. 7240 vrs. to station 919 on the East bank of the Trinity River;

Thence up said Trinity River with its meanderings to the place of beginning, containing 9000 acres of land, more or less.

There is hereby excepted from the above described 9000 acres of land and retained for the use and benefit of the prison system of the State of Texas 500 acres of land around Prison Camp No. 1, and 500 acres of land around Prison Camp No. 2, said 1000 acres of land excepted being more accurately described as follows:

Prison Camp No. 1:

Beginning at a point 875.4 v. N. 60 deg. 13' E. from a 2" iron pipe set for the N. E. cor. of a 100-acre tract of land set aside by the Prison Commission around the prison building known as Camp No. 1;

Thence N. 53 deg. 45' W. 1120.06 vrs. to a point for the north corner of this tract, with which a 2" iron pipe set for the N. W. cor. of said 100-acre tract brs. S. 12 deg. 17' W. 875.4 vrs;

Thence S. 36 deg. 15' W. 2520.13 vrs. to a point for the west corner of this tract, from which a 2" pipe set for the S. W. corner of said 100-acre tract brs. N. 60 deg. 13' E. 875.4 vrs;

Thence S. 53 deg. 45' E. 1120.06 vrs. to a point for the S. corner of this tract, from which a 2" iron pipe set for the S. E. corner of said 100-acre tract brs. N. 12 deg. 17' E. 875.4 vrs.

Thence N. 36 deg. 15' E. 2520.13 vrs. to the place of beginning, containing 500 acres of land.

Prison Camp No. 2:

Beginning at a point 656.6 vrs. N. 81 deg. 15' E. from a 2" iron pipe set for the N. E. cor. of the prison building known as Camp No. 2, which iron pipe is 525 vrs. N. 81 deg. 30' E. from the N. E. corner of the prison building of said Camp No. 2;

Thence N. 53 deg. 45' W. 1680.08 vrs. to a point for the N. cor. of this tract from which a 2" iron pipe brs. S. 8 deg. 45' E. 656.6 vrs;

Thence S. 36 deg. 15' W. 1680.08 vrs. to a point for the W. corner of this tract from which a 2" iron pipe brs. N. 81 deg. 15' E. 656.6 vrs.

Thence S. 53 deg. 45' E. 1680.08 vrs. to a point for the S. cor. of this tract from which a 2" iron pipe brs. N. 8 deg. 45' W. 656.6 vrs.

Thence N. 36 deg. 15' E. 1680.08 vrs. to the place of beginning, containing 500 acres of land.

It is agreed that this lease shall remain in full force for a term of five years from this date and as long thereafter as oil or gas or either of them is produced from said land by the lessee, subject to the terms and provisions hereof.

In consideration of the premises, the said lessee covenants and agrees:

To begin the actual drilling of a test well upon some part of the above described premises within forty-five days from the date hereof and to prosecute said drilling operations diligently and continuously to a minimum depth of



three thousand feet, unless oil or gas is found in paying quantities at a lesser depth and the failure to so begin actual drilling operations within forty-five days and to prosecute the same diligently and continuously or either the failure to begin or to so prosecute said operations shall constitute a forfeiture of this lease and the same shall be null and void and it is hereby further agreed and understood that unless oil or gas is discovered in the first well or unless the same be completed to a minimum depth of three thousand feet within twelve months from the beginning of operations, then this lease shall be null and void.

Should oil or gas be discovered in the first well in paying quantities lessee agrees within thirty days from the date of such discovery and the bringing in and completion of said well to begin actual drilling operations on another well not less than six hundred feet distant from the first well so completed and to prosecute said operations continuously and diligently to a depth of three thousand feet unless oil and gas is found in paying quantities at a lesser depth, and such lessee shall in like manner and time after the completion of each well producing oil in paying quantities begin actual drilling operations on another well within not less than six hundred feet of one of the producing wells on said lease and the failure to so begin said drilling operations on a new well within thirty days after the completion of each well and the failure to prosecute said drilling operations diligently or either such failure to commence or to prosecute same diligently shall constitute a forfeiture of this lease and the same shall be null and void.

Should the first well drilled on the above described premises be a dry hole, then and in that event lessee shall begin the drilling of a second well on some portion of said premises above described within three months from the date of the bringing in of said dry hole and shall prosecute the drilling of said well diligently and continuously to a depth of three thousand feet unless oil or gas is discovered in paying quantities at a lesser depth, and said lessee shall so in like time and manner after the completion and bringing in of each dry hole begin and prosecute diligently another well within three months from the date of the bringing in and completion of said dry hole and the failure to commence the drilling of another well within three months from the time of the bringing in of the dry hole and the failure to prosecute drilling operations on same diligently and continuously or either the failure to so begin or to so prosecute said operations diligently and continuously within the said three months shall constitute a forfeiture of this lease and same shall be null and void.

Lessee agrees as a part of the consideration to deliver to the credit of lessor free of cost in the pipe line to which he may connect his wells, the equal of one-eighth of all the oil and gas produced or saved from said leased premises.

Lessee agrees that if at any time during the life of this lease oil and gas or oil or gas shall be discovered in paying quantities on any land adjacent to and joining the land herein described, not owned or controlled by the lessors herein, said lessee shall within thirty days from the date of the discovery of oil and gas or oil or gas as above begin the drilling of an offset well on the premises above described offsetting the well on the adjacent premises in which oil and gas or oil or gas has been discovered in paying quantities if the said well on the adjacent premises is within six hundred feet of the boundary line or any of the boundary lines of the above described premises.

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Op. No. 2477, Bk. 58, P. 435.

#### CONVICTS ON FURLOUGH OR PAROLE—EXPIRATION OF TERM—FURNISHED WITH CLOTHING, MONEY AND TRANSPORTATION.

A convict on furlough or parole and absent from the prison at the expiration of his term is, when discharged, entitled to be furnished with transportation from the prison to the place from which he was sentenced, or from the prison to such place as he may designate not further from the prison than the place

from which he was sentenced, and is entitled to be furnished with clothing and money as provided by statute, but only in person and at the prison.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 22, 1923.

*Board of Prison Commissioners, Huntsville, Texas.*

GENTLEMEN: The Attorney General is in receipt of yours of the 16th instant, requesting his opinion as to whether or not a prisoner absent from the prison on furlough or parole at the time of the expiration of his term should be furnished with clothing, money and railroad transportation upon being discharged.

Article 6227 of the Revised Civil Statutes as amended by Chapter 32, page 49 (53), General Laws, First Called Session, Thirty-fifth Legislature, reads as follows:

"When a prisoner is discharged he shall be furnished with a written or printed discharge from the Prison Commission signed by the chairman of the Board of Prison Commissioners with the seal of the Commission affixed, giving prisoner's name, date of sentence, from what county sentenced, the amount of commutation received, if any; the trade he has learned, if any; his proficiency in same, and such other description as may be practicable. He shall be furnished with a suit of clothing of good quality and fit, two suits of underwear, one pair of shoes and a hat, one shirt, \$5.00 in money in addition to any money which he may have to his credit with the Prison Commission, and redeemable and non-transferable railroad transportation to the place from which he was sentenced or to such place as he may desire, provided, that the same be not a greater distance from the place where he is released than the place from which he was sentenced."

In the face of the plain wording of this article, it could not be said that a prisoner upon being discharged is not entitled to a written or printed discharge as provided merely because he might be absent from the prison on parole or furlough at the time of the expiration of his term, and we find nothing in this article that would deny to a prisoner in such a case the other benefits accorded to him by it. The plain wording is, without exception or qualification, that "When a prisoner is discharged he shall be furnished" with the things enumerated.

It does not follow, however, that these things should be furnished or delivered to the prisoner elsewhere than at the prison. The contrary seems to be indicated. You could not well fit a prisoner with the clothing indicated without the prisoner being present in person for that purpose, nor could it be known by you with that degree of assurance that should characterize such matters that the person entitled to the clothing, money and transportation here provided for had in fact received them if you should attempt to deliver them otherwise than to the prisoner in person.

We also note that transportation is to be furnished "to the place" from which the prisoner was sentenced, or "to such place" as the prisoner may designate, but it is not stated from what place such transportation shall be furnished. There must be a place from which transportation is furnished or this statute could not be effective. We think this omission is significant and shows that in enacting this article the Legislature must have had in mind the prison system or some part of same as the place from which transportation should be furnished, since that is the place provided by law for the keeping of prisoners. We

think the expression "the place where he is released" as used in this article means that place or part of the prison system where the prisoner is when released, that is, that it is from such place that transportation is to be furnished. Again, a prisoner on furlough or parole might be at some remote place from this prison and it would not be at all practical to furnish transportation from such remote place, nor can we say from this article that it was intended to afford transportation, say, from El Paso, where a prisoner might be on furlough or parole when his term expired, to Huntsville, where he might have been sentenced.

You are advised, therefore, that a prisoner on furlough or parole is entitled to be furnished with transportation as provided by this article upon his discharge just the same as one not on furlough or parole, but only in person and from the prison, and is entitled to be furnished with clothing and money as here provided, but only in person and at the prison.

We do not mean by this that you are absolutely precluded from delivering the discharge, clothing or money to a discharged prisoner elsewhere than at the prison, but that it is not your duty to deliver them elsewhere.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2504, Bk. 58, P. 405.

#### NAVIGATION DISTRICTS—POWERS AND AUTHORITY.

1. The usual rule to the effect that express powers include by implication all power and authority reasonably necessary in order to exercise the express powers applies in the exercise of power and authority by those in charge of the navigation district at Houston.

2. It is the duty of the county auditor to audit all bills of the navigation district and approve same if incurred in accordance with law, and are found by him to be correct, and no bill of the district can be paid until the same has been audited and approved by the county auditor, as provided by law. All warrants of the district must be countersigned by the county auditor.

3. The Attorney General's Department could not pass upon the question whether it is necessary to advertise for competitive bids in employing a person to design a grain elevator in the absence of full information as to the nature and terms of the contract.

4. Moneys derived from a bond issue under the district as it formerly existed, cannot be used for purposes other than those for which the bonds were issued, and such funds cannot be used for the purposes and in the exercise of the powers added to the navigation district by the subsequent act of the Legislature.

5. As a general rule, all work of the district must be let upon competitive bids in accordance with the statute. There may be exceptions to this rule, as, for instance, in the case of employing an attorney. Each particular case will have to be decided upon its merits as to whether it constitutes an exception to this rule.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 25, 1923.

*Honorable H. L. Washburn, County Auditor, Houston, Texas.*

DEAR SIR: The Attorney General has received your communication of April 17, 1923, reading as follows:

"Enclosed find copy of lease agreement between the City of Houston and the Navigation District of Harris County. Kindly refer to Chapter 30, page 53, Acts Thirty-seventh Legislature, First and Second Called Sessions, 1921. Please refer also to Art. 1494A to C, inclusive, and to Title 96, R. S.

"Under the lease agreement the navigation district has taken over the Port of Houston, constructed by the City of Houston, and is operating same, deducting from the gross receipts of the facilities the operating expenses and authorized expenditures for capital investments, and periodically remitting to the City of Houston the difference, if such exists.

"1. The problem is constantly arising as to whether or not the restrictions ordinarily thrown around public expenditures apply to such expenditures from this revenue, or whether they are governed only by the pleasure of the board operating the navigation district. As an illustration, I have in mind such expenditures as the entertainment of officials, the cost of which is proposed to be borne by the district; the insurance of employees in case of death or accident; advertising, and other expenses of a similar nature which I would not approve against the navigation district as it formerly existed, nor against the county. The board takes the position that these and other items are necessary in the operation of the district, but I am disinclined to approve expenditures out of this fund when I know that ordinarily the same may not be approved from public funds, unless it should be your opinion that under this lease agreement such funds are not subject to these limitations, nor to the refusal of the auditor to approve as not being expenditures for public purposes, authorized by law. Please give me your opinion.

"2. The navigation district has voted a bond issue since the port and navigation district have been combined, for the purpose of constructing wharves, docks, elevators, etc., at the port. The board has sent letters to different designers, and in connection with responses, has awarded a contract for \$25,000 to a firm for a design for a grain elevator, but has not advertised for bids nor received them. Please note the case of *Hunter vs. Whiteaker*, 230 S. W., 1096, and 236 S. W., 202, and advise whether bids must be taken under Articles 5992-3.

"3. The bonds above referred to have not been sold, and pending their sale the district is proceeding to advertise for bids and let contracts to be paid for from the surplus remaining from bond issues of the navigation district voted for the construction of the channel under the old form of the navigation district. Can these funds be expended for the erection of wharves, etc., of the port?

"Finally, is it your idea that Articles 5992 and 5993 require bids to be taken upon any work undertaken by the navigation district on the channel as it formerly existed, or on the port as it now exists, or is it limited to the original construction work? If this is limited to the original construction work, there is no other statute requiring bids for labor, material or contracts under the navigation district."

In answer to your questions in the order propounded by you, you are respectfully advised as follows:

#### I.

The powers of the navigation districts are statutory and are to be found in Title 96, Vernon's Complete Statutes of 1920, and also Chapter 30, General Laws of the First Called Session of the Thirty-seventh Legislature.

Under Title 96, the powers of the district are substantially to "make improvement of rivers, bays, creeks, streams and canals running or flowing through such district, or any part thereof, and make, construct and maintain canals and waterways to permit of navigation, or in aid thereof, and may issue bonds in payment thereof as hereinafter provided." (Art. 5955.)

These powers were not considered broad enough and an act was

passed by the Thirty-seventh Legislature, being Chapter 30, above mentioned. This latter mentioned act declared that in addition to the powers already conferred by Title 96 "the right, power and authority to acquire, purchase, take over, construct, maintain, operate, develop and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage lands, towage facilities, and any and all other facilities or aids incident to or necessary to the operation or development of a port, ports, waterways and the navigation district, and to issue bonds in payment therefor and to do any and all other acts and things herein provided." (Section 9.)

It would be quite useless for us to cite and quote extensively from authorities which we have so often cited and quoted from to the effect that the power and authority to do a thing includes power and authority to do whatever is necessary to accomplish that thing. The doctrine of implied power, however, permits of the doing of those things only which are reasonably necessary to accomplish and exercise the express power granted. We do not conceive of any reason why the usual rules as to implied powers should not be held to be applicable as to the powers of a district of this kind. Whatever power the district has (and this includes those acting for the district) must be found in the Constitution and the statute. As to what is, in a given case, a reasonable and necessary expenditure to carry out the authority granted will have to be decided upon the merits of the particular proposition under consideration at this time. We do not believe the lease agreement referred to by you affects the general rule in any way or renders it inapplicable, for, as above stated, whatever authority the district has, must be found in the Constitution and statutes of the State, and only the powers expressly granted, plus the incidental powers necessary in the exercise of the express powers, may be exercised.

There can be no doubt, in view of the plain provisions of the statutes, that the bills of the district are subject to the audit and approval of the county auditor. Articles 1494a et seq. expressly confer authority on the county auditor to audit and approve such bills. It will be noted, also, that these articles provide that all warrants of the district must be countersigned by the county auditor, and that no treasurer, or other depository, of the district, shall pay out any money except upon warrants so duly countersigned.

No one would seriously contend that it is not necessary for the county auditor to approve bills and countersign warrants of the district on the ground that the bills were incurred beyond the power and authority of those in charge of the affairs of the district. The fact that bills were incurred *ultra vires* might be ground for refusal to approve the same, or to countersign the warrants, but could not reasonably be urged in support of the proposition that the bill should be paid without such approval.

You are therefore respectfully advised that all bills of the district are subject to the approval of the county auditor and all warrants must be countersigned by the county auditor.

## II.

In reference to your second inquiry, beg to advise that we would be unable to say whether the contract with a designer to design a grain

elevator would be analogous to the ones involved in the cases which you cite, without examining a copy of the contract.

### III.

As stated in answer to question No. 1, these districts had certain authority under the statutes prior to the enactment of the law of the First Called Session of the Thirty-seventh Legislature, and where bonds were issued for these purposes, it goes without saying that the proceeds of the bonds could not be expended for purposes other than those for which the bonds were voted and issued. This is true, aside from the proposition that the original statute did not authorize the expenditure of the money for the additional purposes, since we cannot assume that the people would have voted the bond issue if they had known the proceeds thereof were to be used for these additional purposes.

These purposes, under the original act, were as substantially stated in answer to your first inquiry. Evidently, the Legislature was of the opinion that the navigation districts did not have sufficient authority to acquire, construct and operate terminal facilities for the development and aid of navigation, or else the act of the First Called Session, above mentioned, would not have been passed. In fact, it is stated in the emergency clause of the act as follows: "The fact that the present laws providing for navigation districts do not provide that said navigation districts may acquire, construct and operate terminal facilities for the development and aid of navigation, creates an emergency," etc. Thus, we have a legislative construction of the prior act entitled to great weight in construing the same.

We are of the opinion that the proceeds of the bond issue under the district as it formerly existed cannot be used for purposes other than those for which the bonds were issued and that such funds cannot be used for the purposes and in the exercise of the powers added to the navigation district by the latter mentioned act.

### IV.

Section 15 of the new act answers your fourth question. It reads as follows:

"The provisions heretofore provided for letting of contracts for navigation districts shall apply in all cases consistent with the provisions of this act; provided, that in case of emergency contracts may be let by navigation and canal commissioners not exceeding one thousand (\$1000) dollars without advertisement for bids; provided further, that in case of urgent necessity or present calamity, advertisement for bids may be waived."

Reading this section with Articles 5992 and 5993, of the Revised Civil Statutes, we are of the opinion that all work of the district as a general rule must be let upon competitive bids as provided in Articles 5992-3, except as to emergency contracts involving one thousand (\$1000) dollars, or less; excepting, also, cases of "urgent necessity or present calamity," in which cases advertisements for bids may be waived. In view of such decisions as those mentioned in your letter, there are undoubtedly other exceptions. It probably would not be contended that a contract with an attorney or a supervising engineer would have to be entered into pursuant to competitive bids. As to whether

there are any other analogous situations that might arise cannot be determined in advance. Let each contract or proposed contract stand upon its own merits in this respect.

Very truly yours,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2457, Bk. 58, P. 464.

WATER AND WATER RIGHTS—CHANGE IN POINT OF DIVERSION AND  
PLACE OF USE—BOARD OF WATER ENGINEERS.

In the absence of a proper application therefor, there is no statute of this State enjoining any duty upon the Board of Water Engineers concerning any change that may be made, or that may be desired, by an appropriator of public waters for irrigation purposes in the point of diversion or place of use.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 30, 1922.

*Board of Water Engineers, Austin, Texas.*

GENTLEMEN: Replying to yours of the 22nd instant, enclosing letter addressed to you by A. D. Harty of Bay City, Texas, under date of the 19th instant, which is returned to you herewith, you are advised that, in the absence of a proper application made to you with respect thereto, there is no statute of this State that enjoins any duty upon you concerning any change that may be made, or that may be desired, by an appropriator of any of the public waters of this State for irrigation purposes in the point of diversion or place of use from that designated or in use upon the acquisition of the right to the use of such waters, and this irrespective of when or how such right may have been acquired.

Furthermore, there does not seem to be any provision in our statutes pertaining to the making of any change by an appropriator in his point of diversion or place of use, either by an application made to you for that purpose, or otherwise. Permit me to suggest that you consider the matter of recommending to the Legislature, as directed by Section 37, Chapter 88, General Laws, Regular Session, Thirty-fifth Legislature, an amendment to our statutes in this regard. Such a statute seems to have been enacted in the States of Nebraska, Nevada, North Dakota, Oklahoma, South Dakota and Utah. See Kinney on Irrigation and Water Rights, Vol. 2, p. 1534, Sec. 871, and Water and Water Rights by Farnham, Vol. 3, p. 2096, Sec. 676, and citations by these authors.

In the case of New Cache La Poudre Irrigation Company vs. Water Supply and Storage Company, 29 Colo., 469 (68 Pac., 781), with respect to such a statute, after reaffirming previous holdings that an appropriator of water, subject to certain limitations, had the right to change his point of diversion and place of use, says:

"\* \* \* but we cannot agree with plaintiff that it was beyond the power of the general assembly to provide, as an exclusive remedy for the protection and enforcement of the vested right asserted, that which the statute furnishes. A party has no vested right to a particular remedy, and if an exclusive statutory remedy, provided for the enforcement of his previously vested right, is

ample for that purpose, he must avail himself of it, and cannot ignore the remedy thus given and resort to a former one which the new was intended to supplant. This court has held that our so-called irrigation statutes for the ascertainment of priorities, and placing the distribution of water for irrigating purposes under control of State officers, are constitutional, though they affect rights which accrued before the enactments were made, and place upon their enjoyment limitations from which they were theretofore exempt. These statutes are upheld as a rightful exercise of the police power of the State. This remedial statute, therefore, may be upheld upon the same principle. Though the owner of a water right has, as an incident of the ownership, the right to change the point of diversion from the natural stream, and to change the place of use, provided always that thereby the rights of others are not injuriously affected, still it is a lawful exercise of legislative power to require, as a condition precedent to such changes, that the person desiring them shall obtain a decree of the proper court allowing them upon a hearing in accordance with the procedure prescribed by this act, and after a judicial ascertainment is had that the rights of other appropriators are not injuriously affected, though such qualified right to the changes existed before the passage of the act, unincumbered with the requirement of securing judicial authority therefor."

See, also, *Lower Latham Ditch Company vs. Bijou Irrigation Company*, 41 Colo., 212 (93 Pac., 483), and *Wadsworth Ditch Company vs. Brown*, 39 Colo., 57 (88 Pac., 1060).

The Supreme Court of Nebraska in the case of *Farmers' and Merchants' Irrigation Company vs. Gothenberg Water Power and Irrigation Company*, 73 Neb., 223 (102 N. W., 487), in considering a statute of this character, says:

"Under the law existing in 1894, the defendant had the right to extend its ditch and change the use of the water so as to use it all for irrigation purposes, instead of for power, if it so desired; and, therefore, the holding of the board of irrigation and the district court that it had a prior right to the use of the whole 200 inches of water is correct. But since the irrigation law of 1895 has been enacted, under its provisions, by which the water must be attached to the land, it is incumbent upon the defendant clearly to specify in its application the identical lands upon which the water has been applied. The section of the statute allowing an extension of the ditch or a change of the place of use must be construed together with the provisions of the 1895 law, and, while a prior appropriator may change the place of use of water which had already been appropriated, it can only do so under the permission and subject to the administrative control of the board of irrigation."

With respect to your inquiry you are also referred to Opinion No. 2284, addressed to you by the Attorney General under date of February 10, 1921.

Nothing in that opinion nor in this one is intended as indicating the opinion of the Attorney General on the question of whether or not an appropriator has the right, under any circumstances or state of facts, to change his point of diversion or place of use. What seems to be a full discussion of this question may be found in *Kinney on Irrigation and Water Rights* (Sec. Ed., 1912), Volume 2, Chapter 48, pages 1499-1539, and *Waters and Water Rights* by Farnham, Volume 3, page 2097, Section 677, and 27 *Ruling Case Law*, page 1279, Sections 189-190, and authorities cited. See, also, *Hard vs. Boyce City Irrigation and Land Company* (Sup. Crt., Idaho), 65 L. R. A., 407; *American Rio Grande Land and Irrigation Company vs. Mercedes Plantation Company* (Civ. App.), 155 S. W., 286, affirmed by our Supreme Court in *American Rio Grande Land and Irrigation Company vs. Mercedes Plantation Company*, 208 S. W., 904; *Lakeside Irriga-*



tion Company vs. Buffington (Civ. App.), 168 S. W., 21; Louisiana Rio Grande Canal Company vs. Frazier (Civ. App.), 196 S. W., 210; Nueces Valley Irrigation Company vs. Howard (Civ. App.), 206 S. W., 575; Edinburg Irrigation Company vs. Paschen (Civ. App.), 223 S. W., 329, affirmed by our Supreme Court in Edinburg Irrigation Company vs. Paschen, 235 S. W., 1088.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2546, Bk. 59, P. 63.

ARTICLE 2652, ARTICLE 2653 AND ARTICLE 2654, R. S., 1911, AND  
CHAPTER 71, ACTS TWENTY-FIRST LEGISLATURE, 1889.

1. Articles 2652, 2653 and 2654, R. S., 1911, do not give the Governor unquestioned authority to issue manuscript bonds for investment by the State Board of Education for the University Permanent Fund, since such bonds are authorized only for the purpose of "supplying casual deficiencies in the revenue."

2. The proceeds of such bonds, if issued by the Governor, could not be used to retire the bonds held by the State Permanent School Fund, since there is no legislative authority to issue such refunding bonds.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 8, 1924.

*Hon. S. M. N. Marrs, State Superintendent and Ex-Officio Secretary  
of the State Board of Education, Capitol.*

DEAR SIR: Your letter of March 11th to the Attorney General has been referred to me and for the sake of convenience in stating the question, I quote your letter as follows:

"Pursuant to the direction of the State Board of Education as the secretary of said board, I am requesting your opinion on the following matter submitted by Dr. W. S. Sutton, Acting President of the University of Texas.

"The University of Texas now has to the credit of Permanent Endowment Fund approximately \$200,000 distributed in some ninety banks of the State and presumably drawing interest at the rate of 4 per cent per annum. The statutes, however, make it the duty of the State Board of Education to invest this fund in bonds of the United States or of the State of Texas. It seems, therefore, to be a violation of law to permit this fund to remain in the depository banks.

"The suggestion is made by the Acting President that the Governor, acting under the authority of Articles 2652, 2653 and 2654, R. S., 1911, issue manuscript bonds of the State of Texas of the face value of \$10,000 each, to bear interest at the rate of 5 per cent per annum, and redeemable at the pleasure of the State. These bonds, when properly issued, to be purchased by the board as an investment for the University Permanent Fund.

"As having a probable bearing upon the issuance and sale of these bonds I wish to direct your attention to the following: The State Permanent School Fund owns State bonds, to wit:

Date.	Amount.	Rate Per Cent.	Due.
January 15, 1891 . . . . .	\$ 11,000	5	1921
March 17, 1891 . . . . .	\$ 8,000	5	1921
January 1, 1904 . . . . .	178,000	5	1944

"The first two series have matured and the third series mentioned, by the terms of the bonds, are now optional. These total \$197,000, which is approximately the amount on hand in the University Permanent Fund.

"Based upon the foregoing information, the following questions are respectfully submitted:

"1. Do the statutes give the Governor unquestioned authority to issue the manuscript bonds for investment by the State Board of Education for the University Permanent Fund?

"2. What purpose should be stated as a reason for the issuance of said bonds?

"3. Can the proceeds of the above mentioned bonds be used to retire the three series held by the State Permanent School Fund?

"4. If this plan is not feasible, can the Governor, under the authority of the statutes quoted, issue \$197,000 State refunding bonds and sell them to the University Permanent Fund and with the proceeds redeem the bonds now held by the State Permanent School Fund?

"In justification of the retirement of the State bonds now held by the State Permanent School Fund bearing three and five per cent interest, the State Board can invest this cash at once in school district bonds bearing five and six per cent interest and thus aid many small districts to build schoolhouses. As the chief executive officer of the public school system I would appreciate an opinion to this effect if you can make it in accordance with your interpretation of the statutes."

Your letter itself raises the question as to the purpose for which the funds derived from the sale of the bonds mentioned may be used, and reference to the articles to which you refer, namely, Articles 2652, 2653 and 2654, Revised Statutes, 1911, discloses the fact that no purpose is stated in either of said articles. The articles referred to were enacted by the Twenty-first Legislature, being found in Chapter 71, Acts Twenty-first Legislature, approved April 2, 1889. The caption of the act reads as follows:

"An Act to provide for the issuance of bonds of this State to supply deficiencies in the revenue, and to provide the manner of the sale of such bonds to the Board of Education for the Permanent University Fund."

Looking to the caption of the act to ascertain the intent of the Legislature, it appears that the only purpose for which such bonds were authorized was to "supply deficiencies in the revenue." So far as I have been able to find from an investigation of the bonds issued by the several Governors since the enactment of the above mentioned articles, no bonds have been issued under the authority of said articles. As stated above, the act mentioned was approved April 2, 1889, and on April 5, 1889, Chapter 72, Acts Twenty-first Legislature, was approved, the caption of which act reads as follows: "An Act to provide for the payment of the bonds of the State issued under an act of the Legislature approved August 5, 1870." I find that the Governor issued bonds under the act of April 5, 1889, for the purpose of refunding the bonds approved August 5, 1870, and that the University Permanent Fund now holds a portion of said bond issue.

Abbott in his work on Public Securities, Section 81, uses the following language:

"The different States of the Union in incurring indebtedness and issuing negotiable securities therefor, are subject to the specific limitations to be found in their several Constitutions, either in respect to the amount to be issued or the *purpose* for which issued." (Italics mine.)

Section 49, Article 3, of the Constitution of Texas, reads as follows:

"No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the

revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars."

Attention is directed to the meaning given to the term "casual deficiency" in well considered cases by the higher courts of other States having a similar provision in their Constitutions.

"Casual" means that which happens by accident, or is brought about by an unknown cause, and as used in the Constitution, forbidding any county to incur a debt without first submitting the matter to a popular vote, 'except for a temporary loan or loans to supply casual deficiencies of revenue,' means some unforeseen and unexpected deficiency, and does not include a debt incurred for the building of a courthouse."

Lewis vs. Lofley, 19 S. E., 57, 59, 92 Ga., 804.

"A casual deficiency of a State's revenue is one that happens by chance or accident, and without any design or intention to evade the constitutional inhibition of such State against increasing the authorized expenditures of such State above a certain amount."

22 Pac., 464, 13 Colo., 316.

Since the Constitution uses the words "casual deficiencies of revenue," it is evident that the Legislature intended to authorize the issuance of such bonds only for the purpose of supplying "casual deficiencies of revenue" and only such casual deficiencies of revenue as hereinabove defined.

Answering your questions in their order, you are advised:

1. The statutes referred to do not give the Governor unquestioned authority to issue the manuscript bonds for investment by the State Board of Education for the University Permanent Fund, but only authorize their issuance for the purpose of "supplying deficiencies in the revenue," and since the purpose for which such bonds may be issued is mentioned only in the caption and is not found in the body of the act, it cannot be said that the authority is "unquestioned."

2. The only purpose that could be stated is "to supply deficiencies in the revenue."

3. The proceeds of such bonds, if the Governor were to issue them, could not be used to retire the bonds held by the State Permanent School Fund.

4. No. Before the Governor would be authorized to issue refunding bonds, it would be necessary for the Legislature to pass an act specifically authorizing the issuance of such refunding bonds.

Very truly yours,

C. F. GIBSON,  
Assistant Attorney General.

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Op. No. 2531, Bk. 59, P. 56.

#### CONSTRUCTION OF STATUTE.

Chapter 54, Second Called Session, Thirty-eighth Legislature, providing that unearned interest upon bonds bought on deferred payments by the State Board of Education, does not authorize the credit of such unearned interest on bonds of another issue but only upon the coupons of bonds of said issue.

Said act authorizes the credit of all of the unearned interest on a particular issue of bonds to be credited on coupons then due or next falling due of said issue.

The redemption of any bond at any time, either before or after the full pay-

ment by the State, would not affect the amount of unearned interest to be credited upon unpaid coupons remaining in the Treasury.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 23, 1923.

*Hon. S. M. N. Marrs, State Superintendent, Capitol.*

DEAR SIR: In your letter to the Attorney General under date of November 21st you submit the following questions in connection with the refunding of unearned interest to certain municipalities as provided in Chapter 54, Acts Second Called Session, Thirty-eighth Legislature:

"(1) The State Board of Education purchased from South Fort Worth, Rosen Heights, Riverside, and Diamond Hill Independent Districts, in Tarrant County, certain issues of bonds and paid for same on installments. Subsequently the City of Fort Worth annexed the major portion of the territory of these districts and assumed payment of the bonds and in fact paid in full the bonds issued by South Fort Worth, Riverside, and Rosen Heights. As Fort Worth has assumed all of this indebtedness, should the aggregate unearned interest on the redeemed bonds, together with the unearned interest on the Diamond Hill bonds, all be credited on the unpaid coupons of the Diamond Hill bonds?"

"(2) An independent district has sold to the State Board of Education an issue of \$10,000 in bonds which were paid for on installments. After the bonds had been paid for in full by the State the district redeemed one of the bonds amounting to one thousand dollars. Shall the Treasurer credit the unpaid coupons attached to the remaining nine bonds in the Treasury with the full amount of unearned interest due the district or shall one-tenth of the unearned interest be deducted on account of the redemption of the bond?"

"(3) If the district had redeemed the \$1000 bond prior to the payment of the last installment on said bonds by the State, would such redemption have affected the amount of unearned interest due the district under the provisions of this act?"

Article 2740a, as amended by said Chapter 54, reads as follows:

"In all cases where the State Board of Education has heretofore purchased bonds mentioned in Article 2740 of this title on deferred payments of the purchase price, said contract of purchase is hereby validated, as of the time of the payment of the first installment thereon, and all sales of bonds to said board under said contract by counties, incorporated cities and districts are hereby validated as of the date of the respective subsequent payments of the purchase price, and the State of Texas shall be deemed to be the owner of said bonds only from the time of the respective payments thereof. It shall be the duty of the State Board of Education within six months from and after the date upon which this act takes effect, to ascertain by calculation the amount of unearned interest on said bonds by reason of the deferred payments of the purchase price, and said board shall certify the amount of unearned interest on each issue so purchased to the State Comptroller of Public Accounts and to the State Treasurer. 'Unearned interest,' as used herein, is defined to mean interest on deferred payments from date of payment of each installment of principal to date of payment of final installment of the principal. It shall be the duty of the State Comptroller of Public Accounts and the State Treasurer to enter upon the records in their respective offices the amount of said unearned interest as certified by the Board of Education. The State Treasurer is hereby authorized and it shall be his duty to credit the amount of unearned interest as certified by the State Board of Education upon the interest coupons of said bonds then due or next falling due and the interest coupons upon which said unearned interest is credited are hereby cancelled in an amount equal to the sum of said unearned interests as credited therein. Upon the maturity of the interest coupons which said unearned interest is credited, the county, incorporated city, independent or common school district, road precinct, irrigation, navigation or levee districts

issuing said bonds to the State Board of Education under such installment contract, shall only be required to pay the difference between the credit of said unearned interest and the principal of the coupons upon which the same is credited. Provided that this act shall only apply to bonds purchased on deferred payments subsequent to September 1, A. D. 1920."

It will be noted from the above section of said act that the only way in which credit can be given for the unearned interest, as defined therein, is by crediting the amount of such unearned interest on the "interest coupons of said bonds then due or next falling due." It follows, therefore, that where any issue of bonds has been redeemed and there are no interest coupons "then due" or to thereafter fall due, it would be impossible to allow any credit for unearned interest under the terms of the act, and you are therefore advised that question No. 1 is answered in the negative and that the State Treasurer would not be authorized to credit the interest on the coupons of some other bond issue.

Replying to your second question, I call your attention to the fact that said Chapter 54 makes it the duty of the State Board of Education to ascertain by calculation the amount of unearned interest on said bonds by reason of the deferred interest payments of the purchase price and to certify the amount of unearned interest *on each issue* so purchased to the Comptroller and to the State Treasury. The act does not make it the duty of the Department of Education to calculate the amount of unearned interest on each bond but *on each issue*. The act further makes it the duty of the State Treasurer to credit the amount of unearned interest as certified by the State Board upon the interest coupons of said bonds then due or next falling due. What "amount" of unearned interest shall the Treasurer credit on said coupons? Clearly the amount as certified by the State Department of Education on each issue of bonds. You are therefore advised that where an independent district has sold to the State Board of Education an issue of \$10,000 in bonds which were paid on installments and thereafter had redeemed one bond, the Treasurer should credit the entire amount of unearned interest as certified by the State Board of Education on the "coupons then due or next falling due."

You are further advised in answer to your third question that the redemption of any bond at any time, either before or after the full payment by the State, would not affect the amount of unearned interest to be credited upon unpaid coupons remaining in the Treasury.

Yours very truly,

C. F. GIBSON,  
Assistant Attorney General.

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Op. No. 2516, Bk. 59, P. 369.

SUPERINTENDENT OF PUBLIC INSTRUCTION—UNIFORM TEXTBOOK LAW  
—FREE TEXTBOOK LAW.

1. Statutes construed: Chapter 29, Acts Thirty-sixth Legislature; Chapter 44, Acts First Called Session, Thirty-fifth Legislature.

2. Superintendent of Public Instruction has no power or authority to bind State by purchase of textbooks to be used in public free schools during scholastic year beginning September 1, 1923, under a contract which expires with the close of the scholastic year beginning September 1, 1922.

3. State Superintendent of Public Instruction has no power or authority to change an adopted series of textbooks or to make extensions or renewals of textbook contracts. That power belongs to the State Textbook Commission alone.

4. Where there have been attempted renewal and extension contracts, you would not have power and authority to bind the State by a purchase of textbooks, under the old contract, to be used in the public free schools during scholastic year beginning September 1, 1923. All said in this opinion is equally applicable where such contracts are involved.

5. Until the validity or invalidity of the purported contracts of the American Book Company are finally determined, the State of Texas would have the right to use the Macmillan geographies it has on hand and owns and, if these are not sufficient to supply the needs of the public free schools during such time, the patrons of the public free schools may purchase the same text "in the usual way," that is, may purchase the same wherever it may be obtained.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 24, 1923.

*Hon. S. M. N. Marrs, State Superintendent of Public Instruction, Austin, Texas.*

DEAR SIR: You have stated orally to this Department that there is quite an accumulation of geographies on hand belonging to the State of Texas in various book depositories in the State that were heretofore purchased under contracts with the Macmillan Company which expires August 31, 1923; that with the books thus accumulated, together with such books as could be purchased by the expenditure of some forty or fifty thousand dollars under the same contracts, the needs of the public free schools of Texas for geographies for the scholastic year beginning September 1, 1923, could be properly supplied. You ask to be advised whether you, as State Superintendent of Public Instruction, have the power and authority to purchase the additional forty or fifty thousand dollars worth of geographies from the Macmillan Company under its said contracts.

After a thorough investigation of all the statutes applicable to the purchase and distribution of textbooks for the public free schools of the State of Texas, we have to advise that you do not have the power and authority to bind the State of Texas in the purchase of such books.

Our reasons for this conclusion based, first, upon the limitations placed upon your power to purchase books by the terms of the applicable statutes and by the construction given to such terms by the Supreme Court of Texas.

Addressing ourselves now to this ground, we call attention to the following provisions of Section 1, Chapter 29, Acts Thirty-sixth Legislature, same being Article 2904 $\frac{1}{2}$ , Complete Statutes of Texas:

"The State Board of Education is hereby authorized and empowered and it is made its duty to purchase books from the contractors of textbooks used in public free schools of this State and to distribute the same without other cost to the pupils attending such schools within this State in the manner and upon the conditions hereinafter set out."

Section 5 of said act, being Article 2904 $\frac{1}{2}$ d, Complete Statutes of Texas, contains the following provision:

"The purchase and distribution of free textbooks for the State shall be under the management of the State Superintendent of Public Instruction, *subject to the approval of the State Board of Education*. All details of plans for purchase and distribution of books not definitely covered by the provisions of this law

shall be subject to the laws of the State and approval of the State Board of Education."

Article 2904<sup>1</sup>/<sub>1</sub> of the Complete Statutes contains the following provisions:

"Specific rules as to the requisitions, distribution, care, use and disposal of books may be made by the State Superintendent of Public Instruction *subject to the approval of the State Board of Education.*"

Construing these provisions of the statute in connection with Section 8 of Article 7 of the State Constitution, the Supreme Court of Texas, in an opinion rendered in the case of *The American Book Company vs. S. M. N. Marrs*, State Superintendent of Public Instruction, delivered June 30, 1923, said:

"The primary duty to purchase and distribute these books is, by Article 2904<sup>1</sup>/<sub>1</sub>, placed upon the State Board of Education.

"The management thereof, its ministerial features, is, by Article 2904<sup>1</sup>/<sub>1</sub>, placed upon the State Superintendent of Public Instruction subject, however, to the approval of the State Board of Education.

"Thus, the Constitution and the statutes placed the responsibility and ultimate authority in the matters of purchasing textbooks from the contracts of textbooks selected by the Textbook Commission, and their distribution, with the State Board of Education.

"It will be noted that by the terms of Article 2904<sup>1</sup>/<sub>1</sub> the State Board of Education is authorized and empowered, and it is made its duty 'to purchase books from the *contractors* of textbooks,' and 'to distribute the same,' etc. This language places the responsibility upon the State Board of Education to ascertain or determine who are *contractors* of textbooks from whom they are to purchase books. This is the agency the Constitution and the law have created and charged with the administration of these functions of government, and clothed with the powers necessary to their performance.

"From the foregoing it is clear, we think, that unless the acts of the Superintendent in specifying the contracting companies and the books to be used have the approval of the State Board of Education, all he may do is a nullity. It amounts to nothing. Only the State Board of Education has authority to determine what books have been contracted for, with whom the contracts have been made, and what matter should be placed in the requisitions sufficient to enable it to ascertain the books to be used, the price thereof, and the money necessary to pay for them, and the counties to which the requisite books should be distributed. Any other construction of the powers and duties of the Superintendent would be inconsistent with the Constitution and corollated statutes."

This is the supreme law of the land and you, as Superintendent of Public Instruction, cannot make an agreement to purchase books, which will be binding on the State of Texas.

Another reason for our conclusion is, that you, as Superintendent of Public Instruction, have no power or authority to make any change in an adopted series of books, nor any authority to make extensions or renewals of textbook contracts.

In this connection, we first call attention to certain provisions contained in the two contracts for geographies that the Macmillan Company has with the State of Texas. These contracts are dated December 3, 1921, and may be found on pages 467 to 478, inclusive, of the minute book of the State Textbook Commission now in your custody.

The following provisions occur in each of the said contracts:

"Section 1. Said contractor covenants and agrees for a period of time beginning September 1, A. D. 1922, and ending with the close of the scholastic year which begins September 1, A. D. 1922, to supply and sell to the public

schools of Texas, to all such as may offer to buy the following named textbook on the following conditions and at retail and exchange prices indicated, viz:

\* \* \*

"Section 9. Said Commission by virtue of the authority vested in it by the act of the Legislature of the State of Texas hereinbefore mentioned, and on behalf of the State of Texas, agrees and covenants that the textbook above mentioned shall be introduced into and used in the public free schools of this State to the exclusion of all others for the period of time aforesaid, *covering scholastic year beginning September 1, 1922.*"

These provisions disclose that the Macmillan Company has bound itself to supply and sell to the pupils and patrons of the public schools of Texas certain books during a period beginning September 1, 1922, and ending with the close of the *scholastic year which begins September 1, A. D. 1922*, and that the State of Texas has bound itself to use such books in the public free schools of Texas only during the *scholastic year* beginning September 1, 1922. The books you contemplate ordering are books to be used during the scholastic year beginning September 1, 1923, and not books to be used during the scholastic year beginning September 1, 1922. A purchase of books under said contracts, by anyone, for use during the scholastic year beginning September 1, 1923, was not in contemplation of either party to the said contracts at the time they were consummated, and could not legally be accomplished. To make such a purchase binding on the State of Texas there would have to be an extension or renewal of the contracts of the Macmillan Company so as to make them cover the scholastic year beginning September 1, 1923.

You, as Superintendent of Public Instruction, have no power or authority to make such extensions or renewals and cannot bind the State of Texas thereby.

Our conclusions are based upon the following provisions of the statutes:

Section 3, Chapter 44, Acts First Called Session, Thirty-fifth Legislature, among other things, provides:

"The Commission shall meet at such times and places as may be designated by the chairman for the purpose of considering and *extending* contracts, the making of new adoptions, *and the keeping and operation of a complete system of uniform textbooks* for the public free schools of this State in accordance with the provisions of this act."

Section 1 of said act provides:

"It shall be the duty of the Commission to meet not later than September 1, 1918, and as often thereafter as may be necessary for the purposes of considering the advisability of continuing or discounting at the expiration of all current contracts any or all of the State adopted textbooks in use in the public schools of Texas, and of making such adoptions as are provided for in Section 5 of this act."

"Before making any change in the adopted series, however, the *Commission* shall, upon thorough investigation, satisfy itself that a change is desirable in the interest of the children in the schools, and in the interest of economy, and if in the judgment of the *Commission*, no text on any subject or subjects is offered that is better suited to the requirements of the schools than the present adopted text or texts \* \* \* *then it shall be lawful for the Commission to renew any contract*, for such period of time as may be deemed advisable, not to exceed a period of six years; provided, that wherever the contractor supplying any book, agrees to renew the contract on the same terms for a period of not less than two years or more than six, the *members of the Commission* shall give



preference to the offer of the company holding the contract, if in *their* judgment they shall thereby secure as good or better books at a lower price than by making a different contract, and it shall always be lawful for *them* to *renew* a contract on such terms as in *their* judgment may be for the best interest of the State."

Section 18 of the act, among other things, provides:

"But if any successful bidder shall fail to make and execute the contract and bond as hereinbefore provided, the Treasurer shall place the deposit of such bidder in the State Treasury to the credit of the available school fund, and the Commission shall readvertise for other bids to supply such books which said bidder may have failed to supply."

Section 5 of this act, among other things, provides:

"The Textbook Commission authorized by this act shall have authority to select and adopt a uniform system of textbooks to be used in the public free schools of Texas, etc. \* \* \* The Commission, as herein provided for, shall adopt textbooks in accordance with provisions of this act for every public free school in this State, and no public free school in this State shall use any textbook unless same has been previously adopted or approved by this Commission, and the Commission shall prescribe rules under which all textbooks adopted or approved shall be introduced or used by or in the public free schools of the State."

It will thus be seen that the duty of determining whether contract shall be extended or renewed or whether changes shall be made in the adopted series of textbooks is imposed exclusively upon the State Textbook Commission of Texas. No duty in that respect is placed upon the State Superintendent of Public Instruction, and neither the quoted provisions of the act, nor any other portion thereof, confer upon him any power or authority in respect to changes, extensions or renewals. This power and authority is expressly and exclusively given to the State Textbook Commission.

The main object of your inquiry, we assume, is to be advised just what you, as Superintendent of Public Instruction, can legally do to properly supply the public free schools of Texas with geographies during the coming scholastic year.

In this discussion we will assume, as we should, that the State Textbook Commission and the State Board of Education and all other officers of the State, who have taken any action in respect to the attempted adoptions, renewals and extensions and who have challenged the validity of the contracts, have endeavored to perform their duty. With this understanding and with no idea of criticising the acts of any officer, board or commission, we can make our views very clear by reference to, at least, one of the issues involved in the pending suit of the American Book Company against you.

The Governor of Texas is by statute made Chairman of the State Textbook Commission and is by statute expressly authorized to execute on the part of the State of Texas any contract with the publishers of textbooks that the State Textbook Commission may make and approve. The statute, however, requires that any publisher whose bid has been accepted by the State Textbook Commission shall execute a bond in an amount within certain limits, determined by the Commission, and, also, a certain kind of written contract. It likewise requires and contemplates that such bond and contract, after being executed by the publisher shall be presented to the Commission and that,

after said Commission has approved the bond, it shall approve the contract. The Commission, however, adjourned without ever seeing or approving said bond and contract, but before adjourning, by motions duly passed and recorded in the minutes, fixed the amount of the bond and authorized the Governor to approve and execute the contract. The Governor approved the bond and contract. You declined to recognize this contract, and your action in doing so has, so far, been successfully defended on the ground that the contract was invalid and void, because the bond and contract were not presented to the Commission, nor approved by it, and because the Commission could not delegate to the Governor its duty of approving the contract and did not attempt to delegate to him its duty of approving the bond.

Now let us see whether your action, if you should purchase these books from the Macmillan Company, would stand the test that has been applied to the acts of the Governor and the Commission. You would be purchasing books without even an attempted authorization thereto by the State Board of Education, upon whom is exclusively imposed the power and duty of purchase. You would be making an oral, instead of a written contract with the Macmillan Company for books to be used in the public schools during the coming scholastic year, without the semblance of any authorization from the State Textbook Commission, upon whom the exclusive power and duty to contract for textbooks is expressly imposed. You would be purchasing books from said company on an oral contract without a bond and without any approval of your act by either the State Board of Education or the State Textbook Commission.

In fact, such action on your part would violate almost every provision of the uniform and Free Textbook laws—those in respect to determining whether textbooks should be changed, or contracts should be extended or renewed, those relating to advertisement for bids, the opening and canvassing and acceptance of bids, the execution and approval of contracts and bonds, and the custody and record of bonds and contracts, all of which provisions the Legislature considered important to safeguard the interests of the public in supplying free textbooks and a uniform system of textbooks for the public free schools of the State.

Nor are we unmindful of the fact that the beginning of scholastic year 1923 is near at hand and that it is quite necessary for the schools to be at once properly supplied with textbooks. There is no emergency, however, which would warrant you, under express or implied powers, as the general supervisor and manager of educational affairs of the State, to take matters in your own hands and assume powers and duties exclusively imposed upon other officers. There has been no breaking down of the law; it still stands. There has been no failure or refusal to act on the part of officers upon whom are imposed duties in respect to changes and adoptions of textbooks and extensions and renewals of contracts. It is not a case where the agencies provided by the government for such purposes have failed or refused to function. But a case where they have endeavored to function and their action has met with the disapproval of other officers of the government. It is a mere difference of opinion between officers of the government, each side thinking itself right. It is a mere lawsuit—just such an occurrence as might arise after any effort to enforce this law, or after any

effort to enforce any other law. It gives no excuse for departure from well known principles for entering into contracts on the part of the State that have been found to be those best suited to protect the interests of the public.

The act itself has designated the following methods for certain emergencies:

Section 1, Chapter 44, Acts First Called Session, Thirty-fifth Legislature, provides:

*"If no text or texts on any prescribed subject or subjects are submitted by any particular publisher or publishers that meet the requirements of the schools, as may be determined by the Commission, then it shall be the duty of the chairman of the Commission to instruct the secretary of the Commission, to investigate the book markets for the purpose of securing bids with a view to providing at the most reasonable price or prices possible, the best available texts on any and all subjects that are to be adopted by the Commission for the schools of Texas."*

Section 10 of said act contains the following proviso:

*"Provided that if the bid submitted to said Commission should not be satisfactory to said Commission, they may postpone the selection of such books or a part thereof to such time as they may select, and after the same is readvertised new bids may be received and acted on by such Commission as provided for in this act."*

Section 18 of said act contains the following proviso:

*"But if any successful bidder shall fail to make and execute the contract and bond as hereinbefore provided, the Treasurer shall place the deposit of such bidder in the State Treasury to the credit of the available school fund, and the Commission shall readvertise for other bids to supply such books which said bidder may have failed to supply."*

Section 23 of said act contains the following provision:

*"Provided nothing in this act shall be construed to prevent or prohibit the patrons of the public schools throughout the State from procuring books in the usual way in the event that no contracts are made."*

If it should be finally determined in the pending litigation, or in other litigation, that the American Book Company, the "successful bidder," has failed "to make and execute the contract and bond" contemplated by the law, then it would be the duty of the State Textbook Commission to assemble and "readvertise for other bids to supply such books which said bidder may have failed to supply," as provided in Section 18 of the act. But this is yet an undetermined issue and the duty has not arisen. Such being the case, we suggest that the following course would be legally pursued pending the termination of this litigation.

The State of Texas owns all books which it has already purchased under its contracts with the Macmillan Company and it may use these books in the public free schools of Texas until the matter of the validity of the purported contracts of the American Book Company is finally determined. If the litigation should finally be in favor of the American Book Company, then these books would be displaced, at the agreed exchange price, stated in the contract, by the books of the American Book Company. If, in the meantime, these books are not sufficient to meet the requirements of the public free schools of Texas for geographies, then, "the patrons of the public schools throughout the State"

could procure the same books "in the usual way," as provided in Section 23 of the act.

The phrase, "in the usual way," would mean the purchasing by the patrons of the Macmillan geographies wherever they could be obtained.

The course suggested would not violate the uniform textbook law, nor would it violate any of the safeguards prescribed by the Legislature for contracting on the part of the State for textbooks. It would be treating the present situation as one merely where, for the time being, there is no enforceable contract, no completed adoption, during which time the State is merely exercising its right to use its own property for purposes for which it was originally intended.

You also ask whether you cannot recognize renewal contracts attempted to be made by the State Textbook Commission at said meeting and at the same time hold invalid those contracts calling for a change in textbooks. This is a matter upon which we cannot aid you, except by saying: That all contracts attempted to be executed at said meeting of the Commission are subject to the same objections as to the manner and mode of execution, and, in that respect, stand on the same footing. Where renewal contracts have been attempted, you have no power or authority to purchase, under the old contracts, books to be used during the scholastic year beginning September 1, 1923. The only conceivable difference between the two cases is, that, where there have been attempted renewal contracts, the State Textbook Commission has indicated that no change in the previously adopted series of books was thought advisable; and where there have been attempted new adoptions they have indicated that a change was deemed necessary. What we have said in this opinion applies with equal force to situations brought about by attempted renewals and extensions.

Yours very truly,

JNO. C. WALL,  
First Assistant Attorney General.

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Op. No. 2467, Bk. 58, P. 442.

FREE TEXTBOOK COMMISSION—SUPPLEMENTAL BIDS.

After the bids have been filed and opened, the Text Book Commission cannot permit supplemental bids except for purposes of correction of mistakes apparent on the face of bids.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 8, 1922.

*To His Excellency, The Honorable Pat M. Neff, Governor, Chairman,  
The Texas State Textbook Commission, Austin, Texas.*

DEAR SIR: Your letter of the 7th instant, together with enclosures, addressed to the Attorney General, has been received. Your letter reads:

"The State Text Book Commission submits for your consideration the following statement of facts and respectfully requests an opinion from your department as to whether it is competent for the Commission to consider the modified or supplementary bid made by the American Book Company.

"You will oblige the Commission by making a full statement as to the legal status of the supplemental bid."

In reply to the same, beg to advise that we have carefully considered the statement of facts submitted and have examined the statute creating the Texas State Textbook Commission and defining its powers and duties, and have examined the authorities pertinent to the subject under inquiry.

Article 2909a, Vernon's Sayles' Civil Statutes, 1918 Supplement, among other things, provides:

"The Commission shall meet at such times and places as may be designated by the chairman, and it shall adopt such rules and regulations for the transaction of its business as it may deem proper, not contrary to the provisions of this act."

In Article 2909b it is provided:

"The Governor shall be chairman of the Commission, and the State Superintendent shall be its secretary, who shall keep a complete record of all proceedings of the Commission. The Commission shall meet at such times and places as may be designated by the chairman for the purpose of considering and extending contracts, the making of new adoptions, and the keeping and operation of a complete system of uniform textbooks for the public free schools of this State in accordance with the provisions of this act."

Article 2909cc, in part, reads:

"When books are to be selected and adopted under the provisions of this act the chairman of the Commission shall for forty days by notices in the public press and by written notices mailed to all persons, firms or corporations in whose behalf such notices may be requested, in which notices the time and place of such selection shall be set out and thus advertised that sealed bids will be received at the time and place advised in said notice. \* \* \* Each bid shall state specifically at what price each book will be furnished." \* \* \*

Article 2909d provides:

"All bids submitted under Section 8 (2909cc) of this act shall be sealed and deposited with the chairman of the Commission, to be delivered by him in the Commission in session and for the purpose of considering the same, and shall be opened in the presence of the Commission."

Article 2909dd provides that:

"It shall be the duty of the Commission to meet at the time and place mentioned in the notice and advertisement, and it shall then and there open and examine these sealed proposals received; and it shall be the duty of the Commission to make a full and complete investigation of all the books and bids accompanying same."

On the 4th day of November, 1922, you, acting in your official capacity as Governor of the State of Texas and Chairman of The Texas State Textbook Commission, gave notice in the public press that The Texas State Textbook Commission would receive sealed bids for contracts for furnishing textbooks used on certain subjects to be used in the public free schools of the State of Texas. That part of your official proclamation, pertinent to the subject under inquiry, reads:

"Now, therefore, I, Pat M. Neff, Governor of the State of Texas, in accordance with the provision of said act, hereby give notice that at any time up to ten o'clock a. m., December 4, 1922, sealed bids will be received by the Texas State Text Book Commission for contracts for furnishing textbooks on subjects to be used in the public free schools of the State of Texas for a period of time not less than one year. \* \* \*"

I have before me the minutes of The Texas State Textbook Commis-

sion which convened in the House of Representatives at 9:30 a. m., October 10, 1921. This was the first official meeting of the present Commission. The minutes of this meeting show that the Commission, acting in pursuance of the specific authority conferred upon it by Article 2909a, appointed a committee for the purpose of drafting—

“rules and regulations for the government of the Text Book Commission of the State of Texas, in its deliberations and work of selecting textbooks for use in the public schools of Texas.”

And that said committee reported ten rules which were unanimously adopted by the Commission. These rules do not seem to have been subsequently amended or repealed. Rule 7 reads:

“All bids submitted under Section 9 of this act shall be sealed and deposited with the Governor of the State, to be delivered by him to the Commission in session, for the purpose of considering same, and shall be opened by the Governor or the vice-chairman in the presence of the Commission, and no bids shall be received later than the date advertised and called for by the Governor, except provided in the law. The Commission shall immediately proceed to classify, tabulate and arrange each and all bids received.”

From the statement of facts submitted, it clearly appears that the supplemental bid of the American Book Company was not delivered to you as Chairman of The Texas State Textbook Commission, prior to 10 o'clock a. m., December 4, 1922, the time limit fixed by you in your proclamation for receiving such bids, but was delivered to you after all bids had been by you delivered to the Commission and after said bids had been opened and read.

The general rule of law with reference to this question as laid down in 36 Cyc., p. 875, is:

“That after the bids have been filed and opened, the officers cannot permit corrections except for mistakes apparent on the face of bids.”

This is declared to be the rule on the subject under consideration by which State officials are governed.

We are of the opinion that the Commission would not be authorized to consider the bid of the American Book Company as modified by the telegram because, first, that is a separate bid which does not comply with the conditions of the proclamation and rules of the Commission, it being a bid for not less than five nor more than six years, whereas the bids were invited for not less than one nor more than six years, and no one else has been permitted to bid for the period of not less than five nor more than six years; and for the further reason that said bid as contained in the telegram was not received within the time stipulated in the proclamation of the Governor calling for bids.

We have given your inquiry as careful consideration as possible within the limited time at our disposal. In this connection, we direct attention to the fact that the inquiry was not received until about 8 o'clock a. m. today with a request for an opinion before the Commission adjourns this p. m.

Yours very truly,

BRUCE W. BRYANT,  
Assistant Attorney General.

Op. No. 2502, Bk. 58, P. 350.

INSANE PERSONS—POWER OF STATE OFFICERS TO EMPLOY.

Superintendents of State Insane Asylums are not authorized to employ as attendants at the asylums any inmate of such institution.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 23, 1923.

*Hon. L. W. Tittle, Member State Board of Control, Capitol Building.*

DEAR SIR: Attorney General Keeling is in receipt of your communication of the 18th instant, reading as follows:

"Would it be legal for a superintendent of an insane asylum of this State to put inmates, or patients, on as employees in positions as attendants, etc., paying them out of the regular appropriation made by the Legislature for the different employees of the institution?"

In reply thereto you are respectfully advised that, in the opinion of this Department, your inquiry should be answered in the negative.

The courts are generally inclined to hold that contracts made by an insane person, who has been judicially declared insane, are absolutely void. We quote the following from 14 R. C. L., page 582:

"Contracts made by an insane person, after he has been legally adjudged insane, are generally held to be absolutely void, the inquisition of insanity being regarded as notice, actual or constructive, to all the world of the fact of insanity."

See, also, the case of *Elston vs. Jasper*, 45 Texas, 409, and, also, *Grimes vs. Shaw*, 2 Texas Civ. App., 20, 21 S. W., 718.

It is not necessary to decide whether under all circumstances contracts with persons who have been judicially declared insane should be considered void or not. It might be that under certain conditions it would be unjust and unreasonable to hold such contracts void for all purposes. However this may be, we do not think that where a statute authorizes the employment of a person out of public funds there would be included in such authority the discretion of employing an insane person. It is true that where a statute authorizes the employment of a person without prescribing the qualifications of the person, a good deal of discretion is left to the officer who does the employing, but it is our opinion that this discretion in the case of a public officer having charge of insane persons who have been adjudged insane would not extend to selecting for employment insane persons under his charge. He could be, as a matter of law, deprived of any discretion to employ such person. In so far as the right and authority of a superintendent of our public insane asylums are concerned, we think that a conclusive presumption ought to be indulged to the effect that the patients are mentally incapacitated, and statutory authority to employ persons to attend such patients would not include authority to employ and compensate persons who are conclusively presumed to be mentally defective. In short, when a law authorizes the employment of attendants, it will be presumed that the legislative intent was to employ persons who had sufficient mental capacity to perform the duties, and where a person has been adjudged mentally defective, according to the law of the land, we are forced to the conclusion that there would be a conclusive pre-

sumption of law against the authority to employ and compensate out of public funds such a person.

This Department, of course, has nothing to do with the question of good policy of such a practice, and we are, of course, confining our opinion to the question of law presented.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.