

## 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. 2645, Bk. 61, P. 17.

BANKS AND BANKING—ACCEPTABILITY OF FEDERAL FARM LOAN BONDS  
UNDER BOND SECURITY SYSTEM OF STATE BANKING.

1. Article 842, providing that bonds issued under the Federal Farm Loan Act may be accepted as security for all public deposits where deposits of bonds or mortgages are authorized by law to be accepted, does not authorize the acceptance of Federal Farm Loan bonds for and on behalf of the lawful depositors of a bank, and such bonds do not comply with the requirements of Article 475 as a bond, policy of insurance, or bonds of the United States, or municipal or district bonds approved by the Attorney General's Department, or other guaranty of indemnity.

2. The expression "or other guaranty of indemnity," contained in Article 475, is not broad enough to permit of acceptance of Joint Stock or Land Bank bonds, even when pledged by owners other than the bank or trust company.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 14, 1926.

*Honorable Chas. O. Austin, Banking Commissioner, Austin, Texas.*

DEAR SIR: Your letter of April 9th addressed to the Attorney General has been referred to me for reply, and as presenting the questions involved, I will here quote a portion thereof:

"Certain Joint Stock Land Banks located in Texas and organized under the provisions of the Federal Farm Loan Act, have made a demand upon me that I receive and permit to be deposited by banks changing from the Guaranty Fund system to the Bond system of securing their deposits, as provided under Article 475, their bonds, and upon my refusal to do so are threatening me with an action in mandamus. \* \* \*

"They contend that the expression 'all public deposits' (Article 842) is inclusive and should be broadly construed to include the act of depositing securities for any purpose whenever and wherever provided by law, and that the requirement of Article 475 providing for the filing of United States and municipal or district bonds, etc., is an act requiring a public deposit of such securities as intended to be covered by the provisions of Article 842. \* \* \*

"My position, on the contrary, is that the expression 'all public deposits' contained in Article 842 refers specifically to deposits of public moneys, that is, moneys belonging to the State of Texas or any political subdivision thereof and which may be deposited in banks under the respective provisions of our several depository acts, and that it is wholly untenable to contend that it refers to the filing or depositing of bonds by banks as provided for in Article 475. \* \* \*

"If they are wrong in this contention, then they contend (alternatively) that the expression 'or other guaranty of indemnity' contained in Article 475, is broad enough to permit the Commissioner to accept bonds of Joint Stock Land Banks, accompanied by a guaranty of indemnity executed by the bank itself or by some individual or individuals acting for the benefit of the bank. \* \* \*

"I further contend that the expression 'other guaranty of indemnity' as used in Article 475 is analogous to and synonymous with the expression 'a bond, policy of insurance' contained in the same article. In other words, that the expression 'guaranty of indemnity' means nothing more or less than a contract of indemnity executed by some corporation permitted under the laws of the State of Texas to execute indemnity contracts for and on behalf of others, and that it might also properly include a guaranty of indemnity executed by individuals who might be able to qualify as to their solvency. \* \* \*

"May I ask that you will therefore be good enough to advise me at as early a date as may be convenient to you whether or not in your opinion the bonds of Federal Farm Loan Banks and Joint Stock Land Banks organized under the Act of Congress approved July 17, 1916, may be accepted by me under the provisions and for the purposes outlined in Article 475, Revised Statutes, 1925, in

lieu of 'bonds of the United States, or municipal or district bonds approved by the Attorney General's Department.'

We take it that you make no special point of the fact that banks offering the Joint Stock Land Bank bonds are changing from the Guaranty Fund system to the Bond system, since the terms of the law are applicable alike to banks originating under the Bond Security system. Article 475 states as a prerequisite to a bank or trust company operating under the Bond Security system that it shall on January first and annually thereafter file with the Banking Commissioner \* \* \* "for and on behalf of the lawful depositors of such bank, a bond, policy of insurance, or bonds of the United States, or municipal or district bonds approved by the Attorney General's Department, or other guarantee of indemnity in an amount equal to the amount of its capital stock, which said bond, policy of insurance or other guarantee of indemnity shall be for and inure to the benefit of all depositors." The italicized words were imported into the original act of 1909 by the amendment of 1925. By an act of 1917, incorporated into the 1925 codification as Article 842, it is provided as follows:

"All bonds issued under and by virtue of the Federal Farm Loan Act, approved by the President of the United States, July 17, 1916, shall be a lawful investment for all fiduciary and trust funds in this State, and may be accepted as security for all public deposits where deposits of bonds or mortgages are authorized by law to be accepted. Such bonds shall be lawful investments for all funds which may be lawfully invested by guardians, administrators, trustees and receivers, for saving departments of banks incorporated under the laws of Texas, for banks, savings banks and trust companies chartered under the laws of Texas, and for all insurance companies chartered or transacting business under the laws of Texas, where investments are required or permitted by the laws of this State."

This provision of our law was responsible to Section 27 of the Federal Farm Loan Act reading in part as follows:

"That Farm Loan bonds issued under the provisions of this act by Federal Land Banks or Joint Stock Land Banks shall be a lawful investment for all fiduciary and trust funds and may be accepted as security for all public deposits." (Federal Annotated Statutes, Supp. 1918, p. 37.)

You are advised that in our opinion under the laws above quoted, considered in the light of other applicable provisions hereinafter referred to, you are not required to accept bonds of Federal Farm Loan Banks or Joint Stock Land Banks under the provisions and for the purposes outlined in Article 475. The inquiry as you present it divides itself into two phases, namely, whether Article 842 is in this regard controlling over Article 475, and whether the term "other guarantee of indemnity" as used in Article 475 should be held to include Farm Loan bonds of either character specified when pledged by owners other than the bank or trust company taking the benefit of the Bond Security system. These questions we will consider separately.

## I.

There can be no doubt but that Articles 475 and 842 must, by virtue of their both being incorporated in the Revised Statutes of 1925, be considered as parts of the same act and accordingly harmonized, if possible. Sayles vs. Robison, 129 S. W., 346, 348; Black on Interpretation of

Laws, 2nd Ed., Sec. 172. There would indeed seem no difficulty about harmonizing these two provisions. Article 842 declares Federal Farm Loan bonds lawful investments for Texas banks, savings banks and trust companies and savings departments thereof where investments are required or permitted by law, but it undertakes to declare these bonds acceptable as security only for *all public deposits*, where deposits of bonds or mortgages are authorized by law to be accepted. If it declared them to be proper security for all deposits under the conditions stated, it would be in evident conflict with Article 475, which permits the filing by a bank entering the Bond Security system of nothing except a bond, policy of insurance or bonds of the United States or municipal or district bonds approved by the Attorney General's Department, or other guaranty of indemnity, for and on behalf of all depositors of such bank. The statutes can be harmonized and therefore should be harmonized.

The deposits protected by Article 475 are all deposits, both public and private, and the Legislature has not undertaken in Article 842 to say what would be acceptable as security for anything but public deposits, referring as you suggest to moneys belonging to the State or any political subdivision thereof, such as may be deposited in banks under the provisions of our depository acts. A specific application of the intent of this law is found in Article 2529, authorizing a state depository to pledge, among other things, bonds of the Federal Land Banks located in Texas. The public's deposits are not public deposits within the accepted meaning of the latter term.

The purpose of Article 475 is to protect all deposits, both public and private, and no distinction is made in this regard; nor would it be practicable to distinguish between the one and the other in the security filed, which, by the terms of the law, is to inure to the benefit of all depositors.

There is involved in this construction of the law no reflection whatever upon the value of the Farm Loan bonds as securities; the question is simply a matter of construction of the law as the Legislature has seen fit to declare it. The fact that the Legislature has authorized that they be accepted, not only as security for all public deposits but also as investments for the State banks, is evidence of the high regard in which these securities are held by our Legislature. But to argue that because a bank is permitted to invest its assets in these bonds is a reason why they should be accepted as security for all depositors under the terms of Article 475, is simply to ignore the specification of the securities that may under the terms of that article be accepted for such purpose.

The Supreme Court of the United States in *Smith vs. Kansas City Title Co.*, 255 U. S., 180, 198, has not only upheld the Federal Farm Loan Act in its entirety, but has specifically declared Section 27 thereof to be constitutional and effective for the purposes there declared. In furtherance of this purpose, the Legislatures of most, if not all, of the States have passed acts similar to Article 842 of our statutes. The Federal act declared Farm Loan bonds lawful investments for all fiduciary and trust funds and acceptable as security for all public deposits, and the Legislatures of most of the States have gone at least this far. It is interesting to note that some are even more specific, as for instance, Louisiana and Alabama, which in almost identical language declare

such bonds security of depositors for the funds of the state and of political subdivisions thereof. (Wolff's Constitution and Statutes of Louisiana, 1920, p. 242; Alabama Civil Code, 1923, Art. 6421.) Florida, like our State, has simply declared that they may be accepted as security for all public deposits. (Statutes 1920, Art. 4978.) Missouri declares "that such deposits shall be accepted as security for all public deposits, *and in all cases* where bonds are required by law to be deposited with any department or any public office of this State." (Missouri Laws, 1921, p. 284-B.) The distinguishing feature in that law and in ours lies in the italicized words, making the succeeding phrase conjunctive with public deposits and additional thereto, instead of leaving this succeeding phrase, as does our law, as a limitation upon the words "public deposits."

## II.

The alternative contention that Farm Loan bonds come within the expression "or other guaranty of indemnity" as used in Article 475, presents more difficulties.

There is no pretense that such bonds come within any of the specific designations in this article, and we apprehend that there can be no serious contention that they come within the general term "guaranty of identity" when they are the property of the bank or trust company seeking to qualify under the Bond Security system. What, it may be suggested, would be the use in the Legislature specifying bonds of the United States, municipal or district bonds approved by the Attorney General's Department, if they were in the next breath going to throw the door wide open for any and all kinds of bonds? It is no answer to this that the term "guaranty of indemnity" may literally be broad enough to include such substantial securities as Farm Loan bonds. The point is that the Legislature, by specifying what kind of bonds are included, has excluded the idea that any other bonds may be included in the dragnet terms in the law.

The words "guaranty of indemnity" carry no definite meaning in themselves and are plainly the result of a confusion of terms on the part of those drafting this law. An indemnity is an engagement to make good and save another from loss upon some obligation which he may incur to a third person, while a guaranty is a collateral undertaking presupposing some contract as principal thereto and binding the guarantor to one to whom another is answerable. *Texas Fidelity & Bonding Co. vs. Insurance Co.*, 184 S. W., 238. Yet this very case cited was reversed by the Commission of Appeals, and a corporation having the power to enter into a guaranty contract was held had the implied power to enter into an indemnity agreement (216 S. W., 144), it being said:

"While there is some technical difference between an agreement to indemnify and a guaranty, yet where the purpose to be accomplished and the liability assumed is practically the same under either form of contract, we do not think a corporation should be permitted to escape liability upon a contract fairly entered into because it adopted the one form of contract rather than the other to accomplish the same result."

So here we believe the combined term "guaranty of indemnity" to have been used in Article 475 without any real regard as to a distinction in meaning one way or the other. At most it may be said to imply the

obligation of a third party, that is, one other than the bank, seeking to qualify; but a contract of indemnity either by a corporation or an individual fulfills this idea of the law and, if anything, repels the inclusion in the term "guaranty of indemnity" of such distinct and different things as bond securities of any kind. The latter are very different things from a bond or policy of insurance, though of the same nature as United States, municipal or district bonds: yet with the law left unchanged upon amendment except by the insertion in its terms of the bond securities specified, there would seem to be no reason to give the term "or other guaranty of indemnity" any other meaning than it already had in the conjunction in which it was used in the original act. (Black on Interpretation of Laws, 2nd Ed., Sec. 168.) If this is true, then the "other guaranty of indemnity" referred to should be of the same nature as the bond or policy of insurance, that is a contract of indemnity.

In Lewis' Sutherland Statutory Constitution, Section 422, it is said:

"When there are general words following particular and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of *ejusdem generis*."

The application of this rule in this instance does not leave the general words "guaranty of indemnity" without effect, but merely restricts their effect.

This construction of the expression "guaranty of indemnity" is persuasively borne out by the fact that a like meaning is necessarily given these terms as elsewhere used in the Bond Security system law. For instance, Article 476 authorizes the charge of an examination fee by the Commissioner as "against any other (that is, other than the qualifying bank) person, firm or corporation permitted to file such bond or other guaranty of indemnity." Such examination is presumably for the purpose of determining solvency and would be absurd as applied to a third party pledging bond securities. Again, Article 477 provides that "the bond, policy of insurance or other guaranty of indemnity herein provided for shall contain the provisions as provided by law and shall be in such form as may be fixed and provided by the State Banking Board." Certainly municipal securities, Farm Loan bonds or bonds of a similar nature could not contain the provisions provided by the Bond Security system law and the State Banking Board could have nothing to do with the form of such bonds. Both of these articles plainly refer to a contract of indemnity by a third person similar in general to the bond or policy of insurance and wholly dissimilar in nature from municipal or other bond securities. As further evidence of this intent in the law, Article 482 provides that "the bond or other guaranty of indemnity herein provided for may be made by any person, firm or corporation authorized to execute the same." And Article 486 provides that "if the surety of any character of guaranty of indemnity shall be a corporation," and shall not pay within sixty days, "the full amount due by it upon such guaranty of indemnity," its charter shall become subject to forfeiture.

It is true that there is a dictum in the recent decision of the Supreme Court in *Texas Bank and Trust Co. vs. Austin*, 280 S. W., 161, to the following effect.

“Who would deny that United States bonds or district or municipal bonds approved by the Attorney General’s Department, when pledged by owners other than the bank or trust company to secure depositors, would constitute a ‘guaranty of indemnity’ other than the bond with sureties of the bank or trust company, or an insurance policy?”

To our minds, however, this language must be considered as strictly limited to the purpose for which it was employed, that is, an argument to the end that after the amendment of Article 475 in 1925 a bank was entitled to qualify under the Bond Security system by filing bonds of the United States belonging to the bank itself. That no practical effect in construction of the terms “guaranty of indemnity” was by this dictum intended to be established by the court, would seem to follow from the following further language used in said opinion:

“The mere filing by the bank or trust company of bonds to which it did not have right or title would be unavailing for the protection of the depositors, which is the ultimate aim of the law. The Legislature could not have intended to impose obligations on strangers to the bank or trust company nor charges on their property without any language referring in the remotest degree to such obligations or charges.”

If the mere filing of United States bonds not belonging to the bank would be unavailing for the protection of the depositors, at least without some independent pledge thereof by the owners of such bonds, and if the Legislature could not have intended to impose obligations on strangers nor charges on their United States bonds specifically mentioned in the law, we cannot imagine how the term “guaranty of indemnity” could carry a greater right with respect to Federal Farm Loan bonds or other bond securities not mentioned, thereby permitting by indirection and implication what the Supreme Court says is in effect denied with respect to United States bonds.

The essential purpose of the Bond Security system, as stated in the case just referred to, is the protection of the general depositors of the banks qualifying thereunder. If the term “guaranty of indemnity” is given the broad construction contended for so as to include the bonds of the Federal Farm Loan Banks and Joint Stock Land Banks, the question arises as to where to draw the line on a further elasticity in the meaning of these words. Bank and trust companies and savings banks are authorized to invest not only in securities of this character, but also in mortgages of certain kinds. (See Articles 396, 416.) If the term “guaranty of indemnity” is held to include bond securities other than those specified in the law, why should it not as well be held to include mortgages? What is the limit of its meaning? In practical result under the broad construction here contended for, the extent of its meaning would be a matter entirely within the discretion of the Banking Commissioner. If this was the intent of the law, there could have been no purpose whatever in specifying the “bond, policy of insurance or bonds of the United States,” etc. The undoubted purpose of such explicit expression on the part of the Legislature was to avoid any unnecessary jeopardy to the bank’s depositors by leaving too much to the discretion of the Banking Commissioner. If the Legislature has not gone as far as it should in including other equally safe bond securities, the remedy lies in amendment of the law, not in judicial legislation.



Our conclusion is that Article 842 has no controlling effect over Article 475, and the expression "or other guaranty of indemnity" in the latter article is not broad enough to authorize you to accept Joint Stock or Land Bank bonds. If the practical result of such broad construction of this expression is, at least within reasonable limits, to leave the meaning to be given it entirely to the discretion of the Banking Commissioner, then certainly he might in such discretion reject the bonds of Federal Farm Loan Banks and Joint Stock Land Banks and no mandamus would lie as a consequence. In such action, in our opinion, you would be entirely justified under the law as we construe it.

Very truly yours,

C. W. TRUEHEART,  
Assistant Attorney General.

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Op. No. 2642, Bk. 61, P. 4.

BANKS AND BANKING—CHANGE OF SITUS.

A State bank cannot, by amendment of its charter, change its situs from one town to another even within the same county of the State.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 17, 1926.

*Mr. Chas. O. Austin, Banking Commissioner, Capitol.*

DEAR SIR: Referring to your letter of the 10th instant, inquiring, among other things as to whether the Riviera State Bank may by amendment of its charter change its situs from Riviera to Kingsville, we beg to advise that in our opinion this may not legally be done.

In view of this answer to your first inquiry, it becomes unnecessary to answer the balance of the questions submitted in your letter, since they are dependent upon an affirmative answer to the question that we have answered negatively.

The only question presented, as amplified by matters of common knowledge, is whether a State bank heretofore authorized by its charter to do a banking business in Riviera, Kleberg County, Texas, a town which under the 1920 census had a population of 500, may so amend such charter as to change the situs of its banking business from Riviera to Kingsville, Kleberg County, Texas, a town about seventeen miles distant in the same county; Kingsville under the 1920 census having a population of 4,700.

Section 16, Article 16 of the State Constitution, after directing the Legislature to authorize the incorporation of banks and to provide for a system of State supervision, regulation and control of same, and after declaring that each shareholder shall be personally liable for all existing debts of such banks to an amount equal to the par value of the shares so owned, further provides as follows:

"Such body corporate (a bank) shall not be authorized to engage in business at more than one place, which shall be designated in its charter."

Article 538 of the Revised Statutes, 1925, contains a provision to like effect of that just quoted, and further provides:

"No such corporate body shall maintain a branch bank, receive deposits or pay checks, except in its banking house."

Article 377 requires that the articles of incorporation of a bank shall state "the name of the city or town or county in which the corporation is to be located." Other applicable provisions of the law are as follows:

Article 380. "The (Banking) Board shall carefully examine the articles of association. \* \* \* The said Board shall also inform itself as to the public necessity of the business of (in?) the community in which it is sought to establish the same, and to determine whether its capital is commensurate with the requirements of law, and the location of the business, and that the applicants are acting in good faith."

Article 381. "If the Board determines any requirement unfavorably to the applicants, the charter shall be refused, but if favorably, then the charter shall be granted."

Article 391. "When a bank is located in a town having less than 800 inhabitants, its capital stock shall not be less than \$17,500, nor less than \$25,000 for banks located in towns and cities having 800 inhabitants and less than 10,000 inhabitants. \* \* \*"

Article 492. "All corporations created under this title (relating to banks) are hereby declared to be charged with the public use, and shall be under State control. \* \* \*"

Article 514 provides that banks "shall own only such real estate as may be required for the transaction of their business," excepting such as required for the protection of debts.

The only charter amendments recognized by the banking law have to do with the reduction or increase of capital stock and the change in the system of banking. (Arts. 500, 501, 502.)

It is at once apparent, upon the foregoing review of the law applicable, that the designation in a bank's charter of its place of business stands upon an entirely different plane from the naming in the charter of an ordinary commercial corporation of the place or places where business is to be transacted. See Art. 1304, par. 3, R. S., 1925. In the case of a bank, such designation is a basic and restrictive feature for the bank's power; in the case of an ordinary commercial corporation, the corresponding designation is generally a mere matter of information for the State and the public in general.

Without any direct inhibition in the law corresponding to that contained in Article 538, above quoted, it was held by the Kentucky Court of Appeals in *Bruner vs. Citizens Bank*, 120 S. W., 345, upon the basis of statutes in other respects similar to ours, that it is not within the power of a State bank to establish a branch bank, it being said:

"From these general but important distinctions that the Legislature has made between banks and corporations generally, it is apparent that banks cannot be allowed to exercise any functions that are not strictly authorized by law. What a mercantile corporation may do is not the standard by which to measure the powers of a banking institution. They occupy toward the public a very different relation."

A similar holding was made by the Supreme Court of Missouri with reference to a National bank in *State ex rel. Barrett vs. First National Bank*, 249 S. W., 619, 30 A. L. R., 918. This case was affirmed by the United States Supreme Court, 263 U. S., 640, 44 S. C., 213. In the latter decision it is said by Justice Sutherland:

"A mere multiplication of places where the powers of a bank may be exercised is not in our opinion a necessary incident of a banking business. \* \* \* Certainly an incidental power can avail neither to create powers which, expressly

or by reasonable implication, are withheld, nor to enlarge powers given; but only to carry into effect those which are granted."

Of course, the question here at issue is not as to the power to establish a branch bank, but rather whether a State bank may by amendment of charter abandon its original location in one town in favor of a new location in another town. The importance of these decisions, however, lies in the fact that even without any direct inhibition in the Kentucky statutes in the one case and the National Banking Act in the other case, the courts held that a branch bank could not be created and that the ordinary freedom accorded other corporations in the matter of moving their business from place to place did not come within the incidental powers of a banking business. This at least serves to illustrate how much more certainly under the provisions of our law a Texas bank is by its charter rooted in the very place where it is originally authorized to do business.

The Riviera State Bank having in its charter designated Riviera as its place of business, cannot under the constitutional provision, first herein quoted, be authorized to engage in business at another place. The fact that it abandons Riviera in adopting Kingsville as its new place of business will not under this constitutional provision suffice, for Riviera alone is designated in its charter, and Kingsville will simply be designated in an amendment. If the word "charter" is given its strict and literal meaning it is not inclusive of an "amendment," and this constitutional provision is conclusive of the matter. The language in the Constitution is presumed to be carefully selected. *Cox vs. Robinson*, 150 S. W., 1149, 1155, 105 Texas, 426.

Similarly it can only be by giving Articles 380 and 381 an adapted meaning as applied to a charter amendment naming a new place of location that they could be given any effect. Under the provisions of these articles the Banking Board is apparently vested with a discretion to determine for or against the public necessity of the business in the community in which it is sought to establish the bank, and a similar provision in the Kansas banking law has been upheld. *Schaake vs. Dolley*, 118 Pac., 80, 37 L. R. A. (N. S.), 877; *State ex rel. Barret vs. First National Bank*, 249 S. W., 619, 620-1. It must certainly have been intended that a bank could not by amendment of its charter avoid this supervisory power vested in the Banking Board.

As bearing on the application of Article 391, making the capital of a bank commensurate with the population of the town where located, it was held by the Circuit Court of Appeals in *First National Bank vs. Murray*, 212 Fed., 140, that a National bank chartered to do business in a suburban village of Oklahoma City, which was afterward embraced within the city limits, could not remove its banking house to the business section of Oklahoma City without increasing its capital stock in proportion to the population of that city as required by the National Banking Act, it being remarked by the court that:

"It is important that there should be a proportion between the capitalization and the amount of deposits which may reasonably be expected in a village, town or city in which a bank is located."

It will be noted that, as stated in this case, the National Banking Act expressly authorizes a change in place of business "to any other

place within the same State not more than thirty miles distant with the approval of the Comptroller of the Currency by the vote of shareholders owning two-thirds of the stock of such association." 6 Fed. Stat. Ann. (2nd Ed.), 721. The absence of a corresponding provision in our State banking law is, to say the least, significant.

The fact that Riviera and Kingsville are in the same county and that the distance between them is only seventeen miles would seem to have no bearing on the question. In *Bruner vs. Citizens Bank*, 120 S. W. (Ky.), 345, 346, above referred to, it is said the fact

"That the branch is established in the same county as the parent bank cannot affect the question. What a bank can do in one county of the State, it can do in any of them. County lines cannot be allowed to confine the activity or limit the business privileges of a bank. No sound reason, or indeed any reason, can be given why it would be legal to have branches in a county in which the parent bank was located and illegal to establish them in other counties."

Precisely the same principle would apply with respect to a change in location from one place to another within the same county.

It is obvious from what has already been said that a change in location of a bank from town to town constitutes a radical or fundamental change in its business even if the purposes of the provisions of the law, above reviewed, can be fully subserved by adapting them to a change in location by an amendment of charter. The further question presents itself whether an amendment making such a radical or fundamental change in the bank's charter should be permitted under considerations of public policy. As indicating the policy of the law of this State in this regard, we find in Article 1314, applicable to corporations in general, this provision:

"No amendment or change violative of the Constitution or laws of this State \* \* \* or which so changes the original purpose of such corporation as to prevent the execution thereof shall be of any force or effect."

As applicable to banks in particular, we find the only amendments recognized in the law are those relating to reduction or increase of capital stock and the change in the system of banking, and all of them require a certain proportion of the vote of the stockholders in order to effect such amendments. In a law as full and comprehensive as the banking law this would seem to indicate that no other amendments are contemplated or allowed.

The general rule is thus stated in *Fletcher's Cyclopedia on Corporations*, Volume 6, Section 4003:

"It is well settled that there is a contract between a corporation and every person who becomes a stockholder or member thereof, either at the time of its creation or afterwards, that the business of the corporation shall be conducted within the limits fixed by the charter, and that there shall be no departure from the objects for which the corporation was created. It is very clear therefore that a majority of the stockholders of a corporation have no power merely by reason of their control over the corporation to bind a dissenting minority by accepting and acting under an amendment of the corporation where the amendment fundamentally or radically changes its character or objects so as to make it in effect a different corporation, or so as to authorize it to engage in a different enterprise from that originally authorized, although of the same general kind. \* \* \* By the weight of authority a majority of a railroad, turnpike or canal company cannot bind a minority by accepting an amendment of the

charter authorizing the corporation to construct its road or canal along a different route from that originally authorized or beyond the original terminus, where the change is so radical as to make the enterprise essentially different from what was originally contemplated."

This is particularly pertinent to the stockholders in a bank, since they are personally liable for its debts to the extent of the stock owned by them.

The proposed amendment of the charter of the Riviera State Bank will probably violate Section 16, Article 16, of the State Constitution, as well as the provisions of the banking law, first herein reviewed; it will certainly so change the original purpose of such corporation as to prevent the execution thereof, in that if it does business in Kingsville, it cannot do business in Riviera, which was the original purpose of such corporation. Nor would the consent of all the stockholders to such a fundamental and radical amendment satisfy the requirements of the law with reference to a bank; for the State is by the Constitution given the power of supervision, regulation and control over banks and they are declared by law to be charged with a public use, so that the State is, as it were, the guardian of its banks, instead of simply being the grantor of a power to them. The provisions of Articles 539 and 540, giving a solvent bank the right to close and make final settlement of its affairs, is the solution contemplated by law for the difficulty of a bank which no longer sees fit to carry out its original charter purposes. It should not be evaded by amendment.

Our conclusion is that the Riviera State Bank should not be allowed by indirection, through charter amendment, to avoid the purposes for which it was created by changing its place of business from one town to another.

Yours very truly,

C. W. TRUEHEART,  
Assistant Attorney General.

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Op. No. 2641, Bk. 61, P. 28.

BANKS AND BANKING—SUBSTITUTION OF SECURITIES UNDER BOND SECURITY SYSTEM.

State banks and trust companies operating under the bond security system have not the right to substitute securities named in Article 475 for securities named in Article 475a, within the annual period for which the original securities were filed with the Banking Commissioner.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 17, 1926.

*Honorable Chas. O. Austin, Banking Commissioner, Capitol.*

DEAR SIR: The Attorney General has referred to me for answer your letter to him of February 11, reading as follows:

"Please advise me whether or not in your opinion bonds made by State banks, members of the Bond Security System of protecting depositors under the provisions of Article 475 et seq., Revised Civil Statutes, 1925, may be exchanged by the principal bank from time to time by depositing with the Banking Commissioner a bond or policy of insurance executed by a fidelity or casualty

insurance company licensed to do business in the State, for and in lieu of a bond or guaranty of indemnity executed by a personal obligation or surety, as provided for in Article 481, Revised Civil Statutes, 1925, and vice versa. Or, whether or not a policy of insurance or bond executed by personal sureties, as provided in Article 481, may be withdrawn before the end of the twelve month period for which such were executed and in substitution or lieu thereof bonds of the United States, municipal or district bonds, etc., may be substituted in accordance with the present decision of the Supreme Court in the mandamus proceedings entitled "Texas Bank and Trust Company vs. Austin."

"The question submitted is wholly as to the right of the principal bank to make substitution of one class of security for another within a period of one year, or twelve months, for which the original security was deposited with the Banking Commissioner."

As I understand your inquiry, it refers solely to the right of banks and trust companies already operating under the bond security system to substitute securities during the period of the year for which the original security was deposited with the Banking Commissioner. In other words, it presupposes that a choice of the bond security system has already been made by the bank or trust company and that such institution has made its periodical filing with the Banking Commissioner of the bond, policy of insurance or other guaranty of indemnity of amount equal to the amount of its capital stock; the specific question being whether such institution may, within the year following the deposit of such original security, substitute other security of the same or another and different class, including United States or municipal bonds. To this, as you know, the decision mentioned by you has no application.

There is no doubt of the right of a bank or trust company to periodically divide the security provided for among the several different classes of securities mentioned. See Article 478. There is also no doubt of the right of the Banking Board to require new or additional security in an amount sufficient to protect depositors even during the current year. See Article 480. It may even be that a bank or trust company not operating under the bond security system can at any time change to such system. Whether a bank or trust company operating under the bond security system may, at its option, during a current year substitute one class of securities for another, to the extent above stated, must be determined by a construction of Articles 475 and 475a, for no other provisions of the law refer to change of securities by such banks or trust companies.

Article 475 (formerly Article 491) provides in part as follows:

"Each and every State bank or trust company now or hereafter incorporated under the laws of this State, which shall elect to come under the bond security system of this chapter shall on January 1, 1910, and annually thereafter file with the Banking Commissioner of Texas, and his successors in office for and on behalf of the lawful depositors of such bank, a bond, policy of insurance, OR BONDS OF THE UNITED STATES, OR MUNICIPAL OR DISTRICT BONDS, APPROVED BY THE ATTORNEY GENERAL'S DEPARTMENT, \* \* \* which said bond, policy of insurance, or other guaranty of indemnity, shall be for and inure to the benefit of all depositors, etc."

As originally enacted, this was a part of the Act of 1909, which, of course, accounts for the reference to January 1, 1910, the beginning of the next calendar year. Chapter 9 of the Acts of the Thirty-ninth Legislature re-enacted this article, simply inserting the words shown

by us in capital letters. A proper construction of this provision as applied to a bank or trust company electing to avail itself thereof since January 1, 1910, would call for a substitution for that date of the actual date of the initial filing of such securities.

Article 475a (formerly Article 492) provides as follows:

"Every such bond, or policy of insurance, or other guaranty of indemnity filed as provided for in this chapter, shall secure deposits at the time said bond is filed and approved and all deposits made during the period of twelve months thereafter; provided, however, that said bond shall become void and of no force and effect upon the making, filing and approval of the next annual bond provided for under Article 491, Revised Statutes of 1911." (Supra.)

This article was enacted as a part of Chapters 75 and 81 (identical in language) of the Acts of the Thirty-ninth Legislature, the only modification of Article 492, Revised Statutes of 1911, being the proviso last quoted.

It will be noted that the catchwords or headlines affixed to both these articles by the codifiers of the Revised Statutes of 1925 are misleading, in that "changing guaranty to bond system" and "new bond" are referred to only in the provisos added to these articles by the Thirty-ninth Legislature. Headlines inserted by codifiers are, however, in nowise authoritative in the construction of the law, not being a part of the Revised Statutes as adopted by the Legislature. *Drake vs. Yawn*, 248 S. W., 726, 731 (writ refused).

These articles unquestionably contemplate an annual filing of the securities specified. The last article goes even further and makes the bond or other guaranty of indemnity so filed an absolute security for deposits made during the period of twelve months thereafter, and under its terms the only way of avoiding the liability there imposed is by the filing and approval of the next *annual* bond. Thus, if new security is given by a bank during the period of twelve months after filing of its original security, such new security could only be additional and could not operate to terminate the depositors' protection on the original security.

It is noteworthy that the same Legislature that in 1909 originally enacted the bond guaranty law, which makes no reference to the withdrawal of securities at the option of the bank or trust company operating thereunder, specifically provided in Section 38 of the act relating to life, health and accident insurance companies (Article 4749) as well as in Section 14 of the act relating to Texas securities of insurance companies (Article 4777), that insurance companies may at their option withdraw securities deposited with the State Treasurer, having first deposited other securities in lieu thereof. This is persuasive of a difference of the legislative intent as between banking and insurance companies.

In the opinion of the Supreme Court in *Texas Bank and Trust Co. vs. Austin* (not yet reported), it is said:

"It has been the legislative policy of Texas since our present State banking system was inaugurated to treat the general depositor as entitled to favored treatment. Such is the essential purpose of both the guaranty fund and the bond security system."

Under the provisions of Article 475, the securities filed are "for and

on behalf of the lawful depositors" and they "inure to the benefit of all depositors," and under the provisions of Article 475a they not only secure existing depositors, but also all deposits made "during the period of twelve months" after filing. Depositors are thus made in effect the beneficiaries in a statutory trust providing in its terms for an annual change only. The securities as filed and approved constitute a continuing guaranty of indemnity for the protection of existing and new depositors for the period of a year, and no action of the bank or trust company within the annual period can terminate its liability. *Gilparric vs. National Surety Company*, 110 Atl. (Conn.), 545; *Rusk vs. Van Norstrand*, 21 Wis., 161, 167. Both classes of depositors make their deposits in the light of the law that provides only for annual changes in the securities filed. The new depositors may even be supposed to have become creditors of a bank or trust company upon the faith of its very securities then on file. All depositors have a right to rely upon such continuing security for their benefit and also upon the fact that annual change thereof is the only substitution that can lawfully occur. The security filed by a bank having once inured to the benefit of a depositor, its release without his consent, on conditions other than those defined by law, would under all equitable principles be ineffective as against such depositor. *Vandiver vs. Savings Bank*, 87 Atl. (Md.), 1086.

There is another thing entitled to some weight as against a construction of the law as allowing a substitution of securities any time at the will of a bank or trust company. If this could be done once during the annual period, there is no reason why it could not be done any number of times. This would necessarily result in the greatest inconvenience to the Banking Commissioner in the matter of examination and approval of the securities offered for filing.

Of course, the mere express requirement of an annual filing of securities does not necessarily imply the exclusion of the right to file securities oftener. Yet to refute such implication there must exist some reason to the contrary. There is none expressed in any part of the banking law and we know of none aliunde thereof. The right of substitution is created by the law and is, therefore, presumptively limited thereby.

Our conclusions are that the law furnishes the standard of annual substitution in classes of securities and that there is no reason found in the intent of the Legislature, the inherent right of a bank or trust company or any other consideration that would authorize a substitution at any other than the annual periods prescribed. On the other hand, there are cogent considerations from the standpoint of the other parties concerned in such irregular substitution—namely, the Commissioner and the depositors, especially the latter—that would deny such right on the part of a bank or trust company though the law were less clear than it is. Certainly a careful reading of Article 475a puts at rest all doubt about the matter.

It is not necessary for the purposes of your question that a distinction be made as to whether the stipulations as to time in the law be mandatory or directory. Your question relates to the right, rather than the power, of the bank or trust company in the matter. It is



therefore enough that the law is in a directory sense exclusive of the right to substitute at will securities of one class for securities of another.

Respectfully submitted,

C. W. TRUEHEART,  
Assistant Attorney General.

Op. No. 2626, Bk. 61, P. 34.

TRUST COMPANIES—BANK AND TRUST COMPANIES—CONSTRUCTION OF  
ARTICLE 1513, R. S. 1925.

Article 1513, Revised Statutes, 1925, relates exclusively to bank and trust companies created under Chapter 4, Title 16, Revised Statutes, 1925.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 16, 1925.

*Hon. Chas. O. Austin, Commissioner of Banking, Austin, Texas.*

DEAR SIR: Your letter of the 3rd inst., addressed to the Attorney General, has been handed to me for attention. The letter is as follows:

"Article 513, Chapter 17, Title 32, Revised Civil Statutes, 1925.

"This statute refers to 'trust companies' and imposes certain duties upon the Banking Commissioner with respect thereto, but I am unable to find any statute, or part thereof, that provides for the organization and incorporation of such concerns.

"I am unable to find any provision in our statutes for the organization of a trust company, and therefore beg to request that you will be good enough to advise me just what my duties are under the article cited, and subsequent articles of the statutes in the same chapter referring to 'trust companies.'

"I am proceeding upon the theory that this statute does not in any manner refer to 'bank and trust companies' organized under the general banking laws."

You evidently refer to Article 1513, R. S. 1925, instead of Article 513. Article 1513, as originally enacted, is found in the Acts of the General Laws of the Third Called Session of the Thirty-sixth Legislature, the same being Chapter 49. We quote the original act verbatim:

TRUST COMPANIES—CONFERRING POWER TO PURCHASE, SELL, DIS-  
COUNT AND NEGOTIATE NOTES, DRAFTS, BILLS  
OF EXCHANGE, ETC.

"An Act to confer upon trust companies with a capital of not less than five hundred thousand dollars, the power to purchase, sell, discount and negotiate with or without its endorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers and other evidences of indebtedness, to purchase and sell, with or without its endorsement or guaranty, stocks, bonds, securities, including the obligations of the United States or of any State thereof; to issue debentures, bonds and promissory notes, to accept bills or drafts drawn upon it, but in no event having liabilities outstanding thereon at any one time exceeding five times its capital stock and surplus; provided, however, that with the consent in writing of the Commissioner of Insurance and Banking, they may have outstanding at any one time ten times the capital stock and surplus, and declaring an emergency.

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

"Section 1. Any trust company organized under the laws of the State with a capital of not less than five hundred thousand dollars shall, in addition to all other powers conferred by law, have the power to purchase, sell, discount and

negotiate with or without its endorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, stocks, bonds, securities, including the obligations of the United States or of any State thereof; to issue debentures, bonds and promissory notes, to accept bills or drafts drawn upon it, but in no event having liabilities outstanding thereon at any one time exceeding five times its capital stock and surplus; provided, however, that with the consent in writing of the Commissioner of Insurance and Banking, they may have outstanding at any one time ten times the capital stock and surplus; and generally to exercise such powers as are incidental to the powers conferred by this act.

"Section 2. The fact that there is now no law that will allow trust companies to purchase, sell, discount, and negotiate notes, drafts, checks, bills of exchange, etc., as provided in this bill, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days, be and the same is hereby suspended and that this act shall take effect and be in force from and after its passage, and it is so enacted."

In order to determine what your duties are under the above article, it becomes necessary to ascertain the meaning of the term "trust company" as understood by the Legislature at the time of the enactment of Chapter 49, General Laws of the Thirty-sixth Legislature at its Third Called Session. Article 1513, R. S. 1925, does not define the term "trust company," and we must necessarily look to all legislative enactments authorizing the creation of corporations for the purpose of exercising trust powers, in order properly to define the term.

Subdivision 37, Article 642, R. S. 1895, authorized the creation of corporations termed "guaranty and fidelity companies." Although this subdivision authorized such corporations to act as trustees under certain conditions, the chief functions to be exercised related to powers possessed by guaranty companies. In so far as the supervision of the Commissioner of Insurance and Banking extended to the business of these corporations, the statute provided that an examination of their affairs should be made at stated times by the Commissioner and that reports should be filed at stated intervals with said official, showing the assets and liabilities of the corporation. Chapter 16, Title 21, R. S. 1895, relates to guaranty and fidelity corporations and places the supervision of such corporations under the Commissioner of Insurance and Banking. It is to be noted that this chapter, entitled "Guaranty and Fidelity Corporations—(Foreign and Domestic) Regulation of," related to corporations created under subdivision 37 of Article 642, R. S. 1895.

Subdivision 37, Article 642, R. S. 1895, was carried forward without substantial change into subdivision 37 of Article 1120, R. S. 1911. At the same time, Chapter 16, Title 21, R. S. 1895, was carried forward into R. S. 1911 under Title 71, relating to insurance, and is found at Chapter 13 of said Title 71, entitled "Fidelity, Guaranty and Surety Companies." The articles of this chapter define the powers of such companies in the language of subdivision 37 of Article 1120, and subject the corporations to the supervision of the Commissioner of Insurance and Banking.

In adopting the Revised Civil Statutes of 1925, the Legislature placed the law relating to fidelity, guaranty and surety companies under Title 78, relating to insurance, and more specifically, under Chapter 16 of said title. In referring to these companies, we find that the Legislature employs the term "Fidelity, Guaranty and Surety Companies."

Subdivision 37, Article 1120, R. S. 1911, was transferred to the title and chapter last mentioned and was eliminated from Title 32 relating to the general law of private corporations. Under R. S. 1925, exclusive supervision of fidelity and guaranty companies is given to the Commissioner of Insurance.

It is seen from a review of the history relating to fidelity and guaranty companies that the Legislature has consistently classified such corporations in the light of their guaranty powers, and without regard to the limited trust powers permitted to be exercised by them under the law. In carrying out the classification given to such companies, it appears that supervisory control thereof was, by R. S. 1895, vested in the Commissioner of Agriculture, Insurance, Statistics and History, by virtue of the fact that that official exercised supervision over insurance companies and corporations possessing kindred powers. By R. S. 1911 we find that the Legislature delegated to the Commissioner of Insurance and Banking the authority to supervise fidelity and guaranty companies. In 1925, after the Insurance Department and the Banking Department had been created and authority pertaining to the banking business given to the Commissioner of Banking and that connected with the supervision of insurance and kindred matters delegated to the Commissioner of Insurance, we find that the Legislature, by the adoption of the Revised Statutes of 1925, delegated the exclusive supervision of fidelity and guaranty companies to the Commissioner of Insurance. We take it that the Legislature, in its wisdom, determined, when it divided the Insurance and Banking Department into two departments, to delegate to those respective departments the authority to supervise the character of corporations possessed of powers connected on the one hand with the business of insurance and on the other hand with the business of banking.

Further reviewing the history of legislation that may enable us to define the term "trust company" as used in Article 1513, R. S. 1925, we find that the Thirty-sixth Legislature at its regular session enacted a law authorizing the creation of corporations for the purpose of accumulating and lending money, purchasing, selling and dealing in notes, bonds and securities, but without banking and discounting privileges, and with the power to act as trustee under any lawful express trust committed by contract, and as agent for the performance of any lawful act. (Chapter 83, Acts of the Thirty-sixth Legislature.) Supervision of this class of corporations was given to the Commissioner of Insurance and Banking, but no provision was made for the incorporation thereof by that official. In 1925, when the Legislature adopted the Revised Statutes of that year, the foregoing act, in so far as the purposes for which such corporations might be created, was placed under subdivision 49 of Article 1302 of Title 32, relating to corporations, and also under Article 1520, R. S. 1925. The remainder of the act is found in Articles 1521 to 1524, inclusive, of the Revised Statutes of 1925. It may be observed that Chapter 17, Title 32, R. S. 1925, is entitled "Trust Companies and Investments," and that the subdivision of said chapter dealing with corporations created under subdivision 49 of Article 1302 is styled "Loan and Brokerage Companies." A point worthy of notice is the fact that the Legislature saw fit, in dividing the Department of Insurance and Banking into two departments, to

give supervisory control of loan and brokerage companies to the Commissioner of Banking. We take it that this is consistent with the character of business engaged in by loan and brokerage companies. An examination of the powers exercised by corporations of this class discloses that many of the powers peculiar to the banking business are granted to them; and that the paramount powers of such corporations pertain to the loan and brokerage business. It is true that limited trust powers are granted, but it is safe to assume that the grant of the few powers that pertain to a trust company were not sufficient in the judgment of the Legislature to stamp this character of corporation as a trust company. Consistent with the denomination of corporations created under subdivision 37 of Article 1120, R. S. 1911, as fidelity and guaranty companies, by virtue of the primary purposes of their creation, the Legislature, in the case of corporations created pursuant to the provisions of Chapter 83, Acts of the Thirty-sixth Legislature, has designated such corporations loan and brokerage companies, by virtue of the primary purposes for which they may be created.

Before reviewing the legislation relating to the third and last class of corporations possessing trust powers, it may be well to state that the names by which the corporations hereinbefore discussed, as known to the laws of our State, appear to be the natural result of the exercise of the primary functions pertaining to business pursuits well known to the modern business world. In authorizing the creation of corporations, the Legislature brings into being no new power or function as the same may relate to the carrying on of the business enterprises which it recognized. The powers and functions of business are the outgrowth of the steady development of commercial enterprises, and the common experience of the business world will determine the application of such powers and functions to any given enterprise. The development of business enterprises has resulted in the grouping of related functions which have been drawn to specific enterprises, each of which are distinguished one from another by the primary function within each group. Such enterprises may embrace common functions that are subsidiary and incidental to the exercise of their paramount function. This is common knowledge, and even the courts of our land would take judicial notice of the fact. Certainly, a legislative body, whose personnel is composed of men drawn from all the walks of life, in enacting legislation authorizing business enterprises to contract with the State and thereby become corporate entities, is cognizant of the common experience of the business world that certain paramount functions are peculiar to certain business enterprises. Thus, in defining the purposes for which corporations may be created and the powers which they may exercise, it must be presumed that the principles which are the outgrowth of sound business development and experience, and which in this day control business enterprises, will be adhered to by our law-making body. If this assumption be correct, then it follows, we think, that each corporation has been classified under our laws in consonance with the principal function exercised by the business enterprise from which it had its inception. Consistent with this assumption, we again say that, in our opinion, the Legislature properly denominated the corporations, hereinbefore mentioned, as fidelity and guaranty companies, and loan and brokerage companies, respectively.

Resuming our investigation of legislation pertaining to companies possessing trust powers, we turn to the third and last of such companies. Section 8, Chapter 10, Acts of the Twenty-ninth Legislature, First Called Session, provides:

*"Any five or more persons, a majority of whom are residents of this State, who shall have associated themselves by articles of agreement in writing as provided by law for the purpose of establishing a bank and trust company, may be incorporated under any name or title designating such business. 'Trust Company,' wherever appearing in the following sections of this act, is intended to mean banking and trust companies, and to refer to corporations created under this section and the succeeding sections of this act relating to banking and trust companies."*

Section 9 of the act sets forth the matters required to be stipulated in the articles of agreement, and Section 11 provides:

*"Corporations may be created under Sections 8 and 9 hereof, for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, with the powers set out in Section 3 of this Act, and one or more of the following purposes."*

Section 3, referred to in said Section 9, defines the powers of corporations organized for the purpose of doing a banking business. It will be noted that this act, in subdivision 7 of Section 9, requires the establishment of a bank of deposit or discount, or both of deposit and discount, with the powers set out in Section 3 of the act, before any powers set forth in Section 11 of the act (which are trust powers) may be exercised. The succeeding sections of the act relating to bank and trust companies refer to such corporations, pursuant to Section 8, as "trust companies." Thus, for the first time in our law, we find the term "trust company" given application to corporations.

The power of granting charters to banks, bank and trust companies, and savings banks, under the foregoing act, was lodged with the Secretary of State, and the supervision of such corporations was given to the Commissioner of Agriculture, Insurance, Statistics and History. This act was carried forward in the Revised Statutes of 1911, under Title 14, relating to banks and banking, and the supervision of corporations created under said title was given to the Commissioner of Insurance and Banking. Bank and trust companies, in addition to the banking powers given them in Section 3 of the act, were given, under the Revised Statutes of 1911, the same powers enumerated in Chapter 10, Acts of the First Called Session of the Twenty-ninth Legislature. Among these powers may be noted those set forth in subdivision 11 of Article 385, R. S. 1911, which reads as follows:

*"To guarantee the fidelity and diligent performance of their duties by persons or corporations holding places of private or public profit or trust, in all cases where individual bonds are not required by law, to guarantee or become surety on any bond given by any person or corporation, and to reinsure or guarantee any person or corporation against loss or damage by reason of any risk assumed by insuring the fidelity or diligent performance of duty of any such person or corporation, or by guaranteeing or becoming surety on any bond; provided that this act shall never be construed as authorizing the guaranteeing of a trust not lawful as between individuals."*

The Thirty-third Legislature, at its regular session, enacted a law, found at page 107, which amended Articles 384 and 525, R. S. 1911,

and repealed subdivision 11 of Article 385 thereof. In this act it is provided that said Article 384 is amended to read as follows:

"The amount of capital stock of any trust company, or bank and trust company, shall not be less than \$50,000, nor more than \$10,000,000; provided, however, that no trust company or bank and trust company shall be incorporated in towns and cities having 20,000 inhabitants or more, with less than \$100,000 capital stock."

By Section 2 of the act, subdivision 11 of Article 285 was repealed. By Section 3 of said act, Article 525, R. S. 1911, was amended, and the term "trust company" was used in addition to the terms "bank," "bank and trust company," and "savings bank."

It will be noted that subdivision 11 of Article 385 defines the powers pertinent to fidelity and guaranty corporations, and that Article 4969, R. S. 1925, relating to fidelity and guaranty companies, embodies the powers formerly set forth in subdivision 11, which was repealed by Chapter 107, Acts of the Thirty-third Legislature.

It is significant that the very Legislature that repealed subdivision 11, above mentioned, passed an act found in Chapter 66 of its Acts, wherein Articles 4928 and 4929 of Chapter 13, Title 71, R. S. 1911, relating to fidelity, guaranty and surety companies, were so amended that the principal powers, theretofore lodged in bank and trust companies under said subdivision 11, could be exercised by fidelity and guaranty companies. The Legislature had evidently reached the conclusion that these powers properly pertained to fidelity and guaranty companies and were unrelated to the proper functioning of bank and trust companies.

Chapter 2, Title 14, R. S. 1911, relating to bank and trust companies, as amended in 1913, is carried forward as Chapter 4, Title 16, R. S. 1925, relating to banks and banking. Prior to the adoption of the Revised Statutes of 1925, the Legislature had provided for the filing of articles of incorporation of banks, bank and trust companies and savings banks, with the Commissioner of Banking.

Article 396, R. S. 1925, provides:

"Bank and trust companies may be created for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, with the powers set out in Article 392, and any one or more of the following purposes:

"1. To act as the fiscal or transfer agent of any State, municipality, body politic, or corporation, and in such capacity, to receive and disburse money; to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any lawful purpose.

"2. To receive deposits or trust moneys, securities and other personal property from any person or corporation, and to lend money on real or personal securities.

"3. To lease, hold, purchase and convey any and all real property necessary in the transaction of its business, or which it acquires in satisfaction or partial satisfaction of debts due the corporation, under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation by any of its debtors; which shall be alienated in good faith within five years from the date of its acquisition to some person other than some one interested in the company.

"4. To act as trustee under any mortgage or bond issue by any municipality, body politic or corporation, and accept and execute any other municipal or corporate trust not inconsistent with the laws of this State.

"5. To accept trusts from, and execute trusts for married women, in respect

to their separate property, and to be their agent in the management of such property or to transact any business in relation thereto.

"6. To act under the order or appointment of any court of record as guardian, receiver or trustee of the estate of any minor, the annual income of which shall not be less than one hundred dollars, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party.

"7. To take, accept and execute any and all such legal trusts, duties, and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipality or other authority; and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

"8. To take, accept and execute any and all such trusts and powers of whatever nature or description, as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive, take and hold any property or estate, real or personal, which may be the subject of any such trust.

"9. To purchase, invest in, guarantee and sell stocks, bills of exchange, bonds and mortgages and other securities; and when money or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

"10. To act as executor under the last will or as administrator of the estate of any deceased person, or as guardian of any infant, insane person, idiot or habitual drunkard, or trustee for any convict in the penitentiary, under appointment of any court of record having jurisdiction of the estate of such deceased person, infant, insane person, idiot, habitual drunkard or convict."

Article 392, R. S. 1925, provides:

"Banking corporations shall be authorized to conduct the business of receiving money on deposit, allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of lending money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; and of buying, selling and discounting negotiable and non-negotiable commercial paper of all kinds. No such bank shall lend more than fifty per cent of its securities upon real estate, nor make a loan on real estate to an amount greater than half the reasonable cash value thereof."

It will be noted that, with the exception of subdivision 9 of Article 396, R. S. 1925, every subdivision thereunder defining the powers of bank and trust companies involves the exercise of a function peculiar to fiduciary relationships. The powers exercised are trust powers, as commonly understood by the business world. By virtue of the fact that the powers conferred on such corporations were inherently and primarily trust powers, the Legislature, in creating this class of corporations, denominated them "trust companies," and for the first time that name became known to the corporation laws of this State. That the denomination of corporations exercising the powers enumerated in Article 396 as trust companies follows the recognition by the Legislature of the fact that business enterprises exercising such functions are commonly known as trust companies, is exemplified by the fact that the Legislature, in enacting Chapter 107, Acts of the Thirty-third Legislature, uses the term "trust company" in addition to the term "bank

and trust company," in referring to the class of corporations authorized to exercise the powers conferred by Article 396 above quoted.

The powers enumerated in subdivision 9 of Article 396 are admittedly not strictly trust powers, but appear to be properly related to the functioning of a bank and trust company in so far as their combined powers are concerned. Be that as it may, the Legislature, in its wisdom, has conferred such powers on bank and trust companies.

In reviewing the legislation relating to corporations possessing trust powers, we have seen that the Legislature has conferred on bank and trust companies the authority to exercise powers inherently and primarily belonging to trust companies; and, further, that in the very act creating such companies the Legislature has said that the term "trust company" shall be taken to mean a bank and trust company. Further, we have seen that fidelity and guaranty companies, and loan and brokerage companies, so designated by the Legislature in the Revised Statutes of 1925, while possessed of some limited powers that pertain to trust companies, are granted those powers that inherently and primarily pertain to fidelity and guaranty companies on the one hand, and loan and brokerage companies on the other hand.

A review of the history of legislation relating to corporations possessing trust powers discloses that bank and trust companies are the only corporations to which the Legislature has granted powers that are primarily and inherently trust powers, and that, in the granting of those powers and in the enactment of the law permitting the creation of such corporations, the Legislature has denominated bank and trust companies "trust companies." We are of the opinion, therefore, that the conclusion is inevitable that the term "trust company," as used in Article 1513, R. S. 1925, was intended by the Legislature to relate to bank and trust companies exclusively. In reaching this conclusion we are sustained by the fact that, in the adoption of Article 1513, relating to trust companies, the powers mentioned therein are germane to, and an enlargement of, the powers granted to bank and trust companies, and foreign to the powers conferred on other corporations possessed of limited trust functions. For example, fidelity and guaranty companies have never been given the privilege of carrying on a bank and discount business, and loan and brokerage companies have had that authority expressly denied to them. The authority conferred in Article 1513, to issue debentures, promissory notes and other obligations, appears to be an enlargement of the authority conferred on bank and trust companies under subdivision 9 of Article 396, wherein such companies are permitted to issue bonds or obligations of the company for moneys borrowed or received on deposit or for investment, and further appears to be properly connected with the authority expressly given in subdivision 2 of said article, conferring on bank and trust companies the power to receive deposits of trust moneys, securities and other personal property from any person or corporation. It would be inconsistent with the established legislative policy of conferring powers on corporations by express grant, to conclude that in this instance the Legislature has attempted to confer on all corporations possessing trust powers the implied power of receiving and borrowing money. We believe that if the Legislature had intended to confer the power to issue debentures, bonds and other obligations on fidelity and guaranty com-



panies and loan and brokerage companies, that, in the same act conferring such powers, the prerequisite power of receiving and borrowing money and other securities would have been expressly conferred. It was unnecessary in the case of bank and trust companies to confer that authority, for it already existed.

In the light of the foregoing, we are of the opinion that the term "trust company," as used in Article 1513, R. S. 1925, embraces bank and trust companies to the exclusion of all other companies possessing trust powers.

You are therefore respectfully advised that, in our opinion, under the provisions of Article 1513, R. S. 1925, your supervision extends exclusively to bank and trust companies organized under Chapter 4, Title 16, R. S. 1925, and that such corporations, when having a capital of not less than \$500,000, may, with the consent in writing of the Banking Commissioner, issue debentures, bonds and promissory notes in an amount not exceeding ten times the capital stock and surplus of such corporations.

Yours truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2620, Bk. 61, P. 1.

**BANKS—AMENDMENT OF CHARTER.**

A bank of deposit and discount organized under the laws of the State of Texas may amend its charter and become a bank and trust company.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 13, 1925.

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

DEAR SIR: This is in reply to your request for an opinion, addressed to Attorney General Moody under date of September 29th.

In view of the fact that the codifiers omitted Articles 534, 535 and 536 of the Revised Civil Statutes of 1911 from the Revised Civil Statutes of 1925, you desire to be advised whether a State bank of deposit and discount may amend its charter and become a bank and trust company instead of a bank of deposit and discount only. Incidentally you make inquiry as to the authority of the codifiers to omit provisions of the prior code from the new revision and whether such omission will have the effect of repealing the omitted matter.

It may now be regarded as settled that any provisions of a general nature contained in the prior revision which are omitted from the new code now stand repealed, unless the same are specifically mentioned in the saving clause in the final title of the new revision. *American Indemnity Co. vs. City of Austin*, 246 S. W., 1019. It will be remembered that the work of the Codification Commission was adopted and enacted into law by the thirty-ninth Legislature, and therefore any change made is to be deemed a change made by the Legislature itself, for which there is ample authority under the Constitution, as was decided by our Supreme Court in the case above cited.

However, we are of the opinion that under the Revised Civil Statutes of 1925 a State bank of deposit and discount may amend its charter and become a bank and trust company, notwithstanding the fact that Articles 534, 535 and 536 do not appear in the same form in the new Revised Statutes as they were in the old statutes. In the first place, there is ample authority for the chartering of a bank and trust company as an original proposition. See Chapter 4 of Title 16 of the Revised Civil Statutes of 1925. That amendments to bank charters are contemplated is disclosed by Article 3921, which authorizes the collection of fees for such charter amendments. Article 500 provides for the reduction of capital stock of any banking corporation and Article 501 provides for the increase of the capital stock of any such corporation. Article 502 expressly authorizes any bank or bank and trust company organized under the general laws of this State to convert such corporation into any other system of banking, and outlines the procedure to be followed. Evidently the codifiers were of the opinion that Articles 500, 501 and 502 amply covered the articles above mentioned of the old code which were omitted in the new revision, in so far as the matter about which you inquire is concerned. Within the contemplation of the provisions of Article 502, we think the amendment of the charter of a bank of deposit and discount so as to include trust privileges, would be a change to another system of banking. We think, therefore, that there was no intention on the part of the Legislature in adopting this new codification to deprive banks of the privilege of amending their charters so as to become banks and trust companies.

You are, of course, familiar with the provisions of Article 4982 under which any State banking corporation may exercise certain powers by complying with the provisions of subdivision 2 under the head of "Insurance."

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2616, Bk. —, P. —.

CONVERSION OF STATE BANKS INTO NATIONAL BANKS—STATE FRANCHISE TAXES.

1. State franchise taxes do not accrue against State banks converting into national banks under the provisions of Article 502, Revised Statutes, 1925, after the date of conversion.

2. The Commissioner of Banking should certify to the Secretary of State all proceedings had relative to the conversion of State banks into national banks.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 28, 1925.

*Honorable Chas. O. Austin, Commissioner of Banking, Austin, Texas.*

DEAR SIR: Your letter of the 19th instant, addressed to the Attorney General, has been handed to me for attention. You submit the following questions:

"1. Does the conversion of a State bank into a national banking association, under the terms and provisions of Section 1, Chapter 150, Acts of the Regular

Session of the Thirty-eighth Legislature, ipso facto surrender the corporate franchise of a State bank; and, if so, in what manner should the Secretary of State be informed of such surrender of the corporate franchise, in order that the proper record thereof might be made in the Department of State?

"2. If the conversion of State banks into national banking associations, under the provisions of the act referred to, does not automatically surrender or cause to be surrendered the corporate franchise of the State banks, then in what manner should a State bank, converting under the provisions of the act referred to, surrender its corporate franchise?"

Article 502, Revised Civil Statutes of 1925, provides:

"If any bank or bank and trust company organized under the general laws of this State wishes to convert such corporation into any other system of banking, its officers shall give notice of said change by publishing its intention to make the same by four insertions in some daily or weekly newspaper published in the town where it is domiciled or adjacent thereto, for at least thirty days before making such change. Such notice shall state under what system of banking said corporation shall be operated after its conversion. Said corporation shall notify the Banking Commissioner of such proposed change under the seal of said bank, at least thirty days before said conversion shall be consummated. Such conversion shall be effected by the written consent or a vote of the owners of not less than a majority of the stock of such corporation, and a statement of such conversion, duly acknowledged by the officers of the corporation shall be recorded and filed in the same manner as provided for the original articles of agreement. No fund or deposit of any kind that shall have been deposited in a State bank or bank and trust company shall be protected by the guaranty fund law or bond security law of this State after such corporation shall have converted into some other system of banking."

Provision has been made by the National Bank Act for the conversion of State banks into national banking associations. U. S. R. S., Sec. 515 $\pm$ .

Article 539, Revised Civil Statutes of 1925, provides for the closing of solvent banking corporations operating under the laws of Texas. The article reads as follows:

"Whenever the board of directors of any solvent banking corporation, organized under or subject to the provisions of this title, shall deem it necessary, expedient or desirable to close the business of the corporation, they shall call a meeting of the stockholders to vote upon such proposition by giving sixty days notice thereof by publication once every week in a newspaper published in the county or city in which such corporation is located, and by mailing notices, at least sixty days prior to the date fixed for such meeting, addressed to the stockholders at their usual place of business or residence. The vote upon such proposition shall be taken by ballot, and the resolution and vote thereon shall be recorded in the minutes of the board of directors. If at such meeting at least two-thirds of the shares of the corporation were voted in favor of such proposition, the board of directors shall proceed to wind up the business of such corporation as in the succeeding article provided; and a copy of such proceedings shall be certified by the president and secretary of such corporation and filed with the Banking Commissioner."

Subdivision 3, Article 1387, Revised Civil Statutes of 1925, requires four-fifths in interest of all the stock outstanding to be voted in favor of the dissolution of a corporation in order to authorize the president, secretary and treasurer to certify to the Secretary of State the dissolution thereof. This article does not appear to be applicable to State banking institutions, inasmuch as the Legislature has enacted Article 539, above quoted, which is especially applicable to such institutions.

On conversion into a national banking association, a bank ceases to

exist as a State bank, but its identity or corporate existence is not destroyed and the officers of the old bank become the officers of the new one until their successors are elected, without regard to their qualifications. 7 Corpus Juris, 760. Fletcher, Cyclopedia of Corporations, Volume 7, Section 4871, has to say:

“While it is not very clear how a banking corporation organized under state laws, owing its existence and powers to such laws, and being purely a state corporation, can properly be said to be the same corporation when it has reorganized under the National Banking Act and become a Federal corporation, deriving its existence and powers solely from the laws of the United States, yet it is settled, in so far as decisions can settle the question, that when a state bank reorganizes as a national bank under the Act of Congress, the reorganization does not change the identity of the corporation, but merely continues the same body under a different jurisdiction, and that as a national bank it takes all the assets and rights possessed by it and becomes subject to all the liabilities incurred by it as a state bank. \* \* \* But a national bank is not liable to the state in which it is organized for a bonus exacted by the state, for its franchises and privileges, from the state bank from which it was reorganized, since, as a national bank, it does not derive its franchises and privileges from the state.”

In the case of Metropolitan Bank vs. Clagett, 141 U. S., 520, the court says, among other things:

“The court decided that the New York statute providing for the redemption of circulating notes and for releasing the bank if the notes were not presented in six years, applies alone to banks closing the business of banking; that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not close its business of banking, nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same properties, assets and banking business, under a changed jurisdiction; that it remained one and the same bank and went on doing business uninterruptedly; and that, therefore, the statutory proceedings relied upon in the answer could not operate as a bar to the liability of either bank to pay the bills delivered by the bank in 1861 to plaintiffs' intestate. This decision is so manifestly correct that it needs no argument to sustain it.”

We must conclude that Article 539 above quoted relates to solvent banks closing the business of banking, and has no application to State banking institutions converting into banks under the Act of Congress. This conclusion is strengthened by the fact that Article 502 permits the conversion by a State bank into a national bank on a vote of at least a majority of the stock, while Article 539 requires a vote of two-thirds of the stock before the corporation may be dissolved. Further, Article 502 requires that notice of intention to convert into a national bank be given by publication in a newspaper for thirty days, while Article 530 requires publication for a period of sixty days. It would appear that these provisions are not reconcilable. Consequently, in view of the authorities above cited, holding that the reorganization of a State bank into a national bank merely continues the same body under a different jurisdiction, and in view of the inapplicability of the general dissolution statute to State banks converting into national banks, we are driven to the conclusion that there is no statute in Texas requiring State banks converting into national banks to file a dissolution certificate surrendering its corporate franchises.

National banks are subject to the paramount authority of the United

States, and States are without power to control the conduct of their affairs where the exercise of authority by the State expressly conflicts with the laws of the United States or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created. 7 C. J., 760.

"The State governments have no right to tax any constitutional means employed by the Government of the Union to execute its constitutional powers, and the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitution or laws enacted by Congress to carry into effect the powers vested in the National Government." *McCullough vs. State of Maryland*, 4 Wheaton, 316.

It cannot be controverted that a State is without authority to collect a franchise tax from a national bank; and further, it must be admitted that, after the conversion of a State bank into a national bank, no State franchise tax can accrue. *State vs. National Bank of Baltimore*, 33 Md., 75.

In so far as your inquiries are concerned, it is not necessary to pass on the question as to whether a State bank converting into a national bank ipso facto surrenders the corporate franchise of the State bank, in view of the authorities to the effect that the identity of the corporation is unchanged, and that the same body is merely continued under a different jurisdiction. The question involved is, does a State franchise tax accrue against a national bank from the date of the conversion of the State bank into such national bank? In view of the foregoing, we are constrained to answer the question in the negative.

Relative to the second part of your first question, it does not appear that the Legislature has provided a method whereby the Secretary of State may be informed of the conversion of a State bank into a national bank. Viewing the question from a practical standpoint, it is our opinion that the Commissioner of Banking should certify to the Secretary of State all proceedings filed in the office of the Banking Commissioner, showing the conversion of the State bank into a national bank, and that the Secretary of State should thereupon file such certified copies in his office and make a book entry showing the conversion of the State bank into a national bank. This procedure is suggested in view of the fact that it appears to be simple, and in view of the further fact that a method should be pursued which will enable the Secretary of State to keep a proper record in order that unnecessary suits for the collection of franchise taxes may be avoided.

Yours truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

Op. No. 2602, Bk. 60, P. 6.

**BANK AND TRUST COMPANIES—INVESTMENT OF THEIR MONEY IN  
STOCK OF INDUSTRIAL PLANTS PROHIBITED—ABSTRACT  
BUSINESS IN INDUSTRIAL PLANT.**

1. Bank and trust companies cannot invest their money in industrial plants by the purchase of stock therein with a view to owning and operating the same.
2. An abstract and title business is an industrial plant within the meaning of the statute.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 4, 1925.

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

DEAR SIR: Your favor received in which you request the opinion of this Department as to whether or not bank and trust companies incorporated under the laws of this State can legally acquire a majority of the stock of an abstract and title company for the purpose of operating the same in connection with its business.

Bank and trust companies incorporated under the laws of this State have only such powers as are conferred upon them by their charter and the laws of this State, or such as are incidental to the powers thus conferred. The purchase of stock in another corporation is not a power incident to the power granted to bank and trust companies. Morse on Banks, Volume 1, Section 59, says:

"In this country the general rule is that any bank may loan on the security of the stock or bonds of other corporations, but cannot buy and sell them except to save a debt or in order to deposit them under a law requiring such stocks to be given as security for circulation or by reason of other express authority."

The buying of stock in other corporations not being an incident to the powers conferred on bank and trust companies the question resolves itself into whether or not the statutes of this State grant express authority to make such investments.

Subdivision 9 of R. S. Article 385 authorizes bank and trust companies "to purchase, invest in, guarantee and sell stocks, bills of exchange, bond and mortgages and other securities." The power to invest in stock of other corporations is thus expressly conferred. But this power we think is materially qualified by R. S. Article 546. That article is as follows:

"No corporation organized under this title (bank and trust companies) shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling ordinary goods, chattels, wares and merchandise, or by owning or operating industrial plants; provided, that it may sell all kinds of property which may come into its possession as security for loans, or in the ordinary collection of debts."

The portion of the article just quoted pertinent to the matter now under consideration, assembled, would read as follows:

"No corporation organized under this title shall employ its moneys, directly or indirectly, \* \* \* by owning or operating industrial plants."

Under this article bank and trust companies are prohibited from directly or indirectly owning or operating industrial plants. They cannot directly use their money to establish such plant, nor can they directly use their money to operate the same. Can they then purchase the stock of such industrial corporation with a view to owning the plant and of operating the same? We think this would be but an indirect way of investing their money in such plants, and prohibited by the statute quoted.

The remaining question is whether or not an abstract and title business is an industrial plant within the meaning of the statute, for if it is, the purchase of its stock with a view of ownership thereof and operating same is prohibited.

"Industry" is defined as "habitual diligence in any employment,

either bodily or mentally." "Industrial" is defined as "consisting or pertaining to industry." "Plant" is defined as "the machinery, apparatus, or fixtures by which business is carried on." "Apparatus" is defined as "a full collection or set of implements for a given duty." "Implements" are things necessary to any trade, without which the work cannot be performed.

The abstract and title business requires both bodily and mental effort, and is therefore industrial. The business requires a full set of implements for its conduct, namely, abstract books, indices, maps, plats, drawing instruments, boards, etc., such being the case, I think it clearly an industrial plant within the meaning of the statute.

You are, therefore, advised that bank and trust companies cannot purchase the stock of an abstract and title company with a view to owning and operating same.

Very truly yours,

JNO. W. GOODWIN,  
Assistant Attorney General.

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Op. No. 2599, Bk. 60, P. 1.

**BANKS OPERATING UNDER COMMON LAW DECLARATION OF TRUST—  
BRANCH BANKS—USE OF WORDS "TRUST" AND "SAVINGS" AS  
PART OF THE TRADE NAME—DUTY OF ATTORNEY GENERAL  
WITH REFERENCE TO BANKS OPERATING ILLEGALLY.**

1. A bank operating under a common law declaration of trust and its branches in actual operation at the time Chapter 185, Acts Thirty-eighth Legislature, took effect, is entitled to continue in business.

2. A bank operating under a common law declaration of trust at the time Chapter 185, Acts Thirty-eighth Legislature, took effect, cannot subsequently to the taking effect of such act establish a branch bank.

3. A bank operating under a common law declaration of trust in actual operation when Chapter 185, Acts Thirty-eighth Legislature, took effect, has a right to continue to use the words "trust" and "savings" as a part of its trade name.

4. It is the duty of the Attorney General to take necessary legal steps to suppress any bank or branch bank operating in violation of Chapter 185, Acts Thirty-eighth Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 30, 1925.

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

DEAR SIR: This acknowledges receipt from you of the following communication, towit:

"I enclose a certified copy of a 'Declaration of Trust' and an amendment thereto under which an association is operating, or attempting to operate, a banking business in the city of San Antonio under the style 'United States Trust and Savings Bank.'

"This association has established and proposes to establish branch offices at various points in the southern part of this State.

"I submit to you the following questions:

"First: Has this association the right, under our laws, to conduct a banking business?

"Second: If it has such right, has it then the right to use the words 'trust' and 'savings' as part of the style and trade name under which it operates?

"Third: If it has the right to conduct a banking business, has this association

the right to do so at more than one place of business, in other words, has it the right to establish and maintain branches at various points?

"Fourth: If this association does not possess the right to do or attempt to do any one or all of these things, then what officer or officers of the State are charged with the duty to proceed against it for the purpose of compelling a discontinuance of its illegal operations?

"In addition to the document herein first referred to, I enclose a communication written upon a letterhead and also a form of check, a form of deposit ticket, and a form of promissory note used by this association and all of which are submitted as bearing upon the subject matter."

Your first and second questions being related we will consider them together.

Section 1 of Chapter 185, Acts Thirty-eighth Legislature, which took effect ninety days after March 14, 1923, is as follows:

"It is hereby declared to be the public policy of this State that no additional private banking institution or business shall be organized or established after the taking effect of this act, and it is hereby enacted 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 hereafter organize or establish, or begin the operation of any banking institution or business within this State, or to resume such operations, except as provided in this act."

This act is entirely prospective. It prohibits the organization and establishment of private banks after it takes effect, but does not attempt to prohibit the continuance of private banks then in operation. If the trustees named in the declaration of trust accompanying your letter were actually operating a bank under and in accordance with the declaration of trust at the time the above act took effect, they would have the right to continue such business. But if the bank provided for by the declaration of trust was not organized and in operation at the time said act took effect, then it could not, subsequent to the taking effect of said act, begin the operation of a bank.

Section 2 of Chapter 185, Acts Thirty-eighth Legislature, is as follows:

"It shall be unlawful for any person, association of persons, partnerships or any trustee or trustees acting under any common law declaration of trust, to hereafter use, advertise or put forth any signs as a bank, trust company, bank and trust company or savings bank, or to in any way solicit or receive business as such, or to use as their name or part of their name on any sign, advertising or letter head or envelope the word bank, banker, banking, banking company, trust, trust company, bank and trust company, savings bank, savings, or any other terms which may or might be confused with the name of a corporation organized under the general provisions of the banking laws of this State.

"It shall be unlawful for any such person, association of persons, partnership or any trustee or trustees acting under any common law declaration of trust to adopt or use any artificial name or business title, or to use any other than the name of the person or one or more of the persons, or a member or one or more of the members of the association of persons or partnership, or a member or one or more of the members of such common law trust association, in the management, conduct or operation of any private banking institution or bank of deposit within the State of Texas.

"Provided, however, that the provisions of the sections of this act shall not apply to any person, associations of persons, partnerships or trustees, or trustees acting under any common law declaration of trust, 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 or savings bank within this State, nor to any bank which may



have been in successful operation in this State for twenty years and shall have suspended operation prior to the passage of this act, but which shall resume operation within twelve months after the passage of this act. The right to continue such business of such bank, trust company, bank and trust company or savings bank so engaged, and that has been so engaged for a period of two years next immediately preceding the time this act becomes effective, or shall resume business as provided in this act, and by their heirs, legal representatives, assigns and successors, is hereby expressly recognized, confirmed and fixed."

This section makes it unlawful for any trustee acting under a common law declaration of trust to thereafter use as its name or a part of its name the words "bank, banks, banking, banking company, trust, trust company, bank and trust company, savings bank, savings," etc. But the same section provides that the prohibition against the use of such words as the name or part of the name of a bank operating under a common law declaration of trust should not apply to such bank which at the time the act took effect was and had been for two years next preceding the taking effect of said act actually engaged in the operation of a bank.

Under the above proviso of Section 2 of the act in question the common law trust referred to in your letter would have the right to use the words "trust and savings" as a part of its name if at the time the aforesaid act took effect it was then and had been for two years next preceding the taking effect of said act actively engaged in the operation of a bank under and in accordance with the declaration of trust. Otherwise, under said act it would not have the right to use as a part of its name such words.

Banks chartered under the laws of this State are prohibited from establishing branch banks. This law has no application to private banks. Their right to establish branch banks prior to the adoption of Chapter 185, Acts Thirty-eighth Legislature, was unquestioned. Where such branch banks were established and in operation at the time the foregoing act took effect they would have the right to continue such business. But Section 1, Chapter 185, Acts Thirty-eighth Legislature, expressly prohibiting additional private banking institutions after the taking effect thereof, no such bank or branch bank could thereafter be established.

In answer to your fourth question you are advised that should it come to your knowledge that any bank or branch is operating in this State in violation of the foregoing laws, you should place the facts before the Attorney General of this State, whose duty it would be to take the necessary legal steps to suppress any such banking institution.

Yours very truly,

JNO. W. GOODWIN,  
Assistant Attorney General.

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Op. No. 2592, Bk. 60, P. 9.

REORGANIZATION OF A STATE BANK INTO A NATIONAL BANK—STATUS  
OF SURETIES ON DEPOSITORY BOND OF STATE BANK AFTER SUCH  
REORGANIZATION—NEW BOND SHOULD BE DEMANDED.

1. Where a State bank is county depository its reorganization into a National bank under U. S. R. S. Section 5154, does not terminate its depository contract

with the county, its reorganization not changing the identity of the corporation, but being a mere continuance thereof under a different jurisdiction.

2. The sureties on the depository bond of a State bank are discharged by reorganization thereof into a National bank under U. S. R. S. Section 5154.

3. Where a State bank is county depository upon its reorganization as a National bank under U. S. R. S. Section 5154, a new bond should be demanded.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 6, 1925.

*Hon. S. H. Terrell, State Comptroller, Austin, Texas.*

DEAR SIR: This Department is in receipt of the following letter addressed by you to the Hon. Dan Moody, Attorney General:

"The First State Bank of Bonham, Texas, has been selected and made bond as county depository of Fannin County.

"Hon. Sam E. Neilson, County Judge of said county, advises that the First State Bank of Bonham is preparing to change its charter and become a National bank, and he desires to learn of this department as to whether or not it will be necessary that a new county depository bond be made.

"Please give us your opinion in the matter."

Revised Statutes of United States, Section 5154 makes provision for the nationalizing of State banks. It reads as follows:

"Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency."

The State of Texas by act of the Thirty-eighth Legislature, Chapter 150, Section 1, has also made provision for changing State banks into other systems of banking. Said section is as follows:

"If any bank or bank and trust company organized under the general laws of this State wishes to convert such corporation into any other system of banking, it shall be the duty of its officers to give notice of said change by publishing its intention to make the same in some daily newspaper published in the town where it is domiciled for at least thirty days before making such change, and if there be no daily newspaper published in the county where such corporation is domiciled for four successive weeks, and if there be neither a daily newspaper published in said town nor weekly newspaper published in said county, then by publication for four successive weeks in the weekly newspaper published nearest to the domicile of said bank or trust company. Such notice shall state under what system of banking said corporation shall be operated after its conversion. It shall also be the duty of said corporation to notify the Banking Commissioner of Texas of such proposed change under the seal of said bank at least thirty days before said conversion shall be consummated. No fund or deposits of any kind that shall have been deposited in a State bank or State bank and trust company in this State shall be protected by the Guaranty Fund Law of this State or by the Bond Security Law of this State, after such corporation shall have converted to some other system of banking."

We shall assume that the purpose of the First State Bank of Bonham is to reorganize under the above recited acts; that the bank as reorganized will have the same stockholders, the same assets and the same situs as the State Bank of Bonham, the only change being in the name

of the bank and the substitution of the Federal charter for the State charter. Assuming such to be the facts, and limiting our opinion to the facts herein assumed, you are advised that said bank when so reorganized will be but the continuation of the First State Bank of Bonham and it will succeed to all of its assets and rights and become chargeable with and bound for the fulfillment of all its contract.

The views here expressed seem the settled law. Fletcher's Cyclopedia of Corporations in discussing this question says:

"While it is not very clear how a banking corporation organized under state laws, owing its existence and powers to such laws, and being purely a state corporation, can properly be said to be the same corporation when it has reorganized under the National Banking Act, and become a federal corporation, deriving its existence and powers solely from the laws of the United States, yet it is settled, in so far as decisions can settle a question, that when a state bank is reorganized as a national bank under the act of Congress, the reorganization does not change the identity of the corporation, but merely continues the same body under a different jurisdiction, and that, as a national bank, it takes all the assets and rights possessed by it, and becomes subject to all the liabilities incurred by it, as a state bank. It makes no difference that it has in form been organized as a new corporation, and that the assets have been transferred to it as if by sale and purchase. The national bank succeeds to the assets of the state bank by operation of law and not as a purchaser.

"It follows from this view of the act of Congress that when a state bank is reorganized as a national banking association, it becomes, as a national bank, the owner of all the assets of the state bank, including choses in action. The national bank succeeds to and is entitled to enforce all contracts and rights of action which have been made with or accrued to the state bank. It may maintain an action on a continuing guaranty for loans, held by the state bank before the change, for loans both before and after the change. And it may maintain an action to foreclose a mortgage on real estate executed to the state bank as security for a loan made upon a note, and assigned to it by the state bank on the reorganization, or, it would seem, without any assignment, the identity of the corporation not being affected by the reorganization.

"On the other hand, as a national bank it is liable for all the debts contracted, on all executory contracts made, and for all torts committed by it as a state bank. It is liable, as a national bank, to the holders of outstanding circulation issued by it as a state bank in accordance with state laws. It is liable, for a reward offered by it as a state bank for the apprehension and conviction of one who had robbed it. And it is liable in an action of trover to recover the value of a special deposit made with it as a state bank and converted, whether the conversion was before or after its reorganization as a national bank."

The text of the law above quoted seems well supported by authorities cited in the footnotes, to which we refer, and we think is undoubtedly the law.

But while the bank as reorganized would be bound by the depository contract made and entered into by and between the First State Bank of Bonham and Fannin County on the ground that the reorganization was but the continuation of the same body under different jurisdiction, it does not follow that the sureties on the depository bond would continue bound. The sureties contracted to stand as sureties for a bank chartered by the State, regulated by State laws and supervised by State authorities, and they have the right to stand on the contract made and any material change therein would under familiar rules of law release them.

We think a change from a State to a Federal charter, from State

regulation and supervision to National regulation and supervision, regardless of the differences in the regulatory law (and there are differences), would be a material change in the contract of the sureties on the depository bond of a State bank and would release them.

You are therefore advised that when a State bank reorganizes under the above cited statutes as a National bank, that the sureties on the depository bond of the State bank are released after such reorganization from further liability and that upon such reorganization a new bond should be demanded and required of the reorganized bank.

Yours very truly,

JOHN W. GOODWIN,  
Assistant Attorney General.

Op. No. 2568, Bk. 60, P. 14.

STATE BANKS—SET-OFF AGAINST—WHEN ALLOWED.

The status of the bank and its creditors is fixed at the time it is closed by the Banking Commissioner on account of its insolvency.

The law of offset applies to an insolvent bank in the hands of the Banking Commissioner for liquidation.

The allowance of offsets is not a preference.

All mutual debts due at the time the bank is closed for insolvency should be offset.

A party indebted to a bank, but whose debt was not due when it became insolvent, should, nevertheless, be allowed to set off against such debt any indebtedness of the bank to him.

Where the debt of a party to a bank was not due when it was closed for liquidation on account of insolvency, such debt cannot be used by the bank as a set-off against the demand of such party, unless he was at the time of the closing of the bank himself insolvent, in which case it could be used as an offset.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 21, 1924.

*Hon. J. L. Chapman, Banking Commissioner, Capitol.*

DEAR SIR: You desire to know whether or not when a bank becomes insolvent and is closed by you for liquidation the law of set-off should be applied, and if applied, your query is as to whether or not that would be a preference.

When a bank becomes insolvent and is closed by the Banking Commissioner for liquidation the rights of all creditors against the bank, and of the bank itself against them, are fixed at the time of the closing of the bank. Whatever each had is preserved. Nothing is lost or gained in the way of rights, liabilities or remedies.

The Supreme Court of Wisconsin (103 Wis., 57) said:

"Upon the date of the declared insolvency each creditor becomes the owner for the purpose of securing his debt of that part of the assets of the bank which bears the same ratio to the whole property as his debt bears to the aggregate indebtedness, and this interest in the assets remains fixed and constant until his debt is paid."

This principle of law is generally recognized and is announced in the following cases:

Yardley vs. Philer, 167 U. S., 344.

Scott vs. Armstrong, 146 U. S., 499.

If the closing of the insolvent bank fixes the rights of the creditors against it and of it against the creditors and nothing is lost or gained, it follows that any right of set-off, either was entitled to at the time, is preserved.

The Supreme Court of the United States in *Scott vs. Armstrong*, 146 U. S., 499, had this very question under consideration. In that case it is contended that the assets of the bank existing at the time of the act of insolvency included all its property without regard to set-offs thereto. That to allow an offset would be a preference. The court in answer to this contention said:

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

Further addressing itself to this question the court said:

"And it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts of creditors the set-off of debts has been universally conceded. The equity of equality among the creditors is either found inapplicable to such set-off or yielded to their superior equity."

The right of set-off in the case of an insolvent bank and the allowance of such set-off is not a preference, is firmly established and so generally recognized that the citation of further authority is deemed unnecessary.

Conceding the right of set-off to exist, the question is, what demands can be offset one against the other? This right is governed by the general law of set-off. It is not all counter-demands that can be so used in determining whether the counter-demands can be offset. The following general rules as modified by equity to meet particular exigencies must be observed.

The first and the most important rule is that the debts, in order to be set off, must be mutual; that is, they must be due to and from the same person in the same capacity or right. To illustrate: A debt due one in his representative capacity as administrator, guardian, trustee, agent, cannot be set off against his personal obligations.

Another rule, but which has been modified and qualified to meet exigencies, is that the mutual demands must be due. This rule will prevent the offsetting of a due debt by one not due. Equity, however, has modified its general rule in case of the insolvency of one of the parties. The injustice of requiring one to pay an indebtedness to an insolvent against whom he held a counter-demand was so great that equity made such case an exception to the general rule.

Applying these rules, you are advised that where a bank becomes insolvent and is closed by you for liquidation, all mutual debts owing by and to the bank, if due when the bank closed, should be offset. This being accorded with the general rule firmly settled, citation of authorities is deemed unnecessary.

A party indebted to a bank at the time it was closed for insolvency, but whose debt had not at that time matured, may, nevertheless, set off against his liability any indebtedness of the bank to him, the bank

being insolvent and indebted to him is deemed inequitable to pay his obligation to the bank; so equity allows the offset. The right of offset, under the circumstances stated, is recognized by a great preponderance of authority. Among the authorities sustaining this doctrine are the following:

Hamilton vs. Van Hook, 26 Texas, 302.  
 Neely vs. Grayson County, 61 S. W., 559.  
 15 L. R. A., 710.  
 Stechman vs. Achley, 32 L. R. A. (N. S.), 1060.  
 17 L. R. A., 456.  
 146 U. S., 499.

Where at the time a bank is closed for insolvency or mutual debts between it and a customer, but the debt of the customer to the bank was not then mature, the bank cannot use such debt as an offset against the demand of the customer, unless he was also insolvent. If he was also insolvent, then the offset can be made.

Presnall vs. Stock Yards National Bank, 151 S. W., 873.  
 9 L. R. A., 108.  
 Irish vs. City Trust Co., 163 Fed., 880.  
 Jordan vs. National S. & L. Bank, 74 N. Y., 467.

The answer to your questions will be found in the syllabus, which is a summary of the conclusions reached by me with reference to the matters inquired about.

Yours very truly,

JOHN W. GOODWIN,  
 Assistant Attorney General.

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Op. No. 2567, Bk. 60, P. 19.

STATE BANKS—INSOLVENCY—ASSESSMENT AGAINST STOCKHOLDERS—  
 SET-OFF.

A stockholder of an insolvent State bank is not entitled to offset against an assessment ordered by the Banking Commissioner the amount of his deposit or other indebtedness of the bank to him.

ATTORNEY GENERAL'S DEPARTMENT,  
 AUSTIN, TEXAS, October 21, 1924.

*Hon. J. L. Chapman, Banking Commissioner, Capitol.*

DEAR SIR: From the question propounded, it seems that you desire to know whether or not a depositor or creditor of an insolvent State bank that has been closed by you for the purpose of liquidation can set off against an assessment ordered by you a deposit or debt which was owing to him by the bank at the time it was closed.

Revised Statutes of Texas, Article 552 provides:

"If default shall be made in the payment of any debt or liability contracted by any bank, \* \* \* each stockholder of such corporation, as long as he owns shares therein, and for twelve months after the date of a transfer thereof, shall be personally liable for all debts of such corporation existing at the date of such transfer, or at the date of such default, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred."

Federal Statutes, Section 5151 provides:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The above statutes, State and Federal, deal with the same subject, have the same object, and are expressed in similar language. The Federal statute has been construed by the United States Circuit Court in the case of *Wingate vs. Orchard*, 75 Fed. Rep., 241. The court, in its opinion in that case, said:

"The sole question presented and argued by counsel in this case is whether or not a holder of stock of an insolvent national bank is entitled to offset against an assessment upon his stock, ordered by the Comptroller of the Currency, the amount of his deposits in the bank at the time it became insolvent. The court below held that the stockholder is entitled to offset against such assessment the amount of such individual claim against the bank, and to review that ruling the present writ of error was brought. We are of opinion that the ruling was erroneous."

After setting out Section 5151, supra, the court in that case said:

"It was to enforce this additional liability that the Comptroller of the Currency directed the assessment, to enforce which the present suit was brought in the court below. The evident object of the statute is to provide a fund equaling in amount, but in addition to, the face value of the stock, to make good all contracts, debts, and engagements into which such association may enter, and, to that extent, it makes every shareholder individually responsible, equally and ratably, and not one for another. The fund thus provided for is not intended for any particular creditor, but to make good all contracts, debts, and engagements of such association, equally and without any preference. But unlike the voluntary obligation of the shareholder to pay for the stock for which he subscribes, and with which funds the business of the bank is to be conducted, the additional double liability imposed by Section 5151 of the Revised Statutes is to be called for only the purpose of making good the contracts, debts, and engagements of the bank. If necessary for that purpose, that liability is to be enforced pursuant to the provisions of Section 5234 of the Revised Statutes; that is to say, through a receiver acting under the direction of the Comptroller of the Currency—such receiver having been appointed by the Comptroller pursuant to the provisions of that section, and of Sections 5226 and 5227 of the Revised Statutes. The fund thus provided for, in the event of the liquidation and winding up of the affairs of the bank, equal in amount to the face value of the stock, and imposed for the express purpose of making good the contracts, debts, and engagements of the association, is manifestly a trust fund, to a pro rata share of which all creditors are equally and equitably entitled. Obviously, to permit a holder of stock in such a bank to offset against an assessment for the additional liability thus imposed upon him as such holder the amount of his deposits in the bank, in respect to which he is no more entitled than any other creditor, would be, in effect, to make him a preferred creditor. If the amount of his deposits should equal the par value of his stock, the allowance of such an offset would be, in effect, to pay him in full the amount of his deposits; and if his deposits are less than the par value of his stock, the effect would be to pay him in full, to that extent, whereas the other depositors may receive little or nothing. Such was not the intention of Congress in imposing, as it did, by Section 5151 of the Revised Statutes, upon the shareholders of every national banking association, in addition to the amount invested in such shares, a liability for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof. On the contrary, the purpose was, as has been said, to provide a fund to which all creditors should be entitled to look upon equal

terms, and in which, in the event of disaster, all creditors, without preference to any, should be entitled to share pro rata."

The United States District Court of New Jersey, in the case of Williams vs. Rose, 218 Fed. Rep., 898, approved the doctrine laid down in the case of Wingate vs. Orchard, supra.

So far as I am aware, our courts have never passed upon the question here involved. The Federal statute, above quoted, being similar to our State statute and enacted for the same purpose, we think it safe to apply the construction of the Federal statute by the Federal courts to our statute.

You are therefore advised that a creditor of an insolvent bank in your hands for liquidation would not have the right to set off against his stockholders' liability his deposit in the bank, or any other indebtedness of the bank to him existing at the time the bank was closed by you.

Very truly yours,

JNO. W. GOODWIN,  
Assistant Attorney General.

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Op. No. 2569, Bk. 60, P. 202.

BOARD OF CONTROL—HIGHWAY DEPARTMENT—PURCHASING EQUIPMENT.

Relative authority of Board of Control and State Highway Commission in deciding upon what kind of automobiles shall be purchased, stated.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 29, 1924.

*State Board of Control, Capitol.*

GENTLEMEN: Attorney General W. A. Keeling is in receipt of a letter signed by your Mr. R. B. Walthall of the Purchasing Division, reading as follows:

"The Board of Control is in receipt of a requisition from the State Highway Department for ten Dodge touring cars, eight Studebaker touring cars and two Studebaker coupes.

"We would appreciate it very much if you would advise us as promptly as possible whether or not, under the law, the Board of Control must purchase identical cars for which requisition is made. We do not believe it is for the best interest of the State to purchase closed cars, as we regard this unnecessary expenditure of State funds."

The question raised is whether the Board of Control has the authority upon requisition for Dodge and Studebaker cars to purchase for the Highway Department some other make of cars. Also upon a requisition for coupes (closed cars) the Board of Control may purchase open cars.

Conceding to each of these departments all the incidental powers necessary to carry out the express powers conferred according to the evident purpose and intention of the Legislature, what is the relative authority of the two in the purchase of equipment for road building? Upon a careful examination of the statutes we find that in so far as



this inquiry is concerned the Highway Commission is a road maintaining department and the Board of Control a purchasing department.

The authority to acquire automobiles is derived from the law making it the duty of the State Highway Commission to maintain State Highways and the appropriation of funds for that purpose. Chapter 75 of the General Laws, Regular Session, Thirty-eighth Legislature, contains, in Section 20, the following language:

"On and after January 1, 1924, the Highway Commission shall and is hereby authorized to take over and maintain the various highways designated as 'State Highways' in the several counties of Texas and the proceeds from the automobile registration fees herein provided for and set aside to the State Highway Fund shall be deposited in the State Treasury to the credit of said fund, and said fund shall be available for the maintenance of said designated State highways under the direction and control of the State Highway Commission and shall be used in maintaining such highways and shall not be diverted to any other use by said Highway Commission until all such roads are properly maintained, unless said Highway Commission shall be without sufficient funds from other available source to meet Federal aid to roads in Texas and road construction is thereby in danger, and in event said Highway Commission finds such a condition, then said Highway Commission is authorized by spreading upon its minutes a resolution to transfer a sufficient amount from this fund to match said Federal aid."

This and the general appropriation act is the authority under which the Highway Commission has issued its requisition upon the Board of Control for the purchase of automobiles and pursuant to which the Commission evidently has decided that it has the discretion of determining the kind of equipment needed to maintain roads. The Commission evidently reasoned that the duty having been imposed upon it and the necessary funds furnished it to maintain roads, the Commission was necessarily vested with discretion in the choice of the proper supplies and equipment to enable them to perform that duty.

The authority of the Board of Control to purchase for the Highway Department is derived from the following: Chapter 50, General Laws, Regular Session, Thirty-seventh Legislature, contains the following provision:

"It shall be the duty of the State Board of Control to make contracts for equipment and supplies (including seals and number plates), required by law in the administration of the registration of licensed vehicles, and in the operation of said department, as provided in Chapter 190 of the General Laws of the Thirty-fifth Legislature, Regular Session. All moneys herein authorized to be appropriated for the operation of the State Highway Department, and the purchase of equipment required by said Chapter 190, shall be paid from the State Highway Fund, authorized to be created by said Chapter 190; and all the remainder of said Highway Fund, not so appropriated for the maintenance and operation of the said department shall be expended by the State Highway Commission for the furtherance of public road construction and the establishment of a system of State Highways, as contemplated and set forth in the provisions of Chapter 190, General Laws, of the Thirty-fifth Legislature, Regular Session, and acts amendatory thereof."

"Sec. 4. The fact that there is now no specific authority for the Legislature to determine the number of, and fix the compensation for, employees of the State Highway Department, and to purchase for such department equipment needed, as purchases are made for other State departments, and inasmuch as the exercise of such authority over the State departments is in accordance with the declared policy of the State, creates an emergency and an imperative public necessity that the constitutional rule requiring all bills to be read on three

several days in each house be suspended, and that this act take effect from and after its passage, and said rule is suspended, and it is so enacted."

The Board of Control also possesses the power and authority formerly vested in the State Purchasing Agent. The act creating the Board of Control Article 7150 $\frac{1}{2}$ d, Vernon's Complete Statutes, 1920) reads as follows:

"The office of State Purchasing Agent is hereby abolished and all the laws relating to such office and conferring authority upon him, including Chapters 1 and 2 of Title 125, Revised Civil Statutes of this State (1911), are hereby made to apply to the State Board of Control, in the same manner as they were formerly executed and carried out by the State Purchasing Agent.

"In the administration of this division of its work, the State Board of Control shall have authority to appoint a chief in its Division of Purchasing; provided, however, that the person selected for such position shall have had not less than five years' experience immediately preceding his appointment as a purchaser for a department store or wholesale establishment or recognized standard and successful experience, and no other person shall be eligible for such position, or be paid by the accounting officers of the State, in the event he should be placed in such position.

"In addition to the duties now provided by statute for the State Purchasing agent, which duties are made the duties of the board created by this act; it shall also be the duty of said board to purchase all the supplies used by all the departments of the State government and all the Normal Schools of the State University of Texas, and the Agricultural and Mechanical College of Texas, and all other State schools heretofore or hereafter created, such purchase of supplies to include furniture and fixtures and to include all things except perishable goods, technical instruments and books.

"These supplies shall be purchased by competitive bids, in the same manner as supplies are purchased by the Purchasing Agent for other institutions under the present statutes.

"It is further provided, however, that in the purchase of supplies, furniture and fixtures, herein provided for and in the making of all purchases provided for by existing laws, which existing law is to be administered by the department created, the bidder therefor shall be required to file with their respective bids an affidavit, that neither the affiant, nor the firm, corporation, partnership or institution represented by him or her or anyone for him, it or them, has within the past twelve months violated any of the laws of this State relating to trusts or monopolies, which affidavit shall be prepared in form by the Attorney General, and shall embrace the various elements of the statutes of this State, forbidding trusts and monopolies; and, in addition, such affidavits shall show that neither the affiant nor his firm, corporation or partnership represented by him and making the bid has communicated, directly or indirectly, the bid made by such person, firm, corporation or partnership so bidding, to any competitor bidding on said contract or engaged in the same line of business.

"Any person making a false statement in any such affidavit shall be deemed guilty of a felony and shall be punished as now prescribed for that offense; provided, however, that in addition to any other county having venue of such offense Travis County shall also have venue of the same, and such person, regardless of where the offense was committed, may be indicted by the grand jury of Travis County and be tried in Travis County. The bids for the sales of goods and the affidavits accompanying same as specified in this section shall be filed by the said board, and shall be preserved for a period of twelve months thereafter as a record of said board."

It is evident from the foregoing that purchases are to be made by the Board of Control for the Highway Department in the same manner as they are made for other departments. This statement does not apply with equal force to the eleemosynary institutions, since, of course, the Board of Control is in a different relation to these institutions than it

is it is to other State departments. It will be noted that the Board of Control took over the Purchasing Agent's duties, and as the purchases for the Highway Department are to be made in the same manner as for other departments it is necessary to examine the Purchasing Agent's Act. The relation between the Board of Control and the Highway Department is clearly similar to the relation formerly existing between the Purchasing Agent and the institutions for which he purchased supplies.

The Purchasing Agent's Act provides that "when and where supplies are to be paid for by the State of Texas out of appropriations and authorized by the Legislature of Texas, it shall be the duty of the Purchasing Agent aforesaid to contract for all supplies, merchandise and articles of every description," etc. See Article 7328, R. S. This act provides that contracts are to be made after advertising for bids. Article 7330 provides as follows:

"All bids shall be opened on the date and at the place specified in the advertisement for the same, and such opening and inspection of the bids shall be made by the Purchasing Agent in the presence of the Governor and Comptroller of Public Accounts and of the superintendent and board of managers, if they desire to be present. The supplies and articles furnished under all bids and contracts shall be such as are called for by requisitions of the superintendents of the several institutions named, and equal to and of the same quality as the sample furnished Purchasing Agent; and all supplies furnished by contract as provided herein shall be equal to the sample which is required by Article 7328 to accompany the bid. And when the supplies delivered under contract do not come up to the sample, the superintendent shall refuse to accept the same. The estimates furnished said Purchasing Agent as aforesaid, upon which he makes his advertisements and contracts, shall, as near as practicable, state the quantity and quality of the articles and supplies needed, and when possible, the brand of the same, and copies of such estimates shall be filed with the Comptroller and be open to public inspection."

We gather from the foregoing statutory provisions that the authority to purchase automobiles is derived from the power and duty to maintain State highways; and the duty to maintain State highways being imposed upon the Highway Commission and the appropriation being made to that department for such purpose, that Commission must necessarily decide what supplies, tools and equipment are necessary in the maintenance of roads. It is clear to us that it is the duty of the Highway Commission to issue a requisition upon the Board of Control and the supplies and articles furnished shall be such as are called for by the requisition. In order to make a requisition it is necessary to determine what is needed, and it is for the Highway Department to determine and state what is needed. But this does not mean that the Highway Department could in stating its needs go so far as to preclude all competition.

The Board of Control after receiving the requisition then acts as a purchasing agent, the evident purpose and intention being that the various departments in making purchases should get the benefit of a centralized purchasing department. But when it acts as a purchasing agent the responsibility of the Board of Control ends so far as the question before us is concerned. If the Board of Control had been charged with the duty and responsibility of maintaining roads, then, of course, it would have the authority to choose the necessary means where such

means were not prescribed by law, but the Legislature has seen fit to place road maintenance in another department and the authority and responsibility of selecting the means necessarily falls to that department.

If it were a matter of purchasing materials such, for instance, as lumber, which is capable of being classified with reasonable accuracy according to grades and qualities, there would be no difficulty in placing an order for the kind and quality desired. But when we come to road equipment such as automobiles, there is no such absolute certainty or standard by which the Highway Department could issue a requisition for automobiles of a certain kind, class and quality by number or grade.

While we are unable to escape the conclusion that the Board of Control would infringe upon the authority of the State Highway Commission if it should decide what type of car shall be purchased by the Highway Commission in the maintenance of State Highways, the selection of the necessary equipment being peculiarly within the province of the road building department as distinguished from the purchasing agency under our present statutes, still we are of the opinion that the requisition of the Highway Department must be confined to stating the general type, quality and specifications within reasonable bounds without specifying any particular brand or make.

In conceding to the Highway Department the authority to name in this way what they desire to acquire, we are giving that Department only what the law appears to have granted that department. Any other conclusion might interfere with the program of road construction, in that the Highway Commission had figured on using approximately so much money for cars and so much for other purposes. If it purchases less expensive cars, there might be more money to devote to other purposes; if more expensive there might not be enough for other purposes. It is easy to see that the wisdom of purchasing a certain type of car involves an investigation and determination of the whole road construction program, a function which the law contemplates shall be exercised by the road construction department. It is necessary to concede to the Highway Department this function to give effect to the law as it is written, and we can do this and at the same time give force and effect to the provisions of law making the Board of Control the purchasing agent.

In reaching the conclusion that the several acts of the Legislature are to be so construed as to give to the department or agency of government requiring supplies and charged with the duty of using supplies and power to select the character, kind and quality needed, and that the law constitutes the Board of Control the agency for purchase only, we have given the several acts what we deem to be the most practical construction.

In making requisition for the needs of the department it is not proper to designate the articles needed so that the description identify any particular brand or make of such article, for to do so would have the effect of eliminating competition, the main object of competitive bids. To illustrate: The Highway Commission being in need of eighteen touring cars and two coupes should have requested the Board of Control to advertise for bids for eighteen touring cars and two coupes, in no way expressing any preference as to whether or not the touring cars should be of the Dodge or Studebaker or Buick or indeed any particular make.

If we were to give this act the construction that the department could in advance of receiving the bids designate the particular article desired by brand or name, this would completely destroy every character of competition and would defeat the real purpose of the act, which was to obtain competitive bids. When the department asks for bids for ten Dodge touring cars, certainly there is but one concern in the country that can bid. Therefore there is no competition whatever. But, on the other hand, if the department calls for ten touring cars meeting certain requirements or specifications the Dodge people would understand that they must demonstrate the practicability of their car and must place on it a price which would be attractive to the Commission. Otherwise, some other manufacturer of touring cars might obtain the contract. Therefore, all departments of the government requiring supplies which are generally sold by designated names should carefully avoid the use of any name or the description of the article so that it might be identified, thus enabling the Board of Control to interest the various dealers in such articles to submit prices of all makes in competition. If this rule were not followed, as stated before, it would be equivalent to the department awarding the contract before bids were received, because it had already expressed its choice by name, therefore rendering the advertisement for bids a foolish task.

We therefore advise you that it is for the Highway Department to state the type and general description of cars desired, without specifying Dodge, Studebaker or other particular brand or make, and then the Board of Control advertises for bids under such general description. It is for the Highway Department to say whether it desires open or closed cars, it being a matter for that department to determine the type necessary to suit its purposes. It cannot be said as a matter of law that under all weather conditions closed cars are unnecessary, and neither can it be said as a matter of law that the Highway Department is precluded from determining that this type of car is necessary.

But, as before stated, the brand or name of the car cannot be specified in the requisition.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2647, Bk. 61, P. 109.

CONSTITUTIONAL LAW—UNIVERSITY PERMANENT FUND—BONDS.

It would violate the State Constitution to issue so-called manuscript bonds and exchange the same for the Permanent University Fund, or a portion thereof, as provided in Article 2606, Revised Statutes of Texas.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 7, 1926.

*Hon. S. H. Terrell, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of April 28th, reading as follows:

"I herewith transmit you a copy of a letter addressed by her Excellency,

Miriam A. Ferguson, to Hon. W. Gregory Hatcher, under date of April 7, 1926, in which the Governor proposes the issuance of manuscript bonds of the State, pursuant to Articles 2652, 2653 and 2654, of the 1925 Statutes of our State and provisions of the State Constitution.

"It is my information that the law provides that I countersign this character of bonds.

"Will you please advise me whether I would be authorized to attach my signature to such evidences of indebtedness, in the event same were issued and presented to me by the Governor, and whether or not, in your opinion, same would constitute a valid obligation of the State.

"Being a member of the State Board of Education, I further desire to inquire whether, in your opinion, that board would have the legal authority to purchase the character of bonds referred to, in the event the issuance of such should be found lawful."

The communication of the Governor, dated April 7, 1926, mentioned in your inquiry, reads as follows:

"April 7, 1926.

"Hon. W. Gregory Hatcher, State Treasurer, Austin, Texas.

"DEAR SIR: Being informed that there is in the Treasury some \$3,000,000 to the credit of the Permanent University Fund, in pursuance of the law made and provided, more especially Articles 2652, 2653 and 2654, and the provisions of the Constitution, I beg to advise that I will at the earliest possible moment issue manuscript bonds of the State to be exchanged at par for the Permanent University Fund, and in due time same shall be offered to the State Board of Education and the Treasury at par and bearing five per cent interest per annum.

"I am taking this action for many reasons. In the first place, if the Permanent University Fund is invested in United States bonds the State will have to pay such premium as will make said bonds net the fund scarcely more than three per cent interest. The bonds which I shall issue will net the Permanent University Fund five per cent interest, a saving of \$60,000 a year, which saving alone in ten years would erect a permanent fireproof building having floor space equal to that of all the unsightly shacks now on the University property. The University has been so handicapped in its building program that it ought to have all the income that can be obtained by the proper investment of this fund.

"In the second place, when this fund is invested in these bonds this \$3,000,000 will be available for appropriation by the Legislature. The amount required for general appropriations will be reduced by that sum and the tax rate will be further reduced by approximately ten cents, or approximately thirty per cent. The Legislature could then appropriate this money for any purpose permitted by law. The amount could be appropriated for completion of the A. and M. College building program, or it could be appropriated for building purposes for the State Teachers Colleges, or a substantial sum could be appropriated for additional buildings at the West Texas Technological College. However, what I would like to see done, and I shall so recommend to the Legislature, that this sum be appropriated to supplement the common school fund which would run the apportionment next year up to approximately \$15 per capita without any additional increase in the tax rate for that purpose. This would provide next year a school term of more than seven months in the common schools.

"If this money were invested in United States bonds this large sum would be immediately withdrawn from the State and paid to some foreign bond house at a time when the money is needed in Texas for loans through the State depositories to the people. Under the plan which I propose the money will remain in the Treasury and in the depositories drawing the usual rate of interest until such time as the next Legislature shall appropriate it for such purposes as may be determined.

"Yours truly,

.....  
"Governor."

The statute purporting to authorize the Governor to have issued manuscript bonds of the State of Texas to be sold or exchanged at par for the Permanent University Fund is Article 2606, Revised Statutes, 1925, which embodies the provisions of Articles 2652, 2653 and 2654, of the Revised Civil Statutes of 1911. Article 2606 is in the following language:

*Manuscript Bonds.*—The Governor is authorized and directed to have issued manuscript bonds of the State of Texas to be sold or exchanged at par for the Permanent University Fund at any time when there is on hand in cash any reasonable amount of such funds not less than five thousand dollars. Said bonds shall be of such denomination as the Governor may direct, shall be redeemable at the pleasure of the State, and shall bear five per cent interest payable annually at the State Treasury on the first day of March of each year. Said bonds shall recite the title and date of passage of the Act of 1889, page 81, shall be signed by the Governor and Treasurer and countersigned by the Comptroller, and shall be registered in the office of the State Treasurer. After said bonds have been registered, the Governor shall offer said bonds to the State Board as an investment for the Permanent University Fund then on hand in cash which are by law authorized to be invested. If the State Board takes said bonds, the Treasurer and Comptroller shall make the proper entry, showing the facts of the transaction and the necessary transfer of such fund on their books. If said board shall not take said bonds thus offered, the same shall be destroyed and cancelled and of no effect whatever.”

It will be noted that the Governor proposes to issue manuscript bonds of the State to be exchanged at par for the Permanent University Fund, and after the same are invested “this \$3,000,000 (Permanent University Fund) will be available for appropriation by the Legislature.”

The Governor also states that “the Legislature could then appropriate this money for any purpose permitted by law.”

You are respectfully advised that if these manuscript bonds were issued and exchanged for the Permanent University Fund, or a part of such fund, as proposed by the Governor, Section 7 of Article 8 of the State Constitution would be violated. It would amount to nothing more or less than a borrowing of a special fund and a diverting of a special fund from its purpose in violation of the Constitution. Section 7 of Article 8 of the Constitution reads as follows:

“The Legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may or ought to come into the Treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose any special fund, or any part thereof.”

It is true that the Constitution provides that the Permanent University Fund “shall be invested in bonds of the State of Texas, if the same can be obtained; if not, then in United States bonds.” (Sec. 11, Art. 7.) But this provision of the Constitution must be read in connection with the provision above quoted inhibiting the borrowing or diverting of special funds by the Legislature. Reading the two provisions together, the Constitution must mean that the Permanent University funds shall be invested in bonds of the State of Texas, provided, however, that such investment shall never amount to a mere borrowing or diverting of the Permanent University Fund by the Legislature. It is not necessary to determine when a particular transaction would cease to be a mere diversion or borrowing of a

special fund, and become a legitimate investment of such fund. It is sufficient to say that it is our opinion that the issuance of these manuscript bonds and the exchanging of them for the Permanent University Fund falls short of being an investment in State bonds within the meaning of the Constitution, no provision whatever having been made for a sinking fund with which to pay interest and principal. The Constitution, in providing for the investment of the Permanent University Fund in State bonds, undoubtedly contemplates "bonds" according to the meaning of that word under the laws of this State and the jurisprudence of this country. 85 Texas, 520, 22 S. W., 668, 674; 96 N. E., 310; 12 N. D., 280.

The statute purporting to authorize the issuance of these "manuscript bonds" makes no provision for the setting aside of any tax, or revenue of any kind, to pay the interest and principal as the same shall become due. The money goes into the State Treasury, subject to appropriation by the Legislature for general State purposes. What is the difference between this and a borrowing or diverting of the University Permanent Fund for general State purposes? Two things equal to the same thing are equal to each other. If this is not a borrowing or diverting of the fund, when no provision is made for a sinking fund—no source of revenue provided for so as to create an inviolable sinking fund—it is difficult to conceive how the Legislature would go about borrowing or diverting this fund from its purpose.

The framers of the Constitution were clearly attempting to provide the safest investment possible for the Permanent University Fund, when they provided for its investment in State and United States bonds only, and certainly when the Constitution says "bonds" it means bonds as that term is usually understood, and not simply I O U's, which may or may not be paid as they fall due, depending upon the needs of the general State government and the disposition of the Legislature to make the appropriation at the particular time the same shall become due. Being of the opinion that the issuance of these bonds and their exchange for the Permanent University Fund as contemplated by the Governor is clearly in violation of Section 7 of Article 8, it is unnecessary to express an opinion as to whether there are other provisions of the Constitution that would be violated. We have no disposition to preclude other questions that may arise in the difficult task of providing a safe investment for the University Permanent Fund, and also a means of financing a building program of the University. However, the following authorities are noted as bearing on the subject: 132 Pac., 861; 96 N. W., 310; 57 Pac., 801; 104 Pac., 285; 24 L. R. A. (N. S.), 1260.

You are therefore advised in answer to your inquiry that you have no lawful authority to countersign these "manuscript bonds" proposed to be issued by the Governor, and such bonds would not constitute valid and binding obligations, and there would be no lawful authority to invest the Permanent University Funds in the same.

We are cognizant of the well established rule that an act of the Legislature is not to be deemed unconstitutional unless it is clearly so. However, we are of the opinion that an eminent judge pronounced a sound doctrine when he said:



"When the Constitution speaks, its voice is supreme and its mandates are to be obeyed by all departments and all officers of the State government." (96 N. W., 324.)

The Constitution has very wisely set aside the University Permanent Fund in the interest of free education and has prohibited its diversion from its proper purpose. The principal is required by the Constitution to be held intact and invested in certain stipulated securities, and was never to be dissipated into other channels and the people taxed to pay interest on the same under the circumstances here involved. It may be stated in this connection that the interest on three million dollars, if it should be borrowed from the University Fund as proposed by the Governor for general State purposes, at five per cent, would amount to \$150,000 per annum. This amount each year would have to come from taxes levied on the people. The people would thus be taxed to pay an additional burden of \$150,000 interest, to say nothing of the necessary amount to retire the principal.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2643, Bk. 61, P. 98.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE—SPECIAL SESSION—  
VALIDATING BONDS.

The Legislature, when not restricted by the Constitution, may legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given. The legalization of such unauthorized acts may be made at a special session of the Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 30, 1926.

*Hon. Barry Miller, Lieutenant Governor, Dallas, Texas.*

MY DEAR SIR: Your letter of March 23rd, addressed to the Attorney General, has been referred to me. Your letter is as follows:

"As Lieutenant Governor of Texas, I desire to submit to your Department for an official opinion the question as to the power of the Legislature in special session, by legislative act, to validate the bonds which by reason of the opinion of the Supreme Court of the United States in the Archer County case have been declared invalid.

"Believing that this matter is of the very greatest concern, not only for those who hold the bonds, but to the credit of the State, and one which should not be delayed in its solution a moment longer than is absolutely necessary to make the action taken legal, I feel that I am warranted in asking this opinion."

First, I must advise you that the opinion of the Supreme Court of the United States in what is known as the Archer County case did not declare any outstanding bonds of Texas road districts invalid, as that question was not before the Supreme Court of the United States. That suit was one timely brought to prevent the issuance and sale of bonds on behalf of Road District No. 2 of Archer County before said bonds

were actually issued and sold, and in that case the court held that the act under which said bonds were to be issued is repugnant to the due process clause of the Fourteenth Amendment of the Federal Constitution, and this is the act under which all road district bonds of Texas have been issued. This act having been held by the Supreme Court of the United States invalid, has given rise to the opinion on the part of some that all road district bonds issued under the authority of this act are invalid, and while no outstanding bonds issued by road districts in Texas were declared invalid by the Supreme Court of the United States in the case referred to, we assume that you intend to ask whether or not such bonds may be validated by legislative act in the event they are invalid by reason of the decision of the Supreme Court in the Archer County case.

Section 40, Article 3, of the State Constitution, is as follows:

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

Therefore, this legislation may be passed at a special session, provided such legislation is designated in the proclamation of the Governor calling such session, or presented to them by the Governor.

The question of validating bonds and securities which were issued without authority of law is not a new one, and there are many cases, both in the State and Federal decisions, upon the subject, and we think that the proposition that the Legislature has the power to validate bonds which have been issued without authority of law is amply sustained by the authorities, provided the Legislature could have originally given authority for the issuance of the bonds or securities.

We think there can be no question but that the Legislature of Texas had the power to create all road districts which have been created within this State and to have levied the tax and fixed the amount to be raised, and the power and authority to find that all roads in such districts are of public benefit.

The Supreme Court of the United States seems to have held the act under which road districts in Texas were created invalid for the following reasons:

- (a) The Legislature did not create the road district.
- (b) The Legislature did not levy the tax or fix the amount to be raised.
- (c) There was no legislative determination that the roads to be constructed would be of benefit to the property taxed.

The Supreme Court in the Archer County case uses this language:

"The Legislature did not create the road district, levy the tax, or fix the amount to be raised. Under the act road districts are not required to correspond with, or include any political subdivision. There is nothing in the law to guide or limit the action of the signers of the petition in selecting the property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners court has no power to modify or deny it; it is bound to grant the petition."

And again this language is used:

"Where a local improvement territory is selected and the burden is spread

by the Legislature, or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefit. But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question, where, as here, a district is not created by the Legislature and that there has been no legislative determination that their property will be benefited by the local improvement."

This, it is seen that the Supreme Court in this case lays down the rule that if the Legislature had created the district and the burden was spread by the Legislature, and the Legislature had found that the property within the district would be benefited by the local improvement, that the district would have been properly created and the act constitutional.

Section 52, Article 3, of the Constitution of Texas, provides:

"The Legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the State, to lend its credit or to grant public money or thing of value, in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association, or company; provided, however, *that under legislative provision any county, any political subdivision of a county, any number of adjoining counties or any political subdivision of the State, or any defined district, now or hereafter to be described and defined within the State of Texas, and which may or may not include towns, villages or municipal corporations,* upon a vote of two-thirds majority of the resident property taxpayers voting thereon, who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limitations imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon, and provide a sinking fund for the redemption thereof, *as the Legislature may authorize and in such manner as it may authorize the same for the following purposes, to-wit: (a) \* \* \* (b) \* \* \* (c) construction, maintenance, and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.*"

It is under this section of our State Constitution that the act declared unconstitutional by the Supreme Court of the United States in the Archer County bond case was enacted, and it will be observed that this section of the Constitution gives to the Legislature control of the creation of all such districts and the right to levy and collect such taxes as may be necessary to pay the interest and provide a sinking fund for the redemption of bonds issued by such district, subject to the limitation only that the bonds issued may not exceed one-fourth the assessed valuation of the real estate. This authority given by this section of the State Constitution to the State Legislature is not questioned by the opinion of the United States Supreme Court in the Archer County case, but is clearly recognized by the statement that "where a local improvement territory is selected and the burden is spread by the Legislature, or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."

The question then arises whether the Legislature, having the power originally, to have created such road districts as may have bonds out-

standing, and to have determined the benefit to the owners of property in the district by the construction of such roads and to have levied the tax necessary to provide for the interest and sinking fund, for the maturity of the bonds, can now by a legislative act cure the defects in the act which have been pointed out by the Supreme Court of the United States, and validate such bonds, if in fact they are now invalid.

It is our opinion that the Legislature of Texas has the power to validate the creation of such road districts and to validate such bonds, if in fact they are invalid, and sustaining this conclusion, we call attention to the following authorities:

A validating statute of Illinois closed with this provision:

"Provided, that where elections may have already been held, and the majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in this act provided. And such elections are hereby declared to be legal and valid as though this act had been in force at the time thereof and all the provisions hereof had been complied with."

In *Anderson vs. Santa Anna Township*, 116 U. S., 356, the United States Supreme Court, in construing this validating act, said:

"The record does not disclose the particular ground upon which the Circuit Court sustained the demurrer, and gave judgment for the township. But we cannot understand how that result was possible, except upon the hypothesis that the Act of February 28, 1867, legalizing elections previously held, at which a majority of the legal voters of a township declared in favor of a subscription to the stock of this company, was unconstitutional. But the constitutionality of that very statute, in respect of the clause now before us, was directly sustained by this court in *St. Joseph Township vs. Rogers*, 16 Wall., 644, 633. The question there was as to the validity of bonds issued by a township on the 1st of October, 1867, to Daville, Urbane, Bloomington and Pekin Railroad Company, under the authority of the beforementioned act of February 28, 1867, and in accordance with a popular vote at an election held in August, 1866. It was there contended that the act was unconstitutional and void, as creating a debt for a municipality, against its will expressed in a legal manner. There, as here, the election referred to in the bonds was held without authority of law. But the court, speaking by Mr. Justice Clifford, said, according to repeated decisions of the Supreme Court of Illinois and of this court, defective subscriptions of the kind there made 'may, in all cases, be ratified where the Legislature could have originally conferred the power'—citing among other cases, *Cowfill vs. Long*, 15 Ill., 202, and *Keithburg vs. Frick*, 34 Ill., 405.

After discussing many cases, the court further says:

"Those cases were all determined before the bonds in suit were issued. While they are not analogous in every respect to the one before us, they seem to rest upon the principle that the Legislature, when not restricted by the Constitution, may, by retrospective statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given. The decision in *St. Joseph Township vs. Rogers* only gave effect to principles announced by the State court prior to the issuing of the bonds."

And again:

"Those decisions are to the effect that, within the meaning of the Constitution, the corporate authorities of a township, like Santa Anna, are the electors, and that while the construction of a railroad, through or near the township,

would be a corporate purpose within the meaning of that instrument, a debt for that object could not be imposed upon it without the consent of its corporate authorities, that is, without the consent of the electors. These principles fall far short of sustaining the proposition that the curative clause of the Act of February 28, 1867, was unconstitutional; for, the Legislature did not, in any just sense, impose a debt upon Santa Anna Township against the will of its corporate authorities, the electors. The act embraces only townships which, by a majority of their legal voters, at an election previously held, had declared for a subscription. That such majority was given at an election is averred by the declaration and is admitted by the demurrer. The curative act only gave effect to the *declared* will of the electors. As the Constitution of the State did not provide any particular mode in which the corporate authorities of a township should manifest their willingness or desire to incur a municipal debt for railroad purposes, we perceive no reason why the act of the majority of legal voters, *at an election held in advance of legislative action*, might not be recognized by the Legislature and constitute the basis of its subsequent assent to the creation of such indebtedness, and its ratification of what has been done. In *Granada County vs. Brogden*, 112 U. S., 261, 271, where somewhat the same question was involved, we said: 'Since what was done in this case by *constitutional majority* of qualified electors and by the board of supervisors of the county would have been legal and binding upon the county had it been done under *legislative authority previously conferred*, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, *equivalent to original authority*.' See also *Thompson vs. Perrine*, 103 U. S., 806, 816; *Ritchie vs. Franklin*, 22 Wall., 67; *Thompson vs. Lee County*, above cited; *City vs. Lamsen*, above cited; *Campbell vs. City of Kenosha*, 5 Wall., 194; *Otos Co. vs. Baldwin*, 111 U. S., 1, 15. The same principle was announced by the Supreme Court of Illinois in a very recent case—*U. S. Mortgage Co. vs. Cross*, 93 Ill., 483, 494—involving the constitutionality of a statute of Illinois which was retrospective in its operation. 'Unless,' said the court in that case, 'there be a constitutional inhibition, a Legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to *ratify and confirm any act it might lawfully have authorized in the first instance*.' It cannot be denied that the Legislature could lawfully have authorized a subscription by Santa Anna Township to the stock of this road, upon the assent, in some proper form, of a majority of its legal voters. The Act of 1867 interfered with no vested right of the township, for, as an organization entirely for public purposes, it had no privileges or powers which were not subject, under the Constitution, to legislative control. *The statute did nothing more than to ratify and confirm acts which the Legislature might lawfully have authorized in the first instance.*"

In *Utter vs. Franklin*, 172 U. S., 416, the Supreme Court of the United States had under consideration bonds which were outstanding and in the hands of relators and which had been declared to be invalid by the Supreme Court of the United States in *Lewis vs. Pima County*, 155 U. S., 54, upon the ground that the bonds issued in aid of railways could not be considered debts or obligations necessary to the administration of the internal affairs of the county within the meaning of the Act of June 8, 1876. A curative act was passed by the Congress of the United States on June 25, 1890, approving, with amendments, a funding act of the Territory of Arizona which had the effect of validating bonds which had been declared invalid by the Supreme Court of the United States in *Lewis vs. Pima County*, supra. The officials charged with the duty of issuing funding bonds in lieu of the bonds which had been declared invalid, refused to do so and the holders of the bonds brought this suit to determine the constitutionality of the validating act. The Supreme Court, in an unanimous opinion delivered by Mr. Justice Brown, said:

"We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the Act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the territory AS FULL AS THAT WHICH A STATE LEGISLATURE HAS OVER ITS MUNICIPAL CORPORATIONS. (Caps ours.) *American Insurance Company vs. Canter*, 1 Pet., 511; *National Bank vs. Yankton County*, 101 U. S., 129.

"Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank vs. Yankton County*, supra, this court sustained an act of Congress nullifying a legislative act, of the Territory of Dakota, authorizing the issuance of railway bonds, but validating action theretofore taken by the county voting subscription to a certain railroad company, holding it to be equivalent to a direct grant of power by Congress to a county to issue the bonds in dispute. In *Thompson vs. Ferrine*, 103 U. S., 806, we also sustained a similar act of the State of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Reed vs. Platts-mouth*, 107 U. S., 568, a similar ruling was made with regard to an act of the Legislature of Nebraska, validating an issue of bonds by the city of Platts-mouth for the purpose of raising money to construct a high school building. See also *New Orleans vs. Clark*, 95 U. S., 644; *Granada County vs. Borgden*, 112 U. S., 261; *Otee County vs. Baldwin*, 111 U. S., 1; 1 *Dillon Mun. Corporations*, Section 544; *Cooley's Constitutional Limitations*, 6th Edition, 456; *Bellos vs. Brimfield*, 120 U. S., 759; *Anderson vs. Santa Anna*, 116 U. S., 356; *Bentzel vs. Woldie*, 30 *California*, 138.

"The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given and it makes no possible difference that they have been declared to be void under the power originally given. The judgment in that case was *res adjudicata*, only of the issues then presented, of the facts as they then appeared and of the legislation then existing."

Perhaps the latest case by the Supreme Court of the United States upon the question of curative or validating acts was passed upon by that court in the case of *Kansas City Southern Railway Company et al. vs. Road Improvement District Company of Sevier County, Arkansas, et al.*, 266 U. S., 379, decided December 15, 1924, by a unanimous opinion of the court delivered by Mr. Justice Van Deventer. In that case the plaintiffs in error assailed the creation of the district and the assessment in so far as it affected them, on the grounds, first, that it was purely arbitrary, and therefore in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States, because the railway property neither would nor could receive any benefit for the improvement of the road; secondly, that it was not in accord with the equal protection clause of that amendment, and because the railroad property, on the one hand, and the farm lands and town lots, on the other, were assessed with benefits in unequal proportions to the detriment of the railway property, and it was made in disregard of the commerce clause of the Constitution of the United States, because the benefits assessed for the railway property were such as would or should accrue to that property, but were such as would accrue, if accruing at all, to the interstate business in which that property was being used, and, therefore, could not be made the basis of a special improvement tax without burdening interstate commerce. While appeal was pending in Circuit Court the State

Legislature passed a special act recognizing the creation and bonds of the district, approving the plans for the improvement of the roads, confirming the assessment of benefits as sustained by the county court, and declared that the assessment fairly represents the benefits that will accrue to the railway property and other tracts in the district. The companies then took the position that the legislative confirmation was open to the same constitutional objections that were made to the original assessment.

The Circuit Court on hearing the case found against plaintiffs in error as did the Supreme Court of the State, in affirming the judgment. 156 Ark., 116. The case was then carried to the Supreme Court of the United States on writ of error. The Supreme Court of the United States in passing upon the case said:

"The objection based on the commerce clause of the Constitution has been abandoned, but those based on the due process of law and equal protection clause of the Fourteenth Amendment, are presented for our attention.

"By a long line of decisions of this court it has been settled that where the State Constitution as construed by the State court of last resort does not provide otherwise, the Legislature of a State may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited, and charged against them according to their value, or the benefits which they will receive; may itself determine what lands will be benefited, in what proportions they will share in the benefits, and may avail itself for the purpose of that determination of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the Fourteenth Amendment. *Spencer vs. Merchant*, 125 U. S., 345; *French vs. Barber Asphalt Paving Company*, 181 U. S., 345; *Houck vs. Drainage District*, 239 U. S., 254; *Miles Sal. Company vs. Iberia Drainage District*, 239 U. S., 478; *Bensons vs. Bush*, 251 U. S., 182; *Valley Farms Company vs. County of Westchester*, 261 U. S., 155. And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive, can legislative determination be said to contravene the equal protection clause of that amendment. *Kansas City Southern Railway Company vs. Road Improvement District No. 6*, 256 U. S., 658; *Thomas vs. Kansas City Southern Railway Company*, 261 U. S., 481."

The court further said:

"The special confirmatory act was recognized by the Supreme Court of the State as a legislative determination of the lands which will be benefited and of the portions which they will share in the benefits. It therefore must be treated here as an admissible legislative assessment of benefits so far as the State Constitution is concerned."

Passing to the opinions of the Supreme Court of the State of Texas, the case of *Blum vs. Looney*, 69 Texas, page 1, is cited in support of our opinion. That case involved a validating statute passed March 31, 1883, validating certain acts done under an act of April 20, 1873, which was unconstitutional. We quote from the court's opinion the following:

"The court below held that the Act of 1873 was validated by that of 1883, but that it was incumbent upon the appellant to show that Lancaster came within the proviso of the later act and that neither the passage of the special act nor the issuance of the patent and certificate under it was sufficient evidence of that fact. \* \* \*

"We think the court below was correct in holding that the special act of April 30, 1873, was validated by the general act of March 31, 1883. It is very true that a body not having the power to make a grant has not the power to ratify one already made. But the converse of this proposition is also true, and decides the present question. For at the time the healing act was passed, there was nothing in our Constitution prohibiting the Legislature from passing such an act as that by which a special grant of land was made to Lancaster. Having the right to make the grant, it had the power to ratify the one already made without authority. The right of the Legislature to validate such grants by the Act of 1883 was recognized by this court in the case of *Bates vs. Bacon*, 1 S. W., 256, and the question is too clear to require further discussion."

In *Nolan County vs. The State of Texas*, 83 Texas, 182, the Supreme Court of this State held: "That where a contract which a municipal corporation had attempted to create is invalid merely for the want of legislative authority, it can be made valid by a subsequent law; e. g., Act of March 24, 1885, validating certain county bonds."

In that case the question was as to the validation of bonds which had been issued and which had been held to have been issued without authority of law. In the opinion delivered by Justice Gaines the court said of the validating statute:

"It is insisted in behalf of appellant that these provisions are contrary to the Constitution of the State because they are retroactive and an usurpation of judicial power. It is also claimed that they apply only to such bonds as may have been purchased by the State directly from the counties.

"That the provisions in question are not repugnant to the Constitution in the particulars urged against them, we think too well settled to require a discussion. *Ritchie vs. Franklin County*, 22 Wall., 74; *New Orleans vs. Clark*, 95 U. S., 644; *Cooley's Constitutional Limitations*, 4th Edition, 466. It can hardly be deemed an open question in this court. *Morris vs. State*, 62 Texas, 741; *Blum vs. Looney*, 69 Texas, 3. Where a contract which a municipal corporation has attempted to create is invalid, merely for want of legislative authority to create it, it can be made valid by a subsequent law. But if at the time of its attempted creation the Legislature could not have authorized it, it may be doubted whether the Legislature could make it valid, although in the meantime by a change in the Constitution a restriction upon its own power may have been removed."

In conclusion, you are advised that while we might cite other decisions in line with the above, we have found none holding contrary to the proposition "that the Legislature, when not restricted by the Constitution, may legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given."

Respectfully submitted,

C. A. WHEELER,  
Assistant Attorney General.

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Op. No. 2634, Bk. 61, P. 61.

**BUILDING AND LOAN ASSOCIATIONS—CORPORATE POWERS—CANNOT  
PURCHASE AND SELL REAL ESTATE.**

Building and loan associations chartered under the provisions of Title 24, Revised Statutes, 1925, cannot engage in the business of buying real estate, subdividing and improving the same, and then selling it to members.



ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 11, 1926.

*Hon. R. L. Daniel, Commissioner of Insurance, Austin, Texas.*

DEAR SIR: This Department is in receipt of your recent letter enclosing the copy of an amendment which a building and loan association in this State proposes to make in its by-laws. You have asked us whether or not action taken by such association under and by virtue of the power assumed in this proposed amendment would be within the corporate powers of the association, under the statute under which it was organized.

This association was chartered under the provisions of the Building and Loan Association Act of 1913, which is now Title 24, Revised Statutes, 1925. The particular provision in this amendment to which you address this inquiry is as follows:

"For the purpose of building and improving homesteads for its members, this association may invest the proceeds derived from the sale of its common stock \* \* \* in the acquisition of land, at its fair and reasonable value, and the construction of buildings and improvements thereon, suitable and necessary to constitute homesteads for its members, and may sell such homesteads to its members on such terms as may be deemed advisable and may carry liens thereon," etc.

Concisely stated, this amendment would empower the association to engage in the business of the purchase of real estate, the subdivision, improvement and sale thereof to its members.

It is our opinion that a building and loan association organized and operating under the provisions of the present law is without power to engage in this character of operation.

The language of the Act of 1913 does not, in any place, undertake to define a building and loan association, and such information as to the character of these institutions as there is in the act must be derived by inference from the regulatory provisions therein contained. The statute at great length undertakes to regulate the activities of an association, but nowhere in it do we find any allusion or reference to, or regulation of, any sort of a power of the character set out in this amendment. The regulations have to do entirely with the loaning of its assets, or the investments thereof in mortgages.

The question of what is a building and loan association has heretofore given this Department some concern, and immediately after the passage of the Act of 1913, we find that the Hon. C. M. Cureton, then Assistant Attorney General, gave the matter an exhaustive study. The conclusion expressed in an opinion which is reported in the Reports of Attorney General, 1912-1914, at page 368, is that a building and loan association is one which has for its primary purpose the accumulation by its members of their money through periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes. Of course this definition might not definitely exclude the power to purchase the land upon which homes were to be built, but his opinion and all the literature upon the subject seem to indicate that a building and loan association does not naturally include among its corporate powers the right to purchase and sell real estate. It is also to be admitted that this power has at times been

permitted to such associations, but the history of their development leads us to the conclusion that the power is not to be permitted unless there is a clear and expressed right granted by the law. As showing the concern which this question has given to the legal profession in dealing with associations of this character, we quote the following from Endlich on Building and Loan Associations (2nd Edition) :

"Sec. 304. Building associations, chartered as such, in the proper signification of the term, exclusively, very frequently engage in a species of real estate transactions, more properly belonging to what in England is called Freehold Land Societies; i. e., they purchase land, and either without or after erecting dwellings thereon, parcel it out to their members, bidding in competition for preference, as for a loan, the successful competitor giving his mortgage upon the property so acquired to the society; or they sell the different properties at auction to outsiders. Such practice, unless clearly authorized by statute and charter, is illegal in every step, from the acquisition of the land, down to the final disposition of it. There is nothing in the objects of such societies permitting them to speculate in land; in fact, to become land societies. The question has received exhaustive consideration in England and the doctrine as there laid down seems entirely applicable in the United States."

This excellent authority but strengthens the conclusion which we have expressed and in which we feel that we are right without question.

We have been favored with letters from attorneys representing this association in which they have kindly suggested the considerations favorable to the view that this amendment is legal, and the suggestions are not without considerable force. The article enumerating the powers and purposes of a building and loan association reads as follows:

"Any number of persons not less than five, who are residents of this State, desiring to organize a building and loan association for the purpose of building and improving homesteads, removing encumbrances therefrom and loaning money to the members thereof, may become a body corporate."

If there is any authority given by law to this association to do the thing that it is now desiring to do, it must be found in this language. It is suggested that the power of "building and improving homesteads" would necessarily include the power to purchase the land on which the homesteads were built and that, by this implication, the Legislature effectually authorized the association to enter upon the character of business mentioned in the proposed amendment. A corporation has and may exercise only such powers as are expressly granted to it by statute and such as arise by necessary implication from those expressly granted. Powers granted by implication are usually incidental to, and are necessary to the exercise of those expressly granted. In this instance the powers mentioned in this amendment are not necessary to the exercise of the usual functions of a building and loan association as they are generally understood and as described in Judge Cureton's opinion here referred to, nor to the powers expressly granted by this act. They are, rather, a departure from such usual and ordinary functions. These functions have, from time out of mind, been satisfactorily exercised, independent of that under inquiry, to the mutual profit of all concerned. If, then, the exercise of this power is to be permitted at all, it must be upon the theory that it is necessarily a part of the expressly granted power to build and improve homesteads. We

take it to be obvious that it is possible to build and improve homesteads without purchasing the land upon which they are built. In determining the question of whether this power is included within the expressed terms of this act, it is necessary that we inquire what the Legislature intended in this regard, and if they can be ascertained, we shall have discovered the law.

The building and loan association act as we have it at this time was passed originally in 1913. The language of the present article describing the purposes for which such associations might be organized, which is quoted above, is the same as the language which occurred in the original act of 1913. Building and loan associations had, however, been known to the courts of this State for a great many years prior to that time, and, when incorporated, had found their authority in the general incorporation statute. The clause under which they were doing business prior to 1913 is now subdivision 47, Article 1302, Revised Statutes of 1925, which subdivision reads as follows:

"To erect or repair any building or improvement and to accumulate and lend money for said purposes and *to purchase, sell and subdivide real property* in towns, cities and villages and their suburbs, not extending more than two miles beyond their limits, and to accumulate and lend money for that purpose."

The history of that subdivision is interesting and instructive. Prior to any official codification of the laws of this State, the purpose for which corporations could be organized under legislative acts were collected and systematized in Paschal's Digest in Article 5936, in which article we find two sections, quoted as follows:

"Section 7. The purchase, location and subdivision of lands and the sale and conveyance of same in lots and subdivisions or otherwise.

"Section 19. The erection of buildings and accumulation of funds for the purchase of real property."

These two sections were carried into the purpose article of the Revised Statutes of 1879 with the same section numbers and the same language. In 1893, the Legislature consolidated the sections above quoted, eliminated both of them in their precise language, and substituted therefor the following:

"Section 17. The erection or repair of any building or improvement, and the accumulation and loaning of money for said purposes and for the purchase, sale and subdivision of real property in towns, cities and villages and their suburbs, and not extending more than two miles beyond their limits and for the accumulation of money for that purpose."

This language was substantially preserved in the codifications of 1895, 1911 and 1925, as will be seen by comparison with the quotation from the 1925 revision above. It was under this subdivision that, prior to 1913, building and loan associations were created and incorporated. Under that law, they had the express authority, if they so desired, to purchase, subdivide, and sell real estate. By 1913 it appears that the Legislature felt the need of specific legislation upon the subject of building and loan associations and it enacted an extensive law authorizing their creation and providing for their operation and regulation. It is exceedingly significant, and we think positively controlling, in consideration of the inquiry which you make, to notice that

the language of the purpose clause of the Act of 1913 is identical in effect with the language of subdivision 17 in effect at that time, except that it omitted from the powers enumerated the right to purchase and sell real estate. The former law permitted associations (a) to erect or repair any building or improvement; (b) to accumulate and loan money for those purposes; (c) to purchase, sell and subdivide real estate; (d) to accumulate money for that purpose. The new act permitted associations (a) to build and improve homesteads, and (b) remove encumbrances therefrom; (c) to loan money to the members. Note that the powers are identical except the new act did not contain the power to buy and sell real estate.

It must be clear that the Legislature specifically intended to take away from the building and loan associations thereafter created any right to purchase and sell real estate, since it deliberately omitted that power from the enumeration when it must have had in mind that an association theretofore created could do that very thing. The emergency clause appended to the Act of 1913 is interesting. It is in this language:

"The fact that there is now no adequate law in force in this State to properly safeguard its people against sale of stock in irresponsible building and loan associations, creates a necessity," etc.

Inasmuch as this legislation is therefore expressly remedial, we must give it such an interpretation as will accomplish the purpose which the Legislature had in mind. When it omitted from the enumerated powers of the associations created under the new act, one which was specifically accorded to the association created under the old law, we cannot escape the conclusion that it was intended to deny this power to associations created under the new act.

We therefore respectfully suggest that you decline to approve the proposed by-laws for the reasons stated.

Sincerely yours,

GEO. E. CHRISTIAN,  
Assistant Attorney General.  
R. B. COUSINS, JR.,  
Assistant Attorney General.

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Op. No. 2611, Bk. 61, P. 48.

**AUTHORITY OF CITIES AND TOWNS OPERATING UNDER HOME RULE  
AMENDMENT TO ORGANIZE INTO WATER CONTROL AND IMPROVE-  
MENT DISTRICTS UNDER CHAPTER 25, GENERAL LAWS OF  
THE THIRTY-NINTH LEGISLATURE.**

1. The Legislature, in the absence of constitutional inhibition, has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly in the boundaries of another municipal corporation or organization for another purpose, but has no power, in the absence of constitutional authority, to authorize two municipal corporations to have jurisdiction and control, at one time, of the same territory for the same purpose.

2. A city of 5000 or over governed by a charter adopted pursuant to Section 5, Article 11, of the Constitution, in which said charter is conferred

the power to supply the inhabitants thereof with water, may not be organized into a water control and improvement district having for its purpose the supplying of water to the inhabitants of said city as provided in Section 135, Chapter 25, of the General Laws of the Thirty-ninth Legislature, for the reason that such cities exercise the power mentioned pursuant to constitutional authority.

3. A water control and improvement district embracing within its metes and bounds the city of Waco cannot exercise within the limits of said city any of the powers conferred on said city by its charter relative to the building of dams and supplying water to the inhabitants thereof.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 5, 1925.

*Hon. C. S. Farmer, County Attorney, Waco, Texas.*

DEAR SIR: Your letter of July 20, 1925, addressed to the Attorney General, has been handed to me for attention.

Your letter is as follows:

"July 20, 1925.

"Attention: Mr. Christian.

*"Attorney General, Austin, Texas.*

"DEAR SIR: There has been submitted to this office by Mr. John Maxwell in behalf of the Board of Water Commissioners of the city of Waco, and in behalf of the water committee of the Chamber of Commerce of the city of Waco, the hereinafter set out questions.

"As explained to this office, it is necessary for the city of Waco, either as a corporation or by organizing into a water improvement district, to expend some rather large sums of money for the purpose of procuring adequate supply of potable water for the city, inasmuch as it has outgrown its present supply from the Brazos, together with the fact that the Brazos water is very heavily impregnated with salt and gip.

"Your former correspondence with Mr. Maxwell has been exhibited to us; and it appears therefrom that by reason of the charter of the city of Waco and the bond limits therein stipulated that the city cannot issue the bonds without an amendment of their charter, which will require a longer time than is wise to wait. They are, therefore, investigating the question of organizing a water improvement district for the purpose of impounding the water and then selling same to the city. They have examined carefully Chapter 25 of the General Laws of the Thirty-ninth Legislature and would prefer to organize a district under Section 135 of such law. They have therefore submitted to this office the following questions:

"Question No. 1. If the city of Waco should organize a water improvement district, with its boundaries coterminous with the boundaries of the city of Waco, under the provisions of Chapter 25 of the General Laws of the Thirty-ninth Legislature, and especially Section 135 of said chapter, first, will the provisions of the charter of the city of Waco with reference to bond limit be applicable? Second, will the constitutional provisions as to tax limit of the city of Waco control?

"The purpose of this question is to ascertain whether or not such a water improvement district, with its boundaries coterminous with the boundaries of the city of Waco, can issue bonds for the purpose of procuring water site and constructing dam and furnishing water to the city of Waco without reference to the bond limits of the city charter of the city of Waco, and without reference to the constitutional tax limit of the city of Waco.

"Question No. 2. If the citizens of Waco should organize into a water improvement district under Section 59 of Article 16 of the Constitution as provided in Chapter 25 of the General Laws of the Thirty-ninth Legislature, and shall include in said proposed district territory adjacent to the present boundaries of the city of Waco, but not included therein, with a view to including in said district future extensions of the boundaries of the present city of Waco, conceding that in an election held under the provisions of the

above chapter both the city and the adjacent territory should vote for said district, then and in that event, what effect, if any, would the present charter bond limit of the city of Waco and the present constitutional tax limit on the city of Waco have on the issuance of bonds by said water improvement district?

"Question No. 3. If the citizens of Waco should organize into a water improvement district under Section 59 of Article 16 of the Constitution, as provided in Chapter 25 of the General Laws of the Thirty-ninth Legislature, and shall attempt to include in said proposed district territory adjacent to the present boundaries of the city of Waco, but not included therein, and if at the election when held as in said act provided, the property taxpaying voters living outside the present city limits should vote against the confirmation of said district, and the property taxpaying voters within the present boundaries of the city of Waco should vote in favor of confirmation of said district, then and in that event what effect, if any, would the present charter bond limit of the city of Waco and the present constitutional tax limit on the city of Waco have on the issuance of bonds by said water improvement district?"

"We have made some investigation of the law as held to the question above submitted and Mr. Maxwell informs us that he has also investigated the questions, but we do not find that the courts have passed specifically thereon. Therefore, in view of the importance, both to this city and to the State at large, we are submitting the questions to you with a request that you give us your answer at the earliest possible date.

"Yours very truly,

"(Signed) C. S. FARMER,

"County Attorney, McLennan County, Texas.

"By W. J. HOLT, Deputy."

The questions you have propounded make it necessary to construe Section 5 of Article 11 of the Constitution of Texas, and Section 59 of Article 16 thereof, as well as Section 135, Chapter 25, of the General Laws of the Thirty-ninth Legislature.

Section 5 of Article 11 authorizes cities having more than 5000 inhabitants, by a majority vote, to adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature and subject to the provision that no charter or ordinance shall contain any provision inconsistent with the Constitution of the State or of the general laws enacted by the Legislature of the State. Cities of this class are authorized under said section to levy such taxes as may be provided by their charters, with the limitation that no tax for any purpose shall be levied for any one year in excess of  $2\frac{1}{2}$  per cent of the taxable property of the city. The same section prohibits the city from altering, amending or repealing its charter oftener than every two years.

Section 59 of Article 16 of the Constitution of Texas authorizes the Legislature of the State to divide the State into such number of conservation and reclamation districts as may be determined to be necessary to the accomplishment of the conservation and development of the natural resources of the State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State. Under this provision of the Constitution, the Legislature is empowered to authorize such districts to create such in-

debtedness as may be necessary to carry out the purposes of the organization.

Chapter 25 of the General Laws of the Thirty-ninth Legislature authorizes the creation of water control and improvement districts under Section 52, Article 3, of the Constitution, and also under Section 59 of Article 16 thereof. The purposes for which such districts may be created under Section 59, Article 16, are the control, storing, and preservation and distribution of the waters and flood waters, the waters of rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of arid, semi-arid and other lands needing irrigation, the reclamation and drainage of overflowed lands and other lands needing drainage, the conservation and development of forests, water and hydro-electric power, the navigation of coastal and inland waters, and the preservation and conservation of all the natural resources of the State.

Chapter 25, above mentioned, does not expressly authorize cities and towns to organize within their territorial limits water control and improvement districts under Section 52 of Article 3 of the Constitution, but by Section 135 thereof attempts to confer on cities and towns the benefit and powers provided by Section 59 of Article 16 of the Constitution, by authorizing any town, city or municipal corporation by ordinance duly adopted by its governing body to organize into a water control and improvement district with the powers, authority and privileges provided by said constitutional provision. Provision is made for the appointment of a board of five directors by the city governing body, the levying of taxes and issuance of bonds by said board, after an election duly held, and the construction of improvements within said district. It is expressly provided that any city or town becoming a water control and improvement district may aid any other water control and improvement district in the construction and operation of improvements to the extent that same may be an advantage to such municipal corporation.

Pursuant to Section 5 of Article 11 of the Constitution, the city of Waco has adopted a charter defining the rights, powers and duties of the governing body of said city. Among the powers given to said city by its charter is the power to construct and maintain a waterworks system. Authority is conferred on the board of water commissioners of the city to have charge of, manage, maintain, operate, improve, extend and enlarge the system of its water supply and facilities, either in or outside of the limits of the city of Waco, to acquire by purchase, donation or condemnation proceedings in the name of the city of Waco, suitable grounds, water privileges, necessary right of way, and all other property rights and privileges, either in or outside the city limits, proper and necessary to the establishing and maintaining of an efficient water plant, and to fix water rates and rates for consumers, and if deemed necessary and advisable to compel the owners of all property and the agents of such owners or persons in control thereof, to pay all charges for water furnished upon such property; and to establish and enforce such rules, charges and restrictions with reference to the use, consumption, waste, payment, cut-offs and turn-ons and the general and detail management of said plant as they may deem proper, which are not inconsistent with the charter of said city. (Section 140, Charter of the City of Waco.)

A water control and improvement district organized under the provisions of Section 59, Article 16, of the Constitution, as permitted by Chapter 25 herein referred to, may have for its purpose the control, storing, preservation, and distribution of the waters and flood waters, the waters of rivers and streams, for irrigation, power and all other useful purposes. You state in your letter that it is the purpose of the city of Waco to form a water control and improvement district within its metes and bounds in order that bonds may be issued for the purpose of procuring a water site and constructing a dam and furnishing water to the city of Waco without reference to the bond limits in the city charter and the limit fixed by Section 5 of Article 11 of the Constitution. In other words, the city of Waco would form a water control and improvement district having the same power and authority with reference to the issuance of bonds for the purpose of procuring water sites and constructing dams and furnishing water as the city possesses under the provisions of a charter duly adopted by a vote of the people pursuant to the authority granted in Section 5 of Article 11 of the Constitution, except that the water control and improvement district would be unlimited in the amount of bonds that might be issued and the tax that might be levied where authorized by vote of the people at an election duly held.

In view of the fact that the city of Waco pursuant to constitutional authority has at this time the power and authority to supply the inhabitants of said city with water by erecting dams, reservoirs, laying mains and constructing a waterworks system or systems, and in view of the principle that the same sovereign functions over the same territory and people cannot be exercised by separate authorities (*Encyclopedia of Law and Procedure*, Volume 28, page 147), your question No. 1, above quoted, resolves itself into the question of the authority of the city of Waco to become a water control and improvement district for the purpose of supplying water to the city of Waco under Section 135 of Chapter 25, above referred to.

It appears to us that the authority of the city of Waco to organize itself into a water control and improvement district for the purpose of supplying water to the inhabitants of said city under said Section 135 of the act hereinbefore referred to is determined by the question as to whether Section 59 of Article 16 of the Constitution has modified or in any manner repealed Section 5 of Article 11 of the Constitution. Powers exercised by the city of Waco are derived from the authority granted in said Section 5 to adopt a charter defining such powers. Among the powers found in the charter of said city is the authority to supply its inhabitants with water by constructing and operating a waterworks system. It is true that the people at an election within the city of Waco have authorized the governing body of the city to exercise the power mentioned and that by a charter amendment such power might be modified or revoked. Further, it is true that the people of the State by an amendment to the Constitution might modify and revoke the power given to cities under Section 5 of Article 11. The question is: Does Section 59 of Article 16 of the Constitution modify or repeal Section 5 of Article 11 in so far as to authorize the Legislature to create a water control and improvement district within the boundaries of a city having a special charter, with the authority to exercise one of the sovereign



functions of such city or town? Section 59 of Article 16 was adopted subsequent to Section 5 of Article 11 of the Constitution, and if in conflict with any of the provisions of said Section 5 of Article 11, its provisions must prevail. Express authority is nowhere in said Section 59 of Article 16 granted to the Legislature to create a water control and improvement district within the boundaries of a city for the purpose of supplying the inhabitants thereof with water. Neither would it appear that such authority is granted the Legislature by necessary implication, as the purposes of said Section 59 may be fully carried into effect by the Legislature without forming a city into a water control and improvement district for the purpose of supplying water to the inhabitants thereof. There are many purposes for which such districts may be created pursuant to constitutional authority exclusive of the purpose of furnishing water to the inhabitants of cities. Such districts may be formed for the purpose of irrigating the arid lands of the State, storing the flood waters and waters of the rivers thereof, for irrigation, power and all other useful purposes. Thus it is seen that each and every purpose of said Section 5 may be carried into effect without the creation of cities into water control and improvement districts for the purpose of furnishing water to the inhabitants thereof. It follows that the authority to create cities into water control and improvement districts for the purpose of supplying water to the inhabitants thereof is not granted by necessary implication in said Section 59, Article 16. There being neither express authority nor authority by necessary implication for the creation of such districts, it would follow that Section 5 of Article 11 of the Constitution is in no manner modified or repealed in so far as cities of 5000 or over are given the authority to adopt their charters and provide for the construction of waterworks and the supplying of water to the inhabitants thereof.

It is true that the Legislature may create any conceivable kind of a corporation it sees fit to create for the more efficient administration of public affairs and endow such corporation and its officers with such powers and functions as it deems necessary and proper for the administration of such corporate powers and affairs, provided there be no constitutional inhibition precluding the creation thereof. On the other hand, the Legislature has no power, in the absence of constitutional authority, to create a corporation within the territory of a corporation previously created pursuant to constitutional authority and permit the new corporation to exercise the same sovereign functions over the same territory and people as are exercised by the old corporation. Stated in another way, the Legislature, in the absence of constitutional inhibition, has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly in the boundaries of another municipal corporation or organization for another purpose (*People vs. Nibbe*, 37 N. E., 317), but has no power, in the absence of constitutional authority, to authorize two municipal corporations to have jurisdiction and control, at one time, of the same territory for the same purpose. (*People vs. Bowman*, 93 N. E., 244.)

Dillon lays down the rule that "there cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same power, jurisdiction, and privileges." (*Dillon on Mu-*

nicipal Corporations, 5th Edition, Volume 1, Section 354.) This rule was adhered to in the case of *People vs. Oakland*, 123 Cal., 598, wherein it was held that when a sanitary district is annexed to a city as a municipal corporation of a higher class and capable of exercising the same functions as well as others—the statute authorizing the annexation effects, ex necessitate, a cession of the powers of the inferior corporation to the greater, and a consequent dissolution of the former as a result of the annexation.

In an opinion rendered by this Department on the 18th of October, 1913, it was held that a road district could not be created out of a portion of an incorporated town. The holding is based on the fact that an incorporated town has exclusive control of its streets and alleys and has the authority to open, alter, extend, widen and improve same, while the management of the affairs of a road district rests entirely upon the commissioners court, and that consequently endless conflict of authority over the streets and alleys of the town would result and lead to utter confusion. (Opinion Attorney General, Opinion Book No. 6, page 158.) This holding is in consonance with the principle that the same sovereign functions over the same territory and people cannot be exercised at the same time by separate authorities. It is true that this Department has held that a city or town may be included within a road district, but it has been consistently held that cities and towns have the exclusive control of their streets and alleys to the extent that a road district embracing such city or town is required to secure the permission of the governing body thereof in order to expend the funds of such road district on the streets of said city.

We are aware of the case of the *City of Rockdale vs. Cureton*, 229 S. W., 852, wherein it is held that a city or town may take control of its schools and thereby constitute a school district. It is held in that case that the school district is a recognized separate municipal corporation acting within the same territory as the city or town and that as a school district its powers are derived from the law of its creation. Section 10 of Article 11 of the Constitution expressly empowers the Legislature to constitute any town or city an independent school district. No conflict between the exercise of the functions of a school district and purely municipal functions within the same territory is resultant. On the other hand, a city assuming control of its schools exercises dual powers; that is to say, it has its powers as strictly a municipality and its powers as a duly constituted independent school district. The case of *Rockdale vs. Cureton*, supra, is, therefore, easily distinguished from the cases holding that the same sovereign functions over the same territory and people cannot be at the same time exercised by separate authorities.

There are expressions in the case of the *City of Aransas Pass et al. vs. W. A. Keeling*, 112 Texas, 339, which, taken in connection with the statement in Section 59 of Article 16 of the Constitution that “the conservation and development of all of the natural resources of this State \* \* \* are each and all hereby declared public rights and duties, \* \* \*” might be used to support the contention that the Legislature of Texas in providing for the formation of water control and improvement districts may use cities and towns as the instrumentalities for subserving the general public welfare under said

Section 59, Article 16, of the Constitution. In the case of *City of Aransas Pass et al. vs. W. A. Keeling*, supra, the court says:

"The donation to a city of a portion of the State taxes collected in its county during a term of years to aid in the construction of sea walls is not a grant of public money for a purpose forbidden by Article 3, Section 51, of the Constitution. The destruction of ports through which moves the commerce of the State is a statewide calamity; a sea wall on the coast, though of special benefit to particular communities, promotes the general welfare of the State; and the use of cities or counties as agents of the State in the discharge of its duties is not forbidden by the Constitution."

The question presented in the case above quoted from is not similar to the question under consideration. It is not doubted that the State has the right to employ cities or counties as agents of the State in the discharge of a proper function of the State, but in the absence of constitutional authority the State, through its Legislature, is without authority to impose upon one municipal corporation the duty of performing a function properly exercised by another municipal corporation pursuant to authority and power derived from the Constitution itself.

Viewing the question under consideration from the standpoint of the construction to be placed on the powers granted the Legislature in Section 59 of Article 16, we note that certain specific powers and duties are enumerated, among which is included the control, storing, preservation and distribution of the storm and flood waters, the waters of the rivers and streams of the State for irrigation, power and all other useful purposes. If the Legislature has the authority to permit cities to become water control and improvement districts for the purpose of furnishing water to the inhabitants thereof, such authority must be derive from the purpose just stated, that is to say, "all other useful purposes" must necessarily include the authority to furnish water to the inhabitants of cities. In determining whether "all other useful purposes" includes the furnishing of water, as aforesaid, it may be well to apply the rule of "ejusdem generis," which means that "when an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things 'ejusdem generis'—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms." *Words and Phrases*, Volume 3, page 2328. It is true that the rule stated is by no means a rule of universal application, and that its use is to carry out, not defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and then to carry out the purpose of the statute, the general word ought to govern. It is a mistake to allow the "ejusdem generis" rule to pervert the construction. *Words and Phrases*, Volume 3, page 2328.

History has it that the first municipal institutions established by the human race originated in the valleys of the Nile, the Euphrates, the Tigris and the Indus in the nations among the oldest of antiquity. The underlying cause for the creation of such corporations is found in the necessity of supplying the wants of everyone in the territory by

concerted action of all of the inhabitants thereof. From the beginning of the development of cities until the present time in meeting the requirements of their inhabitants, municipal governments have exercised certain well recognized powers. Certain fundamental principles applicable to legislative control of municipal governments have been summarized as follows:

1. As the right of local self-government was well understood and recognized, and had been for some years in practical operation, at the time the Constitutions were adopted, the effect of those instruments was to limit the power of the Legislature, unless the contrary is clearly expressed, as to all matters falling within the previously recognized jurisdiction.

2. Under the guise of regulation, the Legislature cannot, either directly or indirectly, take away any part of the power or authority thus created by the Constitution, or recognized in it, by express terms or by necessary implication.

3. Such powers of local administration conferred upon, or recognized in, the municipal corporation are designed for the public good and are to be exercised within the discretion of the local authorities, uncontrolled or unimpaired by legislation of the State, unless there is a failure to exercise a function which may in some manner concern the people of the State at large.

4. Every grant of power made by the Constitution and every recognized right of the people, as individuals, or in the capacity of a local community, contains implications against anything contrary to them.

5. The object of conferring or recognizing governmental power by means of constitutional provisions was to make the grantee of the power, or the one in whom it is recognized, free from interference on the part of any other governmental agency.

6. Any legislation which hampers action (in the premises), or interferes with the free discharge of functions so granted or recognized, is in conflict with the principles of the Constitution.

7. To take away any portion of a power or to withdraw the right to exercise a function connected with, or incident to that power, is, in effect, to destroy the power itself.

McQuillin, *Municipal Corporations*, Vol. 1, pp. 563-564.

Among the powers which have been generally recognized as belonging to municipal government is the furnishing of water to the inhabitants living within the territory. In our State, cities operating under a special charter derive such power from the organic law of the land. In view of the principles above mentioned, it would appear, however, that the cities of this State possessed such well recognized power at the time of the adoption of the first Constitution of Texas. If the fundamental principles applicable to legislative control of cities summarized by Judge McQuillin are correct, then it follows that any legislation enacted without constitutional authority, which hampers action or interferes with the free discharge of the functions granted cities or recognized as being inherent functions, is in conflict with the principles of the Constitution, and that to take away any portion of a power, or to withdraw the exercise of a function connected with it or incident to it, is in effect to destroy the power itself.

This brings us back to the question of the authority granted in

Section 59 of Article 16 of the Constitution to cities to become water control and improvement districts with the authority to exercise a sovereign function theretofore exercised by the city within the same metes and bounds, and the further question of the proper application of the rule of "ejusdem generis." Said Section 59 of Article 16 reads in part as follows:

"The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared to be rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."

We cannot reach the conclusion that the furnishing of water by water control and improvement districts to the inhabitants of a city is included within any of the purposes just mentioned. Properly applying the rule of "ejusdem generis" the term "other useful purposes" would include purposes similar to those purposes specifically set forth. Consequently, in view of the fact that no authority is granted the Legislature to form water control and improvement districts for the purpose of exercising a function that properly belongs to a city, not only as a function recognized from the very beginning of municipal government, but a function granted by the sovereignty, it would follow that the Legislature in attempting to permit the creation of such districts for the purpose of supplying water to the inhabitants of cities of the class mentioned would in effect attempt to take away or destroy a proper municipal function.

We do not believe that such authority has been granted, and we are therefore constrained to hold that the city of Waco is not authorized under Section 135 of Chapter 25 of the Acts of the Thirty-ninth Legislature to organize and create a water control and improvement district with boundaries coterminous with said city for the purpose of furnishing water to the inhabitants thereof. Further, we hold that a water control and improvement district may not be formed under the provisions of Chapter 25 to include within its larger area the city of Waco for the purpose of supplying said city with water.

In view of the conclusion we have reached, it will be unnecessary to pass on the question of the tax limitations inquired about in your letter.

Very truly yours,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2649, Bk. 61, P. 68.

COMMISSIONERS COURTS AND THEIR POWERS—ROADS AND HIGHWAYS  
—MINERAL RIGHTS.

1. The statutes of this State do not authorize commissioners courts to lease public highways for oil, gas or other purposes.
2. Where right of ways are acquired for public highways in this State,

whether by gift, purchase or condemnation proceedings, the county does not acquire title to such land for any purpose other than that to which it was originally dedicated and, in this instance, an easement for the use and benefit of the public, nor does the county own the mineral rights thereunder.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 3, 1926.

*Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.*

DEAR SIR: Your letter of August 31st, addressed to Honorable Dan Moody, Attorney General, has been referred to me for attention. In your letter of above date you state:

"The question has arisen before the Commissioners Court of Jefferson County as to whether or not they own the minerals under a public road leading from Beaumont to Port Arthur in Jefferson County, Texas, and commonly known as the West Port Arthur road. This road for about a half mile runs directly through the center of the New Spindle Top Oil Field. Jefferson County is using, maintaining, and claiming this right of way as a road and has been for twenty or thirty years, unmolested by and with the acquiescence of abutting fee owners during that time. No part of this road has ever been used by the county for any other purpose than a public road. For a number of years the Gladys City Oil and Gas Manufacturing Company, who own the fee in most of the land along this right of way through the new oil field, have been leasing the mineral rights under this road, subject to the easement of the county for road purposes. There appears to be no deed or deeds to the county for this road, nor was said road obtained by condemnation proceedings, so far as the record shows."

Under this statement of facts, you inquire if Jefferson County owns the oil, gas and other minerals under the above described road and if the commissioners court can lease this public highway for oil and gas purposes.

Under the facts submitted as above indicated, it is obvious that the road in question has been used and maintained by Jefferson County for twenty or thirty years, unmolested by and with the acquiescence of abutting fee owners during that time. The record discloses that there is no deed to the county conveying the right of way of such road, nor is there anything to indicate that the right of way of such road was obtained by condemnation proceedings. However, a county which without gift, sale or condemnation proceedings enters on a strip of land for right of way purposes and constructs its road thereon, it has a right in furtherance of its mere easement privileges, not having made any other use of it than it might, had it condemned it, in which case its right would not have included the fee, did not acquire the fee by limitations notwithstanding possession for the requisite time, but would have been limited to the right of way for the construction, maintenance and use of a public highway.

Therefore, the use by a county of a roadway of land for ten years or more, gives title to an easement only and does not give title to the minerals under such roadway.

*Railway Co. vs. McIver, 245 S. W., 463.*

*Boon vs. Clark, 214 S. W., 607.*

*Wheeler vs. McVay, 164 S. W., 1100.*

*Waltern vs. Syck, 142 S. W., 229.*

Counties acquiring right of ways for public highways by prescription

must rest on presumption of establishment by proper authority. *Vidanni vs. Martinez*, 260 S. W., 651 (Sup. Ct., 275 S. W., 999); *Railway Co. vs. Bandat*, 51 S. W., 541.

The commissioners courts by the provisions made in Article 2351, are empowered, among other things, to lay out and establish, change and discontinue public roads and highways; to build bridges and keep them in repair and to exercise general control over all roads, highways, ferries and bridges in their counties. This provision of the statute has not been changed or modified since the Acts of the Legislature of 1911. The commissioners courts are also authorized to order the laying out and opening up of public roads when necessary and discontinue and alter any road whenever it shall be deemed expedient. However, no public road shall be altered or changed except to shorten the distance from end to end unless the court, upon investigation of the proposed change, finds that the public interests will be better served by making the change. (R. C. S., Art. 6703.)

Subsequent to the enactment of the last two articles of the statutes referred to, the Legislature of this State at its Second Called Session, 1923, which is now designated as Article 6773, Revised Civil Statute, 1925, provided that the Highway Commission is authorized to take over and maintain the various State highways in Texas and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways.

The facts do not disclose whether or not the public road here in question has been designated as a State highway or not. This matter will hereafter be discussed, even though, in our opinion, not material to a proper conclusion of the law governing and applicable to the question under discussion. Article 16, Section 24, Constitution of this State, provides that:

"The Legislature shall make provisions for laying out and working public roads, building of bridges," etc.

If the highway in question has been designated a State highway, unquestionably it would be under the control of the State Highway Commission, while, on the other hand, if it has not been designated as a State highway, then it would be under the control and supervision of the Commissioners Court of Jefferson County.

"Public highways belong from side to side, and end to end to the public, and any permanent structures or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated notwithstanding space is left for the passage of the public." *Elliott on Roads and Streets*, 645.

"A city cannot, as landlord or lessor, make a lease of real estate owned by it, which is held for public purposes, when the making of such lease is inconsistent with these purposes." 3 *Dillon on Municipal Corporations*, Sec. 997.

"The primary and paramount object in establishing and maintaining streets and highways is for the purpose of public travel, and the public and individuals cannot be rightfully deprived of such use, nor can the rights of the public therein be encroached upon by private individuals or corporations even with the consent of the municipality. Any occupation of them for other purposes, or any appropriation of them by a legislative sanction to other objects, must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed." 13 *R. C. L.*, p. 251; see, also, 25 *L. R. A. (N. S.)*, p. 400.

Also on page 253:

"The right to use the highways and streets for purposes of travel, however, is not an absolute and unqualified one, but may be limited and controlled by the State in the exercise of its police power, whenever necessary to provide for and promote the safety, peace, health, morals and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement and to provide for their safety while using it."

"In accordance with the general rule heretofore stated, that county boards or county courts have no powers other than those conferred expressly or by necessary implication, such courts or boards have not power to rent or to lease property or franchises owned by the county, in the absence of statutory authority so to do, and, where they do possess statutory authority, it must be strictly pursued, or the lease will not be binding." 15 Corpus Juris, p. 537.

"Yet it would seem that the owner of minerals beneath a highway may remove it if he can do so without any interference with the public in the use of such highway, but this is a rule of little or no practical value in the cases of oil and gas, for an oil or gas well must necessarily be an obstruction of the highway when sunk in it, and especially the machinery used in sinking and operating it, and therefore it is practically impossible to make use of the highway in order to extract oil or gas beneath its surface. As the public authorities only have the right to use the highway for the purpose of the public in traveling, they have no power to let any part of it for oil or gas operations, unless especially authorized by statute to do so, and then only when the public own the fee." 1 Thornton on Oil and Gas, p. 502.

The authority of the Commissioners Court of Jefferson County, as the governing body thereof, to make contracts in its behalf, is strictly limited to that conferred either expressly or by fair or necessary implication by the Constitution and laws of this State. *Foster vs. City of Waco*, 113 Texas, 352, 255 S. W., 1104.

Authority to make such a contract as the one under consideration is not conferred by the terms of the Revised Statutes, Article 2351, which specified the general powers and duties of the commissioners court, or by Article 1577, authorizing the commissioners court to sell and dispose of any real estate belonging to the county, nor have we found any other statutory provision which can be said to expressly authorize such action.

It has been continuously and uniformly held that land, especially highways, dedicated to public use cannot be leased for private purposes. In addition to this, it must be conceded that counties have only such powers as are affirmatively granted to them by the Legislature. *Corpus Juris*, pages 457-537; *Bland vs. Orr*, 90 Texas, 492; *Baldwin vs. County*, 88 Texas, 480; *Edwards County vs. Jennings*, 33 S. W., 585; *Von Rosenberg vs. Lovett*, 173 S. W., 508.

In the case of *Boon vs. Clark*, 214 S. W., 607, the court said:

"The right of way of the county for public road purposes was a mere easement, and the statute authorizing the commissioners court to sell real estate belonging to the county has no application to the action of the court in leasing the public road for all purposes. The county did not own the minerals lying underneath the road, and the only right conveyed by the lease was the right to use the road for the purpose of extracting the oil and gas.

"Not only is there no express authority given by our statutes for the leasing of the public highways for oil and gas wells which will necessarily prove to be obstructions thereof, but a denial of such authority is clearly implied by



Article 812 of our Penal Code, which makes it a misdemeanor, punishable by fine, for anyone to wilfully obstruct any public road or highway in this State."

Again referring to the creation of the State Highway Commission, and their control and supervision of the public highways of this State, we direct attention to the holding of the Supreme Court of this State in the case of *Robbins vs. Limestone County*, 268 S. W., 918, in which the following language was used:

"Formerly, under the laws of the State, these powers were exercised by the county commissioners courts, but, as it was constitutionally authorized to do, the Legislature created another agency, to wit, the State Highway Commission, and invested it with certain powers and functions, same to be performed and executed in conjunction with other agents and agencies of the State. The powers here bestowed by the Legislature are not different from those formerly vested in commissioners courts, which are in no sense a delegation of legislative authority, or a delegation of the power to suspend laws.

"If the title and ownership of the public roads reposes in the counties under the Constitution, and if they are property of the counties, then they would have the right to control them, and certainly the State, or any other power, would have no right to take them in any manner, except and unless compensation should be made therefor. But are public roads within the borders of a county its property, and is its title and control its own and inherent in it? In their very nature and as exercised by the general sovereignty they belong to the State. From the beginning in our State the public roads have belonged to the State, and not to the counties.

"While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the State and for the benefit of the State and the people thereof.

"Public roads are State property over which the State has full control and authority. This is clearly held in *Travis County vs. Trogden*, 88 Texas, 302, 31 S. W., 358.

"The establishment of public highways being primarily a function of government belonging to the State, the right to establish them resides primarily in the Legislature, and, in the absence of constitutional restrictions, the Legislature may exercise that right direct or delegate it to a political subdivision of the State, or to such other agency or instrumentality, general or local in its scope, as it may determine. The exercise of this right by a political subdivision of the State, or by local officers, is founded upon statutory authority therefor. The Legislature may exercise possession of public roads and control over them, by and through such agencies as it may designate. 29 Corpus Juris, 39, 48, 49, 51, 52, 199, 226, 227, 257, 269, 274, 282, 290, 309, 409, 439; 13 Ruling Case Law, 60, 70, 138, 143, 144, 149, 150, 159, 161, 209, 215.

"The Legislature then has the sole and exclusive power pertaining to public roads and highways unless and only to the extent that power may be, if at all, modified or limited by other plain provisions of the Constitution."

The holding of the court in the last case is supported by the cases of *Taylor vs. Dunn*, 16 S. W., 732; *Railway Co. vs. Cook*, 103 S. W., 408.

This Department has continuously held that counties through their commissioners courts cannot lease public highway for oil and gas purposes, and where the title to the right of way of a public highway vests in a county for road purposes, the county does not own the mineral rights thereunder and consequently cannot lease or otherwise dispose of minerals or other substances beneath the surface for private purposes. (Reports and Opinions, Attorney General, 1918-20, page 687).

Therefore, we must conclude that inasmuch as the public highways of a county, whether under the control of the commissioners court or the State Highway Commission, are by statute dedicated to the public, that it is a universal rule that land dedicated to public use cannot be used for private purposes except by action of the Legislature granting such authority, and the statutes of this State nowhere authorize counties through their commissioners court to lease or otherwise dispose of their public highways for any purpose except for the purpose for which they were originally dedicated. The use by a county of a public highway of land for ten years or more gives title to an easement only and does not give title to the minerals under such roadway, and you are therefore advised that the Commissioners Court of Jefferson County is without legal authority to lease, sell or dispose of minerals located under such public road for the reason that Jefferson County has acquired no legal right to the use and benefit of such minerals, and in further support of this conclusion, the Legislature of this State has never lodged authority in the commissioners court to lease its public highways for private purposes. The holdings of the courts in this State and others, seem to have uniformly upheld the rule of law here announced as shown by the following authorities:

Railway Co. vs. McIver, 245 S. W., 463.  
 Capps vs. T. & B. V. Ry. Co., 50 S. W., 643.  
 City of Houston vs. Finnegan, 85 S. W., 470.  
 Hays vs. T. & P. Ry. Co., 62 Texas, 400.  
 Boon vs. Clerk, 214 S. W., 1100.  
 Wheeler vs. McVay, 164 S. W., 1100.  
 Ballard vs. Bowie County, 126 S. W., 56.  
 Porter vs. Johnson, 151 S. W., 599.  
 Hall vs. City of Austin, 48 S. W., 53.  
 Cunningham vs. San Saba County, 20 S. W., 941.  
 I. & G. N. Ry. Co. vs. Cuneo, 108 S. W., 714.  
 McLean vs. Keel, 25 S. W. (Ark.), 894.  
 Waltern vs. Syek, 142 S. W. (Ky.), 229.  
 Biennial Report of Attorney General, 1918-1920, p. 687.  
 Llano vs. County of Llano, 23 S. W., 1008.  
 Kalto vs. Sullivan, 46 S. W., 288.  
 Gibbs vs. Ashworth, 66 S. W., 858.  
 S. A. & A. P. vs. Buland, 34 S. W., 155.  
 City of San Antonio vs. Rush, 38 S. W., 388.

Yours very truly,

C. L. STONE,  
 Assistant Attorney General.

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Op. No. 2581, Bk. 60, P. 127.

CONSTITUTIONAL LAW—LEGISLATIVE AUTHORITY—LIMITATION ON  
 RIGHT TO CONVEY PRIVATE PROPERTY.

1. Legislature may not restrict right to convey private property, except in the proper exercise of its police powers or the right of eminent domain.
2. The right to dispose of property is an attribute of ownership protected by constitutional guaranties.
3. House Bill No. 226 is unconstitutional in that it unduly restricts the right of alienation of private property, and is in effect a taking of private property without "due process of law."

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 31, 1925.

*Messrs. Harold Kayton, R. L. Covey, B. S. Cummings, Sub-Committee, House of Representatives.*

GENTLEMEN: In your communication of January 30th you have requested this Department to render you an opinion as to the constitutionality of House Bill No. 226, by Kittrell, which bill is as follows:

## A BILL

## TO BE ENTITLED

AN ACT to regulate the platting and subdivision of land and the sales of small lots of land in cities and towns and within three miles thereof, requiring the approval of plats by the city or town, providing penalty for the sale of land without such approval, prohibiting the recording by the county clerk of deeds and plats without the approval by the city or town, and prescribing penalties therefor, providing that all laws or parts of laws in conflict therewith are thereby repealed, and declaring an emergency.

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

Section 1. No plat of a subdivision of land, any part of which lies within an incorporated city or town or within three miles of the corporate limits thereof, shall be recorded until it has been approved by the city governing body thereof, and such approval be endorsed in writing on the plat in such manner as such city council or governing body may designate. If such land lie within three miles of more than one city, then the requisite approval shall be by the city whose boundary is nearest to the land. The approval required by this section, or the refusal to approve, shall take place within thirty days from and after the time of the submission of the plat for approval; otherwise such plat shall be deemed to have been approved, and the certificate of such city or town as to the date of the submission of the plat for approval and the failure to take action thereon within such time, shall be issued on demand and shall be sufficient in lieu of the written endorsement or other evidence of approval herein required. The ground of refusal or approval of any plat submitted shall be stated upon the record of the council or governing body. Any such city or town may adopt general rules and regulations governing plats and subdivisions of land falling within its jurisdiction to secure and provide for the co-ordination of the streets within the subdivision with existing streets and roads or with the city plan or plats, for the proper amount of open spaces for recreation, light and air, for the avoidance of future congestion of population, and for orderly, healthful and convenient community development; but such rules and regulations shall not require the dedication to the general public of open grounds or spaces or other than streets and ways. Such rules and regulations shall be promulgated and published as is provided by law for the promulgation and publication of ordinances, and before adoption a public hearing shall be held thereon.

Section 2. Whoever, being the owner or agent of the owner of any land within such municipal corporation, or within three miles thereof, transfers any lot, parcel or tract of said land from or in accordance with a plat or map of the subdivision or allotment of all or a part of said land and upon which plat or map certain areas are indicated as for the use of the public for streets or other public grounds, before such plat or map has been recorded in the office of the county clerk of the county in which the land is situated, shall forfeit and pay the sum of \$100.00 for each lot, parcel or tract so sold; and the description of such lot, parcel or tract by metes and bounds in the deed or transfer shall not serve to exempt the seller from the forfeit herein provided. If the land be within such municipal corporation, then such sum shall be recovered in a civil action brought in any court of competent jurisdiction by the city or town in the name of the municipal corporation and for the use of the street repaid fund thereof. If the land be situated outside of a municipal corporation, then said sum shall be recovered in a civil action brought by the

prosecuting attorney of the county in which the land is situated, in the name of the county and for the use of the road repair fund thereof. This section as herein amended shall not apply to a map or plat of a subdivision from or according to which two or more lots as shown on such plat have been sold or contracted for sale previous to the taking effect of this section nor to a plat or map of a subdivision heretofore made where the proprietor has heretofore carried the improvement of the land in accordance with the plat to the point of commencing the grading of streets or other public ways as shown on the plat; nor to a map or plat of a subdivision on which all areas indicated as streets or open grounds are expressly indicated as for the exclusive use of the abutting or other owners in such subdivision and not as public streets, ways or grounds.

Section 3. No deed conveying any land or interest therein, which land is not more than one acre in area, shall be entitled to record in the county clerk's office unless said land abuts on a public road or a public street, or unless said land is sold or conveyed to the owner of immediately adjacent property or unless the said deed shall have written thereon a certificate to the effect that the public interest does not require that a public road or public street be dedicated before such transfer. It shall be the duty of the city council or governing body, or the person empowered by it, to give such certificate in all cases in which the land sold or conveyed is, by means of private roads or rights of way, assured access to a public road or highway. Such certificate shall be signed by the designated city authority within whose jurisdiction the said property may lie, and it is hereby made the duty of such city or town to make and execute such a certificate upon all deeds where the public interest does not require the dedication of a new public road or public street to be used in connection with such property. The county clerk of any county is hereby prohibited from receiving for record and from recording any deed or plat not in conformity herewith, and the filing or recording of any deed or plat contrary to the provisions of this act shall constitute a misdemeanor punishable by fine of not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars, and both the county clerk and any deputy filing or recording the same shall be deemed guilty. Nothing in this section shall be construed as applying to the sale or transfer of any lot or parcel of land containing an area of an acre or less for which a deed or a contract of sale has heretofore been executed and delivered. When the deed does not disclose that the property thereby conveyed abuts on a public road or a public street or that the grantee is not the owner of immediately adjacent property or that the area of the property conveyed is more than one acre, the county clerk may require the grantor or the grantee, or agent thereof, to file an affidavit setting forth any or all of these facts.

Section 4. All laws or parts of laws in conflict herewith are hereby expressly repealed to the extent of such conflict.

Section 5. The fact that there is now no adequate law relating to the platting and subdivision of land within and adjacent to cities and towns creates an emergency and imperative public necessity, calling for the suspension of the constitutional rule requiring bills to be read on three several days and said rule is hereby suspended and this act shall take effect and be in force and effect from and after its passage, and it is so enacted.

The Fourteenth Amendment to the Constitution of the United States forbids any State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws. Article 1, Section 19, of the Constitution of Texas, provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised, except by the due course of the law of the land."

In the famous Dartmouth College case, Mr. Webster defined the law of the land as follows:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and privileges under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." Cooley's Constitutional Limitations, 7th Ed., p. 502.

Due process of the law in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs. Cooley's Constitutional Limitations, 7th Ed., p. 506.

It is true that the Legislature may in many instances interfere with private rights and may in some cases authorize interference under the broad police power exercised by the State. There is inherent authority in the Legislature to appropriate the property of citizens for the necessities of the State, but certain restraints prevail. A pecuniary compensation, determined by judicial inquiry, must be paid to the citizen before his property can be taken for the support of the government. Again, the taking of property under the power of eminent domain must be for a public use and the mere fact that the general public policy is concerned will not permit the interference of the legislative body with existing vested rights.

Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. Corpus Juris, volume 12, page 955. The State has no power to divert nor to impair vested rights, such rights being protected by the provision of the Fourteenth Amendment of the Constitution of the United States that no State "shall deprive any person of life, liberty or property without due process of law." The right of private property, secured by guaranties in the Federal and State Constitutions, includes the right to acquire, possess, protect, enjoy and dispose of such property. Corpus Juris, volume 12, page 945.

Consequently, any statute which infringes either the right to acquire, the right to possess, the right to protect, the right to enjoy or the right to dispose of private property is in contravention of the constitutional guaranties. This is not to say that under the right of eminent domain and the exercise of its proper police power the State is without power to take private property for public purposes after due compensation is made to the owner, or to limit the purposes for which private property may be used in matters affecting the public health, safety or morals of the people.

An essential element of private property is the right to dispose of it to a constitutionally qualified purchaser, in whole or in part, and the Legislature is without authority to limit this right. The Supreme Court of the United States, in *Buchanan vs. Warley*, has held that an ordinance which attempts to deprive the owner of property of the right to sell it to a Negro is in contravention of the Fourteenth Amendment of the Constitution of the United States, in that it is a taking of property without due process of law. The court says:

"The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The

Fourteenth Amendment protects life, liberty and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution except by the law of the land. True, it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of public health, convenience or welfare. \* \* \* We think the attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights, except by due process of law." *Buchanan vs. Warley*, 245 U. S.. 60.

Section 3 of House Bill No. 226 provides as follows: "No deed conveying any land or interest therein, which land is not more than one acre in area, shall be entitled to record in the county clerk's office unless said land abuts on a public road or a public street or unless said land is sold or conveyed to the owner or immediately adjacent property or unless the said deed shall have written thereon a certificate to the effect that the public interest does not require that a public road or public street be dedicated before such transfer. It shall be the duty of the city council or governing body, or the person empowered by it, to give such certificate in all cases in which the land sold or conveyed is, by means of private roads or rights of way, assured access to a public road or highway. Such certificate shall be signed by the designated city authority within whose jurisdiction the said property may lie and it is hereby made the duty of such city or town to make and execute such a certificate upon all deeds where the public interest does not require the dedication of a new public road or public street to be used in connection with such property. \* \* \*"

The bill precludes the sale of land within an incorporated city or town or within three miles of the corporate limits thereof by a plat without first having obtained a certificate of the approval of the governing body of the city of the plat. In effect, the bill would prohibit the owners of land within the designated area from subdividing their land as they might deem proper and selling any portion of it without the consent of the governing body of the city. Restriction is thereby placed on the right of the owner of the land to dispose of same. The authority for this, if there be such authority, could only emanate from the proper exercise of the police powers of the State or the right to take property for public use after making just compensation. It does not appear that the public safety, health or morals are in any manner involved, nor does it appear that the Legislature is conferring upon the municipality the right of exercising the power of eminent domain. If it be said that the State is depriving the landowner of one of the attributes of his property, that is, the right to dispose of it, then it follows that the State is taking a valuable private right without due process of law, for no provision is made for a judicial determination of the damage that may be sustained by the landowner nor for his just compensation therefor.

We are of the opinion, therefore, that House Bill No. 226 is in contravention of the Fourteenth Amendment of the Constitution of the

United States and of Article 1, Section 19, Constitution of the State of Texas, providing in effect that no person shall be deprived of property, except by the due course of the law of the land.

Yours very truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

Op. No. 2583, Bk. 60, P. 118.

CONSTITUTIONAL LAW—AUTHORITY OF LEGISLATURE TO DELEGATE  
POLICE POWERS TO MUNICIPALITIES.

1. When related to public health, safety, morals and general welfare the Legislature may authorize municipalities to fix reasonable restrictions governing the location, erection and maintenance of buildings.
2. House Bill No. 227 authorizes municipalities to exercise general police powers, and in such respect is within constitutional limitations.
3. Certain sections of said act are invalid.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 31, 1925.

*Messrs. Harold Kayton, R. L. Covey, E. S. Cummings, Sub-Committee,  
House of Representatives.*

GENTLEMEN: In your communication of January 30th you have requested this Department to render you an opinion as to the constitutionality of House Bill No. 227, which bill is as follows:

A BILL

TO BE ENTITLED

AN ACT authorizing legislative bodies of incorporated cities and towns to provide for the promotion of health, safety, morals and general welfare of the community; to regulate and restrict the size, kind and character of buildings; the dimensions of lots, yards, etc.; the density of population and the location and use of buildings for trade, industries, residences, or other purposes; providing that said municipal legislative bodies may subdivide the municipality into districts to carry out the purposes of this act, and within such districts to regulate construction and alteration of buildings, and the use of land therein contained to facilitate the adequate provision of transportation, water, sewerage, schools and parks, and to promote the health and general welfare; providing the method of procedure whereby such legislative bodies shall establish regulations and restrictions to carry out the purpose of this act; providing the manner and method of making changes in such regulations and restrictions; providing for the creation of a zoning commission and defining its powers and duties; providing for a board of adjustment and defining its powers and duties; prescribing the remedy to be pursued in case of violation of this act or any ordinance or regulation made under authority conferred thereby; describing the manner of construing this act with relation to other laws, ordinances and regulations; providing for the repeal of laws or parts of laws in conflict therewith, and declaring an emergency.

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

Section 1. Grant of Power. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of incorporated cities and towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, struc-

tures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.

Section 2. Districts. For any or all of said purposes it may divide the municipality into districts of such manner, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Section 3. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and design to lessen congestion in the streets; to secure safety from fire; panic and other dangers; to promote health and the general welfare; to provide adequate light and air, to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Section 4. Method of Procedure. The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality.

Section 5. Charges. Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change signed by the owners of twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred and twenty-five feet therefrom, or of those directly opposite thereto, extending one hundred and twenty-five feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Section 6. Zoning Commission. In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission to be known as the Zoning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report; and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission.

Section 7. Board of Adjustment. Such legislative body may provide for the appointment of a board of adjustment consisting of five members, each to be appointed for two years. Such board of adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this act. It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of three members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under any such ordinance or to effect any variation in such



ordinance. Such appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality.

Such appeal shall be taken within such time as shall be prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

Section 8. Remedies. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred thereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land or to prevent any illegal act, conduct, business or use in or about such premises.

Section 9. Conflict with Other Laws. Wherever the regulations made under authority of this act require a greater width or size of yards or courts, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards or courts, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute, or local ordinance or regulation shall govern.

Section 10. Repeal of Conflicting Laws. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section 11. The fact that there does not now exist any adequate statute relating to the planning and development of municipalities in this State creates an emergency and an imperative public necessity requiring that the constitutional rule which provides that bills shall be read on three several days shall be suspended and the same is hereby suspended and this act shall take effect and be in full force from and after its passage, and it is so enacted.

An able discussion of the established rules providing the test for the validity of an act of the nature of the one under consideration is found

in the case of *Spann vs. City of Dallas*, 111 Texas, 350, 235 S. W., 513. The question involved in that case was the validity of an ordinance of the city of Dallas prohibiting the construction of any business house within a residence district of the city, except with the consent of three-fourths of the property owners of the district, and on the approval of the building inspector of the design of the proposed structure. Mr. Chief Justice Phillips delivered the opinion of the court and ably discussed the principles of law governing the exercise of police powers. Among other things he says:

“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property strips it of an essential attribute and in actual result prescribes its ownership. The police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive. It is a necessary and salutary power, since without it society would be at the mercy of individual interest and there would exist neither public order nor security. While this is true, it is only a power. It is not a right. The powers of government, under our system, are nowhere absolute. They are but grants of authority from the people and are limited to their true purposes. The fundamental rights of the people are inherent and have not been yielded to governmental control. They are not the subjects of governmental authority. Constitutional powers can never transcend constitutional rights. The police power is subject to the limitations imposed by the Constitution upon every power of government; and it will not be suffered to invade or impair the fundamental liberties of the citizen, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to be interpreted in the light of the maximum of *Magna Charta* and the common law as transmuted into the Bill of Rights; and these things which those maxims forbid cannot be regarded as within any grant of authority by the people to their agents. In our Constitution the liberties protected by the Bill of Rights are by express provision ‘excepted out of the general powers of government.’ It is declared that they ‘shall forever remain inviolate,’ and that ‘all laws contrary thereto shall be void.’ The police power is founded in public necessity, and only public necessity can justify its exercise. The result of its operation is naturally, in most cases, the abridgment of private rights. Private rights are never to be sacrificed to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justly warrant the exertion of the power. The public health, the public safety, and the public comfort are properly objects of this high importance; and private rights, under reasonable laws, must yield to their security. Since the right of the citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating damages.”

By virtue of the police power merely the Legislature cannot impose restrictions upon the use of private property which are induced solely by aesthetic considerations and have no other relation to the health,

safety, convenience, comfort or welfare of the city and its inhabitants. Dillon on Municipal Corporations, 5th Edition, Volume 2, page 1058. The Legislature has no power by direct legislation or by delegation of legislative authority to enact laws to so limit and control the use of private property as to deprive the owner of the benefit and use thereof for causes other than the health, safety, convenience or welfare of the people. However, in the proper exercise of its police power governing bodies may promulgate reasonable restrictions as to the location, erection and maintenance of buildings. Corpus Juris, Volume 12, page 1265. The test to be applied to such legislation in order to determine its constitutionality is: Are the regulations within the police power of the legislative body? If the purpose to be served is purely of an aesthetic nature, then such regulations do not come within the police power of the State. On the other hand, if the regulations are concerned with the public welfare, health, safety or morals, then such regulations are properly within the police power of the State. For example, a regulation requiring an owner of a lot to use a certain portion of the lot for the purpose of building to conform to a building line may have for its purpose the beautifying of the city. If that be the only purpose that is served, the consideration is purely aesthetic, and such restriction would take from the owner of such property his constitutional right to use it and would not be in accordance with due process of law. Again, if a restriction be placed on the height to which buildings and structures may be erected, it may be the proper exercise of the police power of the State, if as a matter of fact the erection of buildings above a certain height would exclude the sunshine, light and air and affect the public health and increase the danger to property from fire.

The Spann case, above quoted from, involved the power of the city of Dallas by the enactment of an ordinance to prohibit the construction of any business house within the residence district of the city. The ordinance on its face shows that it was induced by aesthetic considerations and that it had no relation to the public health, safety, morals or welfare. In short, it was not within the scope of the police powers of the city, and the established rules provided for the test of its validity, as set out in the opinion of Chief Justice Phillips and hereinabove quoted, when applied to it, brought it into that class of legislation prohibited by the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 19, of the Constitution of Texas. Under the guise of its police powers, the governing body of the city attempted "to deprive the citizen of his property rights, without due course of law."

Analyzing the provisions of House Bill No. 227, it appears that the bill has for its purpose the promoting of health, safety, morals, or the general welfare of the people of municipalities. The Legislature would delegate to the governing bodies of the municipalities of the State the power to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residences or other purposes in those cases where the matters are related to the public health, safety, morals or

welfare of the people. For the purpose of aiding the municipality in the exercise of its police powers, it is provided that a zoning commission may be appointed and that the city may be zoned by the governing body upon recommendations made by such commission. In accordance with the purposes of the bill the governing body of the city has power to promulgate rules and regulations for the various zones that are related to those matters coming within the police power. The proposed law is broad in the delegation of the legislative authority to municipalities and does not undertake to prescribe specific rules and regulations for the zoning of cities, the erection of buildings therein, the repair of buildings, etc., but simply authorizes the city governing body to make such rules and regulations when related to those matters properly within the police power. It cannot be said that the bill authorizes the governing bodies of the cities to enact unconstitutional ordinances. On the other hand, it authorizes municipalities to promulgate rules and regulations within a certain scope for the purpose of promoting the public health, safety, morals and welfare; that is to say, it permits them to exercise police powers, and nothing more.

Cases may arise where the city governing body may exceed its authority under its general police powers in prescribing specific rules and regulations. However, we cannot anticipate that unconstitutional ordinances will be passed under the provisions of the bill. On the other hand, we must presume that the governing bodies of the cities of this State will exercise only those powers properly coming within constitutional limitations. If in an attempt to exercise its police powers the regulations promulgated are in contravention of constitutional guaranties, the particular enactment may be called in question. The test as to whether or not the requirements are based upon aesthetic considerations or considerations pertaining to the public health, safety, morals or welfare may then be applied. If public necessity does not justify the exercise of the power, then necessarily private rights will be abridged; but if the public health, the public safety, and the public comfort are involved, then private rights must not stand as an obstacle to the proper exercise of the police power. Under reasonable regulations they must yield to the security of the public health, safety, comfort and welfare.

The subjects mentioned for regulation are not necessarily related to the public health, safety, morals or welfare per se, but it cannot be said that conditions will never prevail where it will be a proper exercise of the police power to regulate and control such subjects. The authority to make a determination as to whether or not the control of such subjects is related to the public health, safety, morals or welfare is delegated to the municipalities of the State. The question is then necessarily one of fact to be determined under the facts and circumstances of the particular case. In making a determination as to whether or not an exercise of its police powers is proper, the governing bodies of the municipalities must apply each and every test set forth in the case of *Spann vs. City of Dallas*, supra.

We are of the opinion that the Legislature is not exceeding any constitutional limitation in delegating to municipalities authority to exercise the powers enumerated in House Bill No. 227, when such

powers are properly related to the public health, safety, morals or welfare of the people.

There are two portions of said act, however, that are, in our opinion, unconstitutional. That portion of Section 6 providing that the board of adjustment may issue a restraining order in certain cases, empowers such board to exercise judicial functions that are vested by the Constitution in the district and county courts of the State. We are of the opinion that the Legislature has no authority to clothe such board with such judicial function. Having given the power to issue injunctions to certain judicial bodies within this State, the Constitution, by necessary implication, prohibits the Legislature from clothing any other body with similar power.

Section 9 provides in effect that the provisions of an ordinance enacted under authority of the bill when in conflict with any other statute, or local ordinance or regulation, shall govern. We are of the opinion that this provision is invalid, for the reason that the Legislature is without authority to delegate to municipalities the right to suspend a statute.

In conclusion, we are of the opinion that House bill No. 227, except in the matters called attention to, is not in contravention of any constitutional provision.

Yours very truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2584, Bk. 60, P. 95.

CONSTITUTIONAL LAW—IMPEACHMENT—POWER TO VACATE IMPEACHMENT JUDGMENT.

It is beyond the power of the Legislature to enact a statute which would pardon a person convicted upon articles of impeachment by the State Senate; a legislative enactment purporting to cancel, remit, release and discharge disqualifications imposed by a judgment of the State Senate, acting as a court under Article 15 of the State Constitution, is void; the disqualification mentioned in Article 15, State Constitution, is constitutional in its nature and cannot be set aside by statute; Senate Bill No. 252 is unconstitutional.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 12, 1925.

*Hon. Lee Satterwhite, Speaker, House of Representatives, Austin, Texas:*

Complying with the request of the House of Representatives of the Thirty-ninth Legislature, expressed in a resolution adopted February 11, 1925, this opinion is given as to the constitutionality of Senate Bill No. 252, which reads as follows:

A BILL  
TO BE ENTITLED

AN ACT granting to every person against whom any judgment of conviction has heretofore been rendered by the Senate of the State of Texas in any impeachment proceeding, a full and unconditional release of any and all acts and offenses of which any such person was so convicted under and by virtue of any such judgment, and to cancel and remit any and all punish-

ment fixed or assessed by any such judgment of said Senate, including that of disqualification to hold any office of honor, trust or profit under the State of Texas, and declaring an emergency.

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

Section 1. That every person against whom any judgment of conviction has heretofore been rendered by the Senate of the State of Texas in any impeachment case, shall be and is hereby granted a full and unconditional release of any and all acts and offenses of which he was so convicted by said Senate of the State of Texas, upon any charge or proceedings of impeachment.

Section 2. That any and all penalties or punishment inflicted by or resulting from any such judgment heretofore rendered by the Senate of Texas, in any such impeachment case, including any disqualification to hold any office of honor, trust or profit under said State, shall be, and the same is hereby fully cancelled, remitted, released and discharged.

Section 3. Any person coming within the purview of this act may, should he so desire, apply to the Secretary of State for a copy of this act and upon such application the Secretary of State shall prepare and deliver to the applicant a copy of this act duly certified by him and shall make and preserve a record of such application, and the delivery of such certified copy, which shall become a permanent record of his office; provided that such application or delivery of a certified copy shall not be necessary in order to render this act effective, nor shall the failure of any person affected by it to make such application or receive such copy render this act invalid or inoperative as to any person coming within the purview thereof.

Section 4. The fact that the relief of persons from further operation of penalties and punishments inflicted under or by judgments in impeachment cases rendered by the Senate of the State of Texas is a Christian function to be exercised by the Legislature of Texas, and there being no law now in force granting the power to give relief in such cases, creates an emergency and an imperative public necessity which authorizes the suspension of the constitutional rule requiring bills to be read on three several days in each house, and said rule shall be and the same is hereby suspended, and that this act shall take effect and be in force from and after its passage, and it is so enacted.

The inquiry of the House of Representatives as to the constitutionality of this bill may be said to raise three questions as to the power of the Legislature:

(1) Does the vesting of the power to pardon by the terms of Section 11, Article 4, State Constitution, considered with other provisions of the Constitution, impliedly prohibit the Legislature from passing an act pardoning a conviction in an impeachment case?

(2) Has the Legislature power to pass an act which, in effect, sets aside and vacates the judgment of a court acting under the provisions of Article 15, State Constitution?

(3) Has the Legislature power to cancel, remit, release and discharge the penalty of disqualification imposed by the judgment of a court of impeachment under the provisions of Section 4, Article 15, State Constitution?

#### I.

The proper consideration of this question requires the construction of Article 4, Section 11, State Constitution, and other provisions, and a general discussion of the powers of the State Legislature.

In the organization of our government, it was intended that there shall be three separate and distinct departments of government, and that each shall be confided to a separate body of magistracy. This is best expressed in Section 1, Article 2, State Constitution, which reads as follows:

"The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, towit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

It is the purpose of that article, and the genius of this government, that the matters which are legislative shall be confided to one department of the State government, and those which are executive shall be confided to the Executive Department, and those which are judicial shall be confided to the Judicial Department. It is expressly provided that "no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances \* \* \* expressly permitted."

It is provided in Section 11, Article 4, State Constitution, defining the powers of the executive, that "in all criminal cases, except treason and impeachment, he shall have power, after conviction, to grant reprieves, commutation of punishment, and pardons; and, under such rules as the Legislature may prescribe, he shall have power to remit fines and forfeitures." Further provision is made that, "with the advice and consent of the Senate, he may grant pardons in cases of treason, and to this end he may respite sentences therefor until the close of the succeeding session of the Legislature."

Section 11, Article 4, State Constitution, should be construed according to the established rules of constitutional construction, and within its terms, considered with other provisions of the Constitution, should be found the intent of the people as to what department of the government they desire to vest with the power of pardon.

There can be no doubt but that it was the intention of the people in the adoption of the Constitution to vest in the Governor the power to pardon, after conviction, in all cases except treason and impeachment. It is evident that they intended to vest in the Governor and the Senate the power to pardon in cases of treason. It is equally evident that they intended to fix a prohibition against the Governor granting any pardon in cases of impeachment. It may be further said that it was the clear purpose of the people to vest in the Governor the power to remit fines and forfeitures, but under such rules as the Legislature might prescribe. And it is also certain that the people intended to vest in the Legislature the power to pass such rules as they might see fit to govern the remission of fines and forfeitures.

By the terms of Section 11, the sovereign people, in the adoption of the Constitution, have vested in the Legislative Department of the State government two distinct powers with respect to the pardoning power. In the Senate has been vested the power to act with the Governor in the granting of pardons in cases of treason. Without the advice and concurrence of the Senate, the Governor is powerless to relieve one from a conviction of treason. The remission of fines and forfeitures is entrusted to the Governor, but under such rules as the Legislature may prescribe. In the Legislature has been vested the power to provide rules by which fines imposed for violation of law may be remitted by the Governor.

Pardon, as used in our law, in its generic sense, means to include all of those acts of grace proceeding from the power which the people have either granted or vested with the right to extend clemency to those offending against the laws of society, and which acts of grace and mercy exempt the individual from the punishment which the law inflicts for a crime or offense which he has committed. In its such use, pardon includes the remission of fines.

A general and familiar rule of construction of State Constitutions is that, having defined or vested a given power in a department of the government, the people thereby reserve to themselves all other powers or prohibit the exercise of all other powers with reference to that particular subject. In *Taylor vs. Goodrich*, 40 S. W. R., 523, it is thus expressed:

“It is a familiar rule of construction in this State that when the Constitution defines the powers of an officer, he is confined to the powers enumerated, and the express mention of such powers negatives the existence of others.”

Other authority might be cited, but the principle is of such general knowledge as to render further citation of authority unnecessary.

The rule comes from the fact that our State Constitution is an instrument naming the duties and limiting the powers of governmental agencies, as distinguished from the Constitution of the United States, which is a grant of power, and from the fact that the residue of power is in the States or the people. The idea is clearly expressed in *Cooley's Constitutional Limitations*, page 11, in these words:

“The government of the United States is one of enumerated powers; the National Constitution, being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect, it differs from the Constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess.”

It may be stated as axiomatic that wherever a State Constitution vests in a department of its government a named power, that the very vesting of the power is in itself a limitation upon that department exercising any further rights in connection with that particular subject, than the power therein vested.

As particularly applied to impeachment, the Constitution inhibits the Governor from granting a pardon. The Constitution, in Article 15, provides for impeachment. In this article, the power of impeachment is vested in the House of Representatives. The Senate is vested with the power to sit as a court of impeachment and with the power to enter judgment. Thus, it is seen that certain powers with reference to impeachment are, by the express terms of the Constitution, vested in the Legislative Department of government. The Constitution vests in agencies of that department all the power with reference to impeachments, up to and including the entering of judgment, and provides penalties which the judgment may impose. This is a separate article. It is silent on the matter of pardon.

Therefore, the people, by the adoption of the Constitution, having vested in the Senate a power to act with the Chief Executive in pardoning for treason, and having vested in the Legislature the power to pre-



scribe rules and provisions by which fines may be remitted, and having provided in the Constitution an article on impeachment, but made no provision therein for pardoning one impeached, it may be safely said, under this rule of construction, that, upon reasonable construction, the people impliedly prohibited the Legislative Department of our government from the exercise of any further prerogative or rights in the granting of pardons, after conviction, than the right of the Senate to act with the Governor in pardoning treason and the power of the Legislature to make rules for remitting fines and forfeitures.

It is a familiar rule that, in the construction of constitutional provisions, they are to be construed so as to promote the objects for which they were framed, and to give effect to the intent of the framers and the people who have adopted them. To this end, the proceedings of the convention which framed the Constitution may be looked to in an effort to find the intent of the framers and the intent of the people. (Corpus Juris, Vol. 12, p. 711.) The people are supposed, when they adopt the Constitution submitted by the convention, to have adopted the reason and intent of its framers.

It will be found that on September 30, 1875, the committee to which had been referred the preparation of an article on the Executive Department in the new Constitution, presented their report. They submitted an article headed "Executive Department," and in this article is found Section 11, which is the same as Section 11, Article 4, as it exists in our Constitution today, except that the words "of punishment" were added after the word "commutation" each time that word appeared in the section as submitted. (Constitutional Convention Journal, page 230.)

On October 4, 1875, Mr. Erhard offered a resolution providing that the Legislature should regulate the pardoning power and fixing provisions as to a certificate of the district clerk to petitions for pardon, and that the pardon should be signed by the Governor and Attorney General, and attested by the Secretary of State. This resolution was referred to the Committee on General Provisions. It appears that, notwithstanding the resolution offered by Mr. Erhard seeking to fix the power of regulating the granting of pardons in the Legislature, that the Constitution was adopted providing that the Governor should exercise the pardoning power.

The convention had before it a resolution which, if embodied in the Constitution, would vest in the Legislature the power to regulate pardons; and which would, perhaps, include the power to grant pardons. The convention rejected the idea and submitted to the people a Constitution which vested the power to grant pardons, after conviction, in the Governor. The intent thus evinced is that it was the purpose of the framers of the Constitution to vest in the Chief Executive of the State the power to grant pardons after conviction. If the people, in the adoption of the Constitution, adopted the reason and intent and purposes of their convention, then the provisions of Article 4, Section 11, must be construed to limit the Legislature on questions of pardons to the powers therein expressly enumerated.

The courts will look to the history of the times in construing the Constitution with the view of ascertaining the objects and purposes and the condition inducing the adoption of the provision under con-

sideration. In the adoption of the Bill of Rights in the Constitution of the United States, its framers no doubt had in mind the history of the great state trials in England, the Star Chamber and the Inquisition, which is but the chronicling of judicial and executive outrages against the liberty of citizens. They no doubt had in mind the rules that obtained in the ancient Jewish and Roman civilization. With these incidents of history in mind, they embodied in the Constitution of the United States those guaranties of liberty which are intended to protect the citizen from the injustice of a tyrannical and despotic government. A counterpart of this Bill of Rights is found in our State Constitution. We are unwilling to assume that the men who framed the Constitution of Texas were mere borrowers from the writings of others, or anything less than great men of general information and men whose minds had been enlivened to the needs of society by an intimate knowledge of history. With the past experiences in mind, they adopted as part of our organic law those great guaranties of personal and political liberty that inure to the benefit of the proudest and, at the same time, to the humblest citizen in all the great State of Texas. The well known incidents of history may have, and likely did, operate on the minds of the framers of our Constitution in lodging the power of pardon. It is probable that in framing the Constitution of the United States, its authors excepted from the pardoning power of the President the crime of impeachment, because of the history of impeachment in England. There was a time in that kingdom when, because of favoritism, the king would shield a corrupt official from the shame and humiliation of impeachment, by executive pardon. This was attempted many times by the king to shield the wicked from the investigation and punishment of Parliament, until the Commons in 1679, protested against a royal pardon being pleaded in bar of impeachment, and by Act of Settlement, 12 William III, c. 2, it was declared "that no pardon under the great seal of England shall be pleaded to an impeachment by the Commons in Parliament." Did this experience in England operate upon the framers of the Constitution of the United States to exempt impeachment from the pardoning power? We have been taught to believe that the Bill of Rights was brought about by considerations of history. No man can gainsay the assertion that the limitation upon the pardoning power of the President was induced by like considerations. Is it not fair to conclude that the same reasons operated on the minds of our people in Texas, and that it was their purpose to expressly except from the power of pardon the offense of impeachment? When we consider that many thousands of our citizens live out their lives without being given honors of office, and that the extreme punishment imposed for impeachment is removal from office and disqualification from further holding office, that neither life, liberty or property are affected; it does not seem improbable that the denial of the privilege to hold office was deemed commensurate punishment for impeachable offenses, and that the intent was to prohibit the granting of pardon.

Our governmental institutions are largely the result of experiences in matters of government in England, and are peculiarly shaped after the ideals of government which, until recently, belonged almost ex-

clusively to the mind of citizens of this nation. The Constitution of Texas follows the wisdom of the Constitution of the United States.

The power of pardon as it exists in our country finds its history and origin in the power as exercised in England. The King of England granted pardons as the sovereign, and as an act of sovereignty.

In the Constitution of the United States, and in the Constitutions of most States in the Union, there is contained a provision which fixed the power of pardon in the executive with an express prohibition against pardon of impeachment. Courts look to like provisions in the Constitutions of other States and to the United States Constitution, in the construction of our own Constitution.

In the adoption of the Constitution of the United States, the power, such as was granted by the States in matters of pardon, was lodged in the Chief Executive of the Nation. No power of pardon is enumerated in the powers granted by these States to Congress, the legislative department of the Federal government. And the Federal government has only the powers enumerated in the Constitution of the United States. The President has power to grant pardons "for offenses against the United States, *except in cases of impeachment.*" (Const. U. S., Art. 11, Sec. 3.) The States in the gift of power did not extend their grant of sovereign powers to the right to pardon in cases of impeachment. It logically follows, under the rules of construction, that no power to pardon impeachments exists in any department of the Federal government; but that the power is reserved.

If that power was withheld from the Federal government, notwithstanding the fact that on impeachment a judgment of the National Senate, sitting as a court of impeachment, may impose a penalty disqualifying one from holding office (U. S. Const., Art. 1, Sec. 3), and taking into consideration the likeness in the wording in the Constitution of Texas, it seems a logical inference that the people of Texas intended that impeachment should know no pardon at the hands of the agencies created by the Constitution.

The question may be approached from a different angle. The statement is frequently made that the Legislature, coming fresh from the people, and being the representative of sovereignty, has the power to do anything which is not violative of some express prohibition of the Constitution, or of such prohibition of the Constitution as may, by a fair and proper interpretation, be said to be reasonably included within such prohibition. This statement is not literally correct. It may be granted that the Legislature is powerful to do anything of a legislative nature which is not expressly prohibited, or by fair and proper interpretation of the Constitution, impliedly prohibited. The position that the Legislature is any more the agency of the people than the other departments of the government is not consonant with the theory of our government. It was intended that we should have three separate and distinct departments of government; that each should be supreme in its sphere, and that they should be coordinate and independent, except in those cases where two of them were, by the express terms of the Constitution, called upon to act jointly in the exercise of some function of government. The frame of our government, the vesting of the legislative power itself, the organization of the executive authority, the erection of courts of justice, all create implied limitations upon the law-

making authority as strong as though a negative was expressed in each instance. It may therefore be said that this power of the Legislature, except where expressly or impliedly provided to the contrary, is limited to the exercise of functions properly belonging to that department of our government.

There is respectable authority that the power to pardon is an executive function.

"Is any legislative act needed to aid the President, or can any legislative act restrict him in the exercise of his functions? Plainly not. Pardoning is clearly a kind of executing, not of making laws. As far as authority is conferred upon the chief magistrate, it can neither be extended nor limited by Congress. A statute passed to give construction to the Constitution and confining its operation to particular classes of pardons would be a palpable usurpation of the judicial function." Pomeroy's Constitutional Law, Sec. 695, page 583.

Again,

"A pardon is confessedly a step in the execution of laws, and the American Congress, unlike the British Parliament, has no executive function. It may apportion punishment; it may enact that punishment shall be conditional; but when it has once decided on a penalty, its authority would seem to be ended. Remission is a proper act of the President, and is not legislative." Pomeroy's Constitutional Law, page 583.

"Can the Legislature bestow upon any officer other than the Governor the power to grant an unconditional pardon? \* \* \* Although questions have sometimes arisen whether a power properly belonged to one department of the government or another, yet there is no contrariety of opinion as to which department of the government the power to pardon properly appertains. All unite in pronouncing it an executive function. So thought the framers of our Constitution, and accordingly vested it in the chief executive officer of the State." 41 L. R. A. (N. S.), 1144.

"Since it is a principle of constitutional law that each of the great departments of government, viz., the executive, the legislative, and the judicial, shall in its sphere be supreme and independent of the others, and that a grant of general powers to one department constitutes an implied exclusion of the other departments from the exercise of those powers, it is the prevailing weight of judicial opinion that a grant of the pardoning power by the Constitution upon the executive department of either the State or Federal government precludes the legislative department of that government from exercising or controlling that power. In other words, that the pardoning power is solely an executive function, and cannot be exercised, limited or impaired by the Legislature." 24 Am. & Eng. Encyc. of Law, 557.

In *United States vs. Klein*, 13 Wall., 128, the intimation is found that the legislative department has no pardoning power, even though the President cannot pardon impeached persons.

"It is the intention of the Constitution that each of the great coordinate departments of government—the legislative, executive, and the judicial—shall be in its sphere independent of the others. To the executive alone belongs the pardoning power; and it is granted without limitation. Pardon includes amnesty."

In *United States vs. Wilson*, 7 Peters, 159, Chief Justice Marshall said:

"A pardon is an act of grace proceeding from the power intrusted with the execution of law, which exempts the individual from the punishment which the law inflicts for a crime he has committed."

This definition has been frequently quoted, and seems to be a standard definition of the word in its generic sense as used in the law.

As to the reason for vesting the power in the one intrusted with the execution of the laws, Story on the Constitution, Vol. 2, Sec. 1498, says:

"The reason in favor of vesting it (the pardoning power) in the Executive Department may thus be stated. A sense of responsibility is always strongest in proportion as it is undivided. A single person would, therefore, be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law; and the least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The consciousness that the life or happiness of an offender was exclusively within his discretion, would inspire scrupulousness and caution; and the dread of being accused of weakness or connivance would beget circumspection of a different sort. On the other hand, as men generally derive confidence from numbers, a large assembly might naturally encourage each other in acts of obduracy, as no one would feel much apprehension of public censure."

This seems to have been taken by the author of this standard text on the Constitution, from the Federalist, No. 74.

The Legislature is authorized, under the Constitution, to make, amend or repeal laws. That power is to be employed in the providing of rules of conduct for the government of society, within the limitations contained in the Constitution.

Texas has never expressly vested this power to pardon elsewhere than in the executive, except in one instance. In the Provisional Constitution of the Republic of Texas, of 1835, it was expressly conferred upon the law-making body. The omission of this provision or a similar provision from all subsequent Constitutions, under the proper rules of constitutional construction, must be taken as evidence of an intent to impliedly prohibit the exercise of this power by the Legislature.

Upon the authority that the power to pardon, historically, has been exercised by the executive; that it is by the better weight of legal authority regarded as an executive function, and because of the reasons for lodging the power in the executive; we are constrained, under the terms of the Constitution of Texas, to conclude that the Legislature is prohibited from exercising this function of government.

## II.

In the matter of impeachment, the Constitution provides the mode of impeachment. In this matter, the Constitution of Texas follows the provisions in the Constitution of the United States, and takes the existing institution of the Senate as the forum for trial. This procedure, apparently, was taken in large measure from the existing precedents and procedure of the English Parliament. The hearing before the Senate is in the nature of a trial—a judicial proceeding. The weight of authority seems to regard the hearing as a trial in the form of a judicial proceeding. The Senate, for this purpose, becomes a court. Our Constitution (Article 15, Section 2) provides that "The impeachment of the Governor \* \* \* shall be tried by the Senate." Article 15, Section 3, Constitution of Texas, provides that "when the Senate is sitting as a court of impeachment, the Senators shall be on oath or affirmation, impartially to *try* the party impeached; and no

person shall be *convicted* without the concurrence of two-thirds of the Senators present." It further makes provision for the penalty to be imposed by the "*judgment in cases of impeachment.*" The power to try and convict a citizen and enter a judgment is of the very essence of judicial power; the tribunal is in the very nature of things a court, and the determination of the issues presented is a judgment.

"The Senate, when organized for the trial of an impeachment, is a court of exclusive, original and final jurisdiction; its judgments cannot be reversed by any other tribunal." 15 Am. & Eng. Encyc. of Law, 1064.

"The subject of impeachment, like the power of the Legislature to punish for contempt, has a different character from subjects requiring the action of both branches of the Legislature and the Governor in order that laws may be enacted. The power conferred upon the assembly to impeach the Governor is a judicial power." *People vs. Hays*, 143 N. Y. Supp., 325.

"The accusing power is the House; the judicial power is the Senate." Tucker on the Constitution, Vol. 1, p. 409.

"The trial of impeachment is peculiarly a judicial act, yet the Senate is the only court for that purpose." Pomeroy's Constitutional Law, p. 118.

The argument of Judge Benjamin R. Curtis, given on the impeachment trial of Andrew Johnson, Vol. 1, page 409, is reasonable and persuasive authority, and clearly states the theory that the Senate in the trial of impeachment cases acts as a court. It is quoted:

"I desire to refer to the sixty-fourth number of the Federalist, which is found in Dawson's Edition, on page 453:

"The remaining powers which the plan of the convention allots to the Senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments, as in the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will, therefore, conclude this head with a view of the judicial character of the Senate.'

"And then it is discussed. The next position to which I desire the attention of the Senate is, that there is enough written in the Constitution to prove that this is a court in which a judicial trial is now being carried on. 'The Senate of the United States shall have the sole power to try all impeachments.' 'When the President is tried, the Chief Justice shall preside.' 'The trial of all crimes, except in cases of impeachment shall be by jury.' This, then, is the trial of a crime. You are triers, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution. There is also, according to its express words, to be an acquittal or a conviction on this trial for a crime. 'No person shall be convicted without the concurrence of two-thirds of the members present.' There is also to be a judgment in case there shall be a conviction.

"Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury; a conviction, if guilt is proved; a judgment on that conviction; a punishment inflicted by the judgment for a crime; and this on the express terms of the Constitution itself."

This argument was founded on provisions in the Constitution of the United States which have heretofore been pointed out as similar to the provisions of the Constitution of Texas with reference to the trial of impeachment cases.

Likely, the latest expression of any court or text writer on the character of the Senate when sitting in an impeachment trial, is by the Supreme Court of Texas in the case of *Ferguson vs. Maddox*, 263 S. W. R., 890:

"The Senate, sitting in an impeachment trial, is just as truly a court as is this court. Its jurisdiction is very limited, but such as it has is of the highest. It is original, exclusive and final. Within the scope of its constitutional authority no one may gainsay its judgment."

No provision is made for the summoning of witnesses or for the administering of oaths or affirmations to witnesses. This is inherently the power of a court, and in impeachment cases the Senate as a court has that power. No provision is made for enforcing its lawful orders, but courts must have that power to render their orders efficacious, and the Senate as a court in cases of impeachment inherently has that power. No particular rule of procedure is defined by the Constitution as binding on the Senate, but the Senate, sitting as a court of impeachment, inherently has the power to adopt its own rules of procedure. No express words of the Constitution or statutes define impeachable offenses. Apparently, we have a court without a law to enforce or construe. But the Senate, as a court of impeachment, may nevertheless convict. To this end, it has the power to determine what state of facts may constitute an impeachable offense. In this matter it is not bound by the charges made in the articles of impeachment preferred by the House. It may sustain demurrers or exceptions to the sufficiency of such charges, or hold that, though the same be true, the acts alleged do not constitute an impeachable offense. It may be said that the usages and customs of the English Parliament are adopted. However this may be, the fact remains that it adopts rules, and concludes the kind and quality of conduct that warrants or justifies an impeachment.

The logical conclusion follows that, in the matter of impeachment, the sovereign people of this State, by the constitutional provisions, have vested and confided in that body for the time all attributes of sovereignty which in republics are spoken of and treated as judicial powers. The matter of determining the procedure and the law of impeachable offenses in a sense is of a legislative nature, but does not proceed from the general legislative power. The power emanates from the constitutional provision fixing the tribunal for the trial of impeachments. It is not, in any sense, a part of our existing judicial department, as such, but in this matter it exercises functions of government which are judicial in their nature, because the people clearly had a purpose to effectively provide for the impeachment of officers guilty of offenses warranting removal from office. And having vested that power in the State Senate as a court, they vested in it whatever power might be necessary to accomplish the plain and evident purpose of the people.

The Legislature does not bring into existence the judgment of impeachment by a legislative act, but the court brings this judgment about by judicial proceedings and acts. It is apparent that, in so far as the proceeding is judicial, the Legislature is without power by statutory enactment, to add to or take from the judgment of the court of impeachment.

The very terms of Article 2, Constitution of Texas, dividing the functions of government between three departments, are sufficient to authorize the statement that the Legislature is powerless by legislative enactment to vacate or set aside judgments of the courts. There is further authority for this, with regard to impeachment judgments. The Constitution vests in the Legislature, as such, only legislative func-

tions, and in so doing it is limited to the exercise of the same. The Legislature is not concerned, as a Legislature, in the vacating of judgments proceeding from a power invested by the people with the judicial authority under the terms of the Constitution.

The provisions of Senate Bill No. 252 attempt by legislative enactment to vacate a judgment. Section 2 of the bill reads:

"Section 2. That any and all penalties or punishment inflicted by or resulting from any such judgment heretofore rendered by the Senate of Texas, in any such impeachment case, including any disqualification to hold any office of honor, trust or profit under said State shall be, and the same is hereby fully cancelled, remitted, released and discharged."

This provision would cancel, remit, release and discharge a judgment resulting from a judicial investigation and finding of facts, a judicial determination of principles of law, and a judicial application of the facts to the principles of law, and this all included in the judgment. No such authority exists in the Legislature.

### III.

In addition to what has been said above, we are of the opinion that the impeachment article (Article 15, State Constitution) is a restriction on the power of the Legislature to enact such a law. The article is separate and distinct, and is competent within itself. Its terms authorize a judgment of removal from office, and a disqualification from holding any office of honor, profit or trust under this State. The finding of guilt of the acts charged in the articles of impeachment would, from the finding itself, and the entering of judgment thereon, carry with it removal from office, according to the weight of authority. It could not be urged with any degree of force that the Legislature could, immediately following the finding of guilt and the entering of judgment by a court of impeachment adjudging the respondent guilty, meet and pass a statute restoring the ousted official. Such a statute would contravene the evident intent of the Constitution. It would destroy the consequences of the finding of fact and the entering of the judgment, a consequence which the Constitution fixes as the result of such finding and judgment.

The better weight of authority seems to have it that the provision for disqualification from holding office is a penalty which the court of impeachment, in its discretion, may or may not impose. The court has an option in the fixing of this penalty. If the court determines to enter a judgment disqualifying a person from further holding any office of honor, profit or trust under this State, it does so without the aid of assistance or action of the Legislature. The status of the person against whom the judgment is entered springs as a constitutional disqualification, brought about by a judgment entered under authority of the Constitution. The provision is not self-functioning, but when brought into operation by the judgment, the disqualification is of a constitutional character. The provision could not be given effect if it should be held that the Legislature may, by statute, set aside a judgment or destroy its effect. The power vested in a court of impeachment could not be exercised if the Legislature is at liberty to enact a statute setting aside and voiding the judgment.



A law-making body, under our system of government, may pass laws upon subjects within its authority, defining rights and duties. After the judgment is entered, it is no longer a law-making function to set aside such judgment.

This, then, is not within the proper legislative province. The Legislature could not provide a tribunal for the trial of impeachments, for the Constitution has made that provision. The Legislature could not provide by statute for the penalty upon conviction, for the Constitution has fixed the penalty. When the penalty of disqualification has been imposed, such is done in the exercise of a constitutional right by the court of impeachment, and the Legislature cannot transcend its power to remove the effects of the judgment or annul the penalty.

It is fundamental that the Legislature cannot remove the disqualification from holding office by reason of dueling, fixed by Article 16, Section 4, of the State Constitution. In impeachment, the Constitution imposes the disqualification upon the court's entering the judgment, and it is then beyond the Legislature's power to remove it.

There is no established precedent in a case of this character, and, so far as we have been able to find, no case adjudicates the question. Our conclusions are based upon what we believe to be fundamental principles of law.

You are therefore respectfully advised that the measure inquired about in the resolution of the House of Representatives, is unconstitutional and void, and would not remove the disqualification resting upon any person against whom such a judgment had been entered by a court of impeachment.

In our consideration of the question presented, we are indebted to a number of very able lawyers who have contributed briefs and citations of authorities supporting one side of the question or the other. We have given all the more careful considerations to the conclusions expressed herein, because the bill in question has already been passed in the Senate, where it was advocated by eminent attorneys for whose judgment on questions of law we entertain the utmost respect. However, from our research on the question, we believe that reason and logic lead against all resistance to the conclusion that the enactment of the proposed bill is beyond the authority of the Legislature of this State.

Respectfully submitted,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2625, Bk. 61, P. 194.

CONSTITUTIONAL LAW—EXPENSES OF IMPEACHMENT SESSION OF THE  
HOUSE OF REPRESENTATIVES.

1. The financing, or underwriting, of the expenses of a session of the House of Representatives for impeachment purposes from private or individual sources is unauthorized and unwarranted as against public policy.

2. There would be no authority to issue warrants against the exhausted appropriation made for the contingent expenses of the Thirty-ninth Legislature, to cover compensation of members of the House while attending an impeachment session, should it be called by the Speaker.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 4, 1925.

*Hon. Lee Satterwhite, Speaker of the House of Representatives,  
Amarillo, Texas.*

DEAR SIR: Receipt is acknowledged of your communication of date December 1, 1925, reading as follows:

*"Hon. Dan Moody, Attorney General, Austin, Texas.*

"MY DEAR ATTORNEY GENERAL: Someone has raised the question that if the members of the House of Representatives should convene upon a proclamation issued in regular form by the Speaker the members could not accept any pay for their services from funds loaned by individuals for that purpose. With that question in mind, may I submit for your interpretation the following questions:

"1. It being the opinion of the Attorney General in answering the query as to the legality of the House convening as provided in the Act of the Thirty-fifth Legislature, that the House may do so, but would be prohibited from appropriating funds to pay expenses; therefore, can the expense for such a session be underwritten by individuals and members paid the same per diem and mileage as is provided by law for regularly called special sessions of the Legislature? (See Title 100, page 1705, R. C. S., 1925.)

"2. The contingent fund of the Regular Session of the Thirty-ninth Legislature having been exhausted, would it be permissible to issue warrants against that fund to members of the House convened for investigation purposes by proclamation issued by the Speaker, as provided by law, and trust to a succeeding Legislature to appropriate funds to pay such warrants?

"3. In the event a fund should be created through a loan by individuals to pay the expenses of holding a session of the House, which had been convened by proclamation of the Speaker as provided by law, would the law prohibit the Speaker and other members of the House from pledging their efforts to prevail upon a succeeding Legislature to appropriate funds to reimburse those who might make the loan, the claim to be filed with the Committee on Claims and Accounts, just as any other claim might be filed?

"Will appreciate your earliest possible attention to those questions.

"Very sincerely yours,

(Signed) "LEE SATTERWHITE,  
"Speaker, Thirty-ninth Legislature."

Your first question must be answered in the negative. The financing of a session of the House of Representatives from private or individual sources is unauthorized and unwarranted as against public policy. The House of Representatives is an agency of the Government created by and in behalf of the people. The people are clothed with sovereign power ample and sufficient to raise the necessary funds to pay the expenses of any governmental agency. The limitation upon power of taxation goes no further than to hold that it must be within what is reasonable and necessary for the proper public purposes as far as the people themselves are concerned. At no place in the Constitution or the laws is any provision made for financing or underwriting the expenses of judicial, legislative or executive agencies of the State government by private sources, and in the manner proposed, and the wisdom of omitting any such provision is obvious. The policy of this State and the system of popular government enjoyed is opposed to the financing of any governmental agency by private subscription. It is the purpose of our system of taxation to provide funds in an equitable manner to meet the necessary expenses of the administration of public affairs through the public officers chosen by the people.

Our laws are so framed and the structure of our government has been so built as to insure as nearly as possible independence on the part of public officials and to furnish them an opportunity to discharge their duties without even an appearance of evil. If private persons or interests may finance our governmental bodies and thus encourage or discourage financially their functioning, the very purpose of supporting public institutions by a system of taxation is destroyed. No intimation is made by this opinion that the personnel of the governmental agency proposed to be supported by private subscriptions in this particular instance would not be unaffected and uninfluenced by that fact, but such an action is contrary to the established public policy of this State. Neither do we intimate that persons who might furnish money by private subscription for the purpose of defraying expenses of such agency of the government would be actuated by anything other than altruistic motives, but the law supposes that in the payment of taxes sufficient money will be raised from such sources to defray all cost of administering the government.

We cannot escape the conclusion that such a practice is fraught with danger to the public welfare, and it is so far contrary to our system of government and its institution and the general purpose of our government to promote absolute independence of action upon the part of public officials, as to be contrary to the sound public policy and is unwarranted and unauthorized. The fact that the people in their sovereign capacity, or those constituting the de facto government through failure to provide funds, have made it difficult or inconvenient for a public agency to meet and function cannot be urged in justification of a practice which would in a measure amount to government by private interests rather than a government by the people. It might be plausibly argued that a government capable of being privately financed might become a government privately controlled.

The foregoing is, of course, said without impugning the motives of anyone in connection with the present situation. On the other hand, we are confident that there exist no improper motives on the part of any person in suggesting that a session of the House of Representatives be financed privately. We are sure that only the public welfare has been taken into consideration, but the above remarks seem to be appropriate in support of our conclusion.

Your second question is as to the issuance of warrants against the exhausted appropriations made for the contingent expenses of the Thirty-ninth Legislature. In reply to this question you are respectfully advised that there would be no authority to issue warrants against the exhausted appropriation just referred to in the event a session of the House should be convened by the Speaker. There is no authority in law to issue warrants against an appropriation which is exhausted. We assume of course that you have no reference to deficiency warrants issued against a deficiency granted by the Governor, to supplement an exhausted appropriation.

It would seem unnecessary to answer your third question in view of what has been said in answer to your first and second questions.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

Op. No. 2644, Bk. P. 149.

RIGHT OF CORPORATION TO ISSUE STOCK OF NO PAR VALUE WITHOUT VOTING POWER—RIGHT TO ISSUE STOCK OF NO PAR VALUE WITH AN UNEQUAL VOTING RATIO—THE NON-PAR LAW, CHAPTER 19A, REVISED CIVIL STATUTES, 1925, CONSTRUED.

1. A corporation under Chapter 19A, Revised Civil Statutes, 1925, may issue stock of no par value, having no right to vote.
2. A corporation under the provisions of Chapter 19A, Revised Civil Statutes, 1925, may issue stock having no par value divided into classes, which classes possess an unequal voting ratio.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 26, 1926.

*Hon. Emma Grigsby Meharg, Secretary of State, Capitol.*

DEAR MADAM: Replying to several letters and oral requests from your department, we are answering herewith the following questions presented by you in the course of your official duties.

1. May a corporation under the provisions of Chapter 19A, Revised Civil Statutes, 1925, issue stock having no par value without the right to vote?
2. May a corporation under the provisions of Chapter 19A, Revised Civil Statutes, 1925, issue stock of no par value divided into classes, which classes possess an unequal voting ratio?

It has long been recognized as the rule in this State and in every other State that a corporation is but a creature of law, possessing only those powers and rights which are conferred upon it under the charter and the law of its creation. The powers of corporations are those calculated to effect the objects for which the corporation was called into existence. The corporate franchise being a privilege conferred upon individuals by the State, it clearly follows that the State may demand that its creature submit itself to such regulations as the State may see fit to impose. The State of Texas in its wisdom has seen fit to construe strictly its laws regulating private corporations. It does not, however, follow from this that it is necessary in order to safeguard the interests of the public, which is the only reason for action by the State, to adopt a rule of construction which would substantially nullify legislative action. The duty of regulating corporations devolves upon the Legislature, and where such regulation has been announced in statutory form, it should be given effect and not treated as a vain and fruitless effort.

We subscribe fully to the general doctrine that legislative authority must be shown before a corporation may perform any act trenching upon public policy. We do not, however, consider that this authority must be conferred in language meticulously exact and susceptible of only one construction into whatever shape or form it may be tortured by ingenious hypothesis. Ineptitude of expression should not necessarily be fatal to intention; form should not be permitted to nullify substance. It is enough, in our opinion, if the law indicates with sufficient clarity the intention of the lawmakers.

We turn, then, to Chapter 19A of the Revised Civil Statutes, 1925, to determine the following question: Does Chapter 19A grant to private corporations created for profit the right to issue stock of no par

value without the right to vote and to issue such stock divided into classes, which classes possess an unequal voting ratio? We have concluded that this authority is granted by Chapter 19A. With the wisdom or unwisdom of this grant, we are in no way concerned. Such matters are for the consideration of the Legislature. It is the prerogative of law-making bodies and propriety forbids that upon that prerogative we should encroach.

Section 1 of Chapter 19A, which is Article 1538a, Revised Civil Statutes, 1925, contains the following provision:

"Upon the organization, under the laws of this State, of any private corporation for profit, other than corporations authorized to conduct a banking or insurance business, or upon the amendment of the charter in the manner now or hereafter provided by law of any private corporation for profit now organized under the laws of this State other than corporations authorized to conduct a banking or insurance business, provision may be made for the issuance of shares of its stock without nominal or par value. Every such share shall be equal in all respects to every other such share, except that the charter or any amendment thereof may provide that such shares should be divided into different classes, the shares of each class to have such preferences, designations, rights, privileges and powers and be subject to such restrictions, limitations and qualifications as shall be stated in the charter or any amendment thereof."

To our minds, in order to find that this statute does *not* authorize the creation of stock having no par value and with such voting power as may be prescribed by charter or amendment, it is necessary to engraft upon it an *exception*, to say that the statute does not mean what it says, but, on the contrary, means what it did not say and means something diametrically opposed to what it *actually did say*. What is in the language of the statute? It first provides that *stock having no par value* may be issued; second, it provides that *in the absence of provision in the charter or any amendment thereof* "every such share shall be equal in all respects to every other such share"; and, third, it provides that by charter or amendment thereof the shares of each class may have "*such preferences, designations, rights, privileges and powers and be subject to such restrictions, limitations and qualifications as shall be stated in the charter or any amendment thereof.*" Thus the statute lays down a rule of stock-equality and then provides that this rule may be abrogated by the charter or any amendment thereof. What authority can justify us, *who are not lawmakers*, in saying that this provision shall not apply to voting power? The very expression, "the right to vote," expresses the undeniable fact that the right to vote is a *right*; any other construction is absurd, and is it not provided that the stock shall have such *rights* as shall be stated in the charter or any amendment thereof. Is not the "power to vote" a power? Is not voting "a privilege"? May not all these things be limited, restricted and qualified by charter and amendment under the provisions of this act? How may we be justified in saying that the Legislature in providing that the stock should have such rights, privileges and powers as shall be stated in the charter or any amendment thereof *intended* to say "shall have such rights, privileges and powers as shall be stated in the charter or any amendment thereof and *the right to vote*, which right is not subject to the restrictions, limitations and qualifications which we have authorized."

As a generalization, it may be stated that the rights of stockholders are:

(a) The right to vote, which is to participate by voting in the management of the corporation.

(b) To share in the division of the earnings of the corporation; and

(c) To participate ratably in the division of the assets of the corporation upon its dissolution.

All of these are valuable rights and privileges, and all of these are surely included in the phrase "rights, privileges and powers." The statute has not said that *some* of these "rights, privileges and powers" may be limited, restricted and qualified, but the language is comprehensive. It is certainly broad enough to include, and, unless an *exception* be engrafted upon it, manifestly *does* include, all such "rights, privileges and powers." We cannot remake this statute by saying that the Legislature *intended* an exception which it has not expressed.

While we gravely doubt the propriety of any examination into the *purpose* of a statute so plain and unequivocally worded, we will consider this very briefly. It is apparent that the primary purpose was to authorize the issue of classes of stock, which classes should sell for different prices. Manifestly, then, it was intended that different classes of stock should be of different values. The value of stock can only be determined by the "rights, privileges and powers" which it carries with it. So it appears, and the language of the statute is plain, that it was intended that such different and unequal "rights, privileges and powers" should exist in the different classes of stock. In effect this statute confirms in the people of this State a freedom in the right to contract. This freedom existed at common law, and upon this point we deem it unnecessary to refer to authority. The State through its proper instrumentality, the Legislature, has announced its policy in the passage of this law, and there being no constitutional objection to such a law, it must govern and control. Under this law it is permissible, and it is reasonable to suppose that this will be done, to sell stock having no power to vote at a lower price than stock having the power to vote. Under this law it is possible to sell stock at its *true value*. A corporation may sell what it desires to sell and no more. A man may purchase precisely that character of interest in the corporation which he desires to purchase and no more.

We do not presume to take part in the war now being waged among text-writers as to the advisability of this legislation with regard to the advantageous conduct of business. We decide only that the thing is done, and there, for our purposes, the matter ends.

Our understanding of Section 1 of Chapter 19A is, we believe, reinforced by an examination of Section 8, which provides that "the preferences, rights, limitations, privileges and restrictions granted or imposed with respect to any share of outstanding stock shall not be impaired, diminished or changed without the consent of the holder thereof," which clearly implies that there may be different rights, privileges and powers in classes of stockholders and advances as the only limitation a salutary provision that the rights already existing of the stockholders of any particular corporation which is to be converted into a non-par corporation shall not be disturbed without their consent.

We further believe that the consistent meaning placed upon statutes

of this nature is apparent from the holding of the case of *State vs. Swanger*, 89 S. W., 872; in this case the court without any hesitation assumed that a statute very similar to Chapter 19A conferred the right to regulate voting power. The case in question turned upon the validity or invalidity of such a grant considered in the light of the Constitution of that State. *We have found no case where a similar statute has been construed not to grant this power to restrict the right and privilege of voting.*

*People vs. Emmerson*, 134 N. E., 707, is also in point, and shows that in the absence of constitutional or statutory provisions to the contrary the right to prescribe such restrictions and limitations existed in the incorporators.

We are, of course, confronted with the proposition that if stock of this nature may be issued the internal management of corporations will be seriously complicated, for instance, in the dissolution of a corporation or an increase or decrease of the capital stock thereof. It is to our minds absolutely certain that this can have no restraining or limiting effect upon the statute. These statutes were passed prior to the passage of the non-par law and apply to stock having a par value. The statutes in question will govern non-par corporations, but they must be qualified by Chapter 19A, which is the last expression of the legislative will.

We repeat again that we are not concerned with the results which may flow from the issue of this stock, if such issue be authorized by law. It is, however, quite plain to us that no seriously disturbing effects will follow, and, in any event, we cannot permit the fact that the Legislature in passing this act did not pass the best possible act to achieve results and did not in each instance consider the harmonious interlocking of statutes, to nullify entirely their well considered decision expressed in the act itself.

Accordingly, you are advised that it is the opinion of this Department that a corporation under the provisions of Chapter 19A, Revised Civil Statutes, 1925, may issue stock of no par value having no right to vote.

With regard to your second question, it must follow from what we have said that under the provisions of Chapter 19A, a corporation may issue stock of no par value divided into classes, which classes possess an unequal voting ratio. It is proven that the existence of such stock may complicate even more than the existence of stock *entirely* without voting power the internal management of corporations, but we perceive no distinction which would justify us in holding that while stock might be issued with no right to vote, stock divided into classes, which classes possess an unequal voting ratio, could not be issued.

We desire to acknowledge the assistance courteously tendered us in the form of briefs and oral argument by Messrs. Chas. L. Black, M. W. Townsend, W. H. Flippen, John T. Gano, Eugene Locke, Ralph Feagin and Brady Cole.

Respectfully submitted,

PAUL D. PAGE, JR.,  
Assistant Attorney General.

Op. No. 2635, Bk. 61, P. 143.

CORPORATIONS—FOREIGN CORPORATIONS—OIL AND GAS—PIPE LINE.

1. That Chapter 15, Title 32, refers only to domestic corporations and then only to such corporations as desire to engage under the provisions therein contained in the business of transporting oil and producing oil.

2. That a company desiring to engage in the pipe line business or the transportation of oil may be created under the provisions of subdivision 36, Article 1302, and have all the rights vouchsafed to it in Title 102, R. S. 1925.

3. That a company desiring to engage in the business of maintaining an oil company may be created under the provisions of subdivision 37, Article 1302.

4. That a corporation cannot be created in Texas to engage in the business of an oil company and a pipe line company together except under the provisions of Chapter 15, Title 32.

5. That a foreign corporation may not be admitted under the provisions of Section 15, Title 32, but a foreign corporation may be admitted under the provisions of subdivision 36, Article 1302, with the privileges accorded to it in Chapter 102 to engage in the pipe line business; and a foreign corporation may be admitted to maintain an oil business under the provision of subdivision 37, Article 1302, but may not be admitted under any law to engage in both businesses.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 28, 1926.

*Mrs. Emma Grigsby Meharg, Secretary of State, Austin, Texas.*

DEAR MRS. MEHARG: The Attorney General has received your letter of January 26th together with a supplemental communication of January 27th in which you ask us for our opinion upon the question of the right of a foreign corporation engaged in the operating an oil pipe line to obtain a permit to do business in Texas. In this connection you have asked us generally to advise you with reference to the construction of Chapter 15, Title 32, R. S. 1925.

We have noted the suggestion that under the proper construction of the laws pipe line companies must operate in Texas, if at all, under the provisions of Chapter 15 above mentioned, and that Chapter 15 is limited in its operation to domestic corporations.

We have made a careful study of the laws involved in answering your questions and have given particular attention to the reasons stated by you in your letter of January 27th, and we beg respectfully to advise that the opinion of this Department is that a foreign corporation engaged in the business of transporting oil, gas, salt brine and other mineral is entitled, after complying with the provisions of the law, to a permit to do business in Texas.

Subdivision 36 of Article 1302, Revised Statutes, 1925, provides for the creation of domestic corporation

"to store, transport, buy and sell oil, gas," etc.

Subdivision 37 of this same article provides for the creation of corporations in Texas:

"To establish and maintain an oil business with authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, petroleum and gas," etc.

It will be noted that under the above quoted subdivisions of the purpose article of our corporation statute the creation of a company to do an oil business is authorized and the creation of a company to do a pipe



line business is authorized. Under a line of decisions with which you are thoroughly familiar, a corporation could not be created having the power to maintain an oil business and at the same time a pipe line business.

Article 1529, R. S. 1925, specifically authorizes a foreign corporation to enter Texas under a permit in these words substantially:

"Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State of the United States, desiring to transact or solicit business in Texas shall file a copy of its articles of incorporation and thereupon the Secretary of State shall issue a permit. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes."

Under the language of this article and the policy of your Department, and the decisions of the courts, a foreign corporation could, prior to the enactment in 1917 of Article 1498, in said Chapter 15, have been admitted to the State to do either an oil business or a pipe line business, but not both businesses. We, therefore, take it that except for the passage of this act in 1917 no question could have been raised in the instant case had the company applied for a permit to transact a pipe line business. Chapter 16, which embraces the Act of 1917, above referred to, sets out with the declaration that it embraces corporations created for the purpose of *transporting* oil and gas and *producing* oil and gas. This is a peculiar and special provision of our law, in that it combines two of the purposes which were theretofore enumerated separately in the purpose article of the general corporation statute. It was a remedial statute and seems to have been designed to create corporations or to authorize the creation of corporations with this combined power, but at the same time it set up for the regulation of corporations of this character certain restrictions and limitations which did not apply to other corporations. The manner in which these two separate businesses may be combined is though the separate incorporation of its pipe line business and the ownership of the shares of stock of such pipe line corporation by a parent company, which parent company may engage in the oil business. Or such parent corporation may, in lieu of engaging directly in the oil and gas producing business, purchase and own the stock of another corporation engaged in that business, but may not own more than one oil company nor more than one pipe line company under the laws of this State or any other single State. Thereupon the statute sets out this significant provision in Article 1502:

"No corporation organized in any other State or country shall 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."

This last provision effectively confines the operation of Chapter 15 to companies desiring to engage in both the oil business and the pipe line business to Texas domestic corporations. A foreign corporation cannot avail itself of the provisions of this chapter. On the other hand, there seems to be in the language an assertion almost explicit that foreign corporations may be admitted to operate these businesses under other laws.

There is no express repeal in any of the statutes which now com-

prise Chapter 15 of either subdivision 36 or subdivision 37 of Article 1302 above referred to, nor is there anything which would by a necessary implication operate to repeal these subdivisions. Chapter 15 is designed primarily for the corporation which is to engage in the oil business and the pipe line business. Its somewhat cumbersome machinery would hardly be a desirable working basis for a company desiring merely to engage in the oil business nor one desiring merely to engage in the pipe line business, and indeed the manner of organization and operation of these dual companies could not apply to the operation of a corporation created to do either single business. We are, therefore, of the opinion that these two subdivisions remain intact, unaffected in any measure by the provisions of Chapter 15, Article 1504 contains the express stipulation that no provision thereof shall be construed as limiting, modifying or repealing any part of the law regulating oil pipe lines.

It is also to be noted that subdivisions 36 and 37 are carried into the revision of 1925 along with the provisions of Chapter 15, so it was quite evidently the intention of the Legislature in this recodification to recognize that they are both at this time effective and operating laws in this State.

Title 102 of the 1925 Revision, including particularly Article 6022, deals at length with the regulation and control of the producing and transporting phases of the oil business and sets out with some particularity the limitations and restrictions under which pipe line companies operate. This chapter specifically sets out that if any company organized to do a pipe line business shall accept the regulatory provisions therein contained that it shall thereupon be entitled to exercise all the privileges conferred by the chapter. This chapter does not confine these duties and privileges to corporations coming within the provisions of Chapter 15, Title 32, and, therefore, necessarily applies to any corporation properly engaging in the pipe line business. One of the rights conferred in this chapter is the right of eminent domain.

Our conclusion, from the above observation and the study which we have made of the statutes involved, together with authorities bearing thereon are:

1. That Chapter 15, Title 32, refers only to domestic corporations and then only to such corporations as desire to engage under the provisions therein contained in the business of transporting oil and producing oil.
2. That a company desiring to engage in the pipe line business or the transportation of oil may be created under the provisions of subdivision 36, Article 1302, and have all the rights vouchsafed to it in Title 102, R. S. 1925.
3. That a company desiring to enter in the business of maintaining an oil company may be created under the provisions of subdivision 37, Article 1302.
4. That a corporation cannot be created in Texas to engage in the business of an oil company and a pipe line company together except under the provision of Chapter 15, Title 32.
5. That a foreign corporation may not be admitted under the provisions of Section 15, Title 32, but a foreign corporation may be ad-

mitted under the provisions of subdivision 36, Article 1302, with the privileges accorded to it in Chapter 102 to engage in the pipe line business; and a foreign corporation may be admitted to maintain an oil business under the provision of Subdivision 37, Article 1302, but may not be admitted under any law to engage in both businesses.

We trust that we have sufficiently covered the perplexing phases of this chapter and we again express our appreciation of the very thorough manner in which you have expressed your own views on these questions.

Very truly yours,

R. B. COUSINS, JR.,  
Assistant Attorney General.

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Op. No. 2628, Bk. 61, P. 124.

CORPORATIONS PURPOSE CLAUSE.

1. A corporation may not be formed for two or more purposes found in different sections of Article 1302, Revised Civil Statutes, 1925.

2. The Secretary of State should decline to file the charter of a specific corporation inasmuch as the purpose clause is drawn from two subdivisions of said Article 1302.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December —, 1925.

*Hon. D. A. Gregg, Acting Secretary of State, Capitol.*

DEAR SIR: We herewith return to you the charter of "The Beaumont Little Theater." This charter is not in proper form to be filed and you should decline to file the same for the following reasons:

The purpose of this charter as stated in Article II is:

"This corporation is formed for literary and educational purposes for the promotion of painting, music, dramatic and other fine arts."

It is evident upon the face of this charter that an attempt is made to incorporate under both subdivisions 2 and 3 of Article 1302, Revised Civil Statutes, 1925. By subdivision 2 of said article it is provided that corporations may be organized for the promotion of any benevolent, charitable, educational or missionary undertaking. And subdivision 3 provides for the organization of corporations for the support of any literary and scientific undertaking; the maintenance of a library or promotion of painting, music and other fine arts.

It has long been held by this Department in accordance with the recognized line of judicial decision that a corporation may not be incorporated under two subdivisions of Article 1302. Article 1304 provides among other things that the charter of a corporation shall set forth the *purpose* for which it is formed. In construing this article the courts of this State have uniformly held that a corporation cannot be formed under two of the subdivisions of Article 1302, but that its purpose must be taken from one of these subdivisions alone. In the case of Ramsey vs. Todd, 69 S. W., 134, the Supreme Court of this State spoke as follows:

"Considering these provisions together, we are of the opinion that it was the intention of the Legislature to authorize a corporation to be formed for any one or more of the purposes as specified in any one of the subdivisions and not for two or more purposes as designated in two or more subdivisions."

This opinion was explained and limited by the Supreme Court in the case of *Johnston vs. Townsend*, 103 Texas, 122, wherein it was specifically held that a corporation might not be chartered for the transaction of two distinct businesses. In the instant case we are of the opinion that the filing of this charter would not result in any of the evils which the rule that the purpose must be drawn from only one subdivision of Article 1302 was designed to prevent. However, we do not believe that the facts of any case would justify you in abrogating the established rule of law and policy of your office. A dangerous precedent would thus be set and one of which advantage might later be taken by persons whose motives are not so praiseworthy as those of the present incorporators. You are advised accordingly that, for the reasons above indicated, you should refuse to file the charter of "The Beaumont Little Theater" until its purpose clause, which is Article II, is so amended as to conform to the requirements of law.

In order that we may not be faced with this proposition the second time and to promote the rapid incorporation of this organization (since it has been represented to us that time is of the essence) we have deemed it advisable to suggest a proper purpose clause for this organization. Upon first examining the proposition it might appear that incorporation should be sought under Section 44 of Article 1302.

In our opinion this particular organization should not be chartered under said Section 44, which relates strictly to commercial and business enterprises.

We suggest that a proper purpose clause for an organization of this nature would read as follows:

"This corporation is formed for the promotion of music, painting and the drama through the medium of concerts, musicales, lectures, art exhibits, dramatic reading and the presentation of plays."

Yours very truly,

PAUL D. PAGE, JR.,  
Assistant Attorney General.

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Op. No. 2627, Bk. 61, P. 116.

CORPORATIONS—EDUCATIONAL CORPORATIONS—CONSTRUCTION OF SUBDIVISION 2 OF ARTICLE 1302, REVISED CIVIL STATUTES, 1925.

1. The term "educational" as applied to corporations organized under subdivision 2 of Article 1302, Revised Civil Statutes, 1925, refers to corporations having as their primary object the imparting of knowledge, by giving instruction in some recognized field of study.

2. Incidental educational benefits to be derived from the functioning of a corporation will not stamp such corporation as educational in its nature.

3. Where it is apparent from the purpose clause contained in the proposed charter of a corporation that the primary object of its creation is to advertise well known business enterprises, and that the educational benefits to be derived from carrying out such function are purely incidental, the creation of such corporation as an educational undertaking under subdivision 2 of Article 1302, Revised Civil Statutes, 1925, is unauthorized.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 18, 1925.

*Hon. D. A. Gregg, Acting Secretary of State, Capitol.*

DEAR SIR: Your letter of the 14th instant, addressed to the Attorney General, enclosing proposed charter of Dendy's Colleges of Amarillo, Texas, has been handed to me for attention. You desire to be advised whether the purpose clause contained in the proposed charter is sufficient to authorize the incorporation of the company under subdivision 2 of Article 1302, Revised Civil Statutes, 1925.

The purpose clause is as follows:

"This corporation is formed for the purpose of supporting an educational undertaking, in an effort to educate members of the public as to the proper use of cosmetics, beauty culture, barbering, and scalp and skin treatments and the cure of diseases of the skin and scalp, and a through knowledge of the nerves and muscles of the head, face and neck, and any and everything appertaining to manicuring, using of cosmetics, marcelling, barbering and all and everything in connection with beauty culture and beauty work, and treatment of skin and scalp diseases and infections, for the purpose of and with a view of being a benefit to the general public."

Subdivision 2 of Article 1302, Revised Civil Statutes, 1925, authorizes the creation of private corporations for "the support of any benevolent, charitable, educational or missionary undertaking." Chapter 9 of Title 32, Revised Civil Statutes, 1925, deals with religious, charitable and educational corporations. Subdivision 2 of said chapter is confined to educational corporations. This subdivision relates to corporations created for educational purposes under subdivision 2 of Article 1302, above quoted. Article 1411 of said subdivision provides that the directors or trustees named in the charter of any college, academy, university or other corporation to promote education, may make all necessary by-laws, elect and employ officers, professors, teachers and agents and fix their compensation. Article 1410 refers to the faculty of such educational institutions. Article 7094, Revised Civil Statutes, 1925, exempts corporations formed for "strictly educational purposes" from the payment of a franchise tax.

The foregoing references indicate the important enactments of law relating to corporations formed for educational purposes. The question is: Does the purpose stated in the proposed charter of Dendy's Colleges indicate that the corporation is being created for educational purposes?

The primary functions exercised by a corporation will determine its character. Thus an educational corporation exercises functions that primarily relate to the giving of instruction in useful and recognized subjects. The fact that educational benefits may be derived as incidents to the functioning of a corporation is not sufficient to authorize its creation under a statute dealing with educational undertakings. As said by the Court of Appeals of New York in the case of *In re De Peyster's Estate*, 104 N. E., 714:

"A corporation or association organized exclusively for scientific, literary, library, patriotic, or historical purposes, or for any one of such purposes, is necessarily to some extent educational in its nature, and in the results attained from such organization. An exclusively historical society does not gather

books, manuscripts, pictures, and antiquities simply to hoard them. Its purpose is not alone to discover and preserve things and facts of historical value, but to keep and record them that they may be seen, read and studied, that greater knowledge may be attained from them. The Legislature, in including educational corporations or associations in the first part of the statute quoted, intended corporations or associations engaged in something more than the incidental education which is necessarily derived from corporations organized exclusively for scientific, literary, library, patriotic, or historical purposes."

A business having for its purpose the advertising of goods, wares and merchandise, or the advantage to be derived from wearing clothing fashioned in a certain style, would necessarily in carrying out the objects of its organization incidentally give instruction to the public. The fact that the public or a limited number of persons may derive educational advantages from the incidental instruction by such enterprise, would not stamp it as primarily educational in its nature. The functioning of the various corporations organized under the laws of this State no doubt results incidentally in the instruction of the public or of a limited number of persons in subjects of general interest to the business world. In the sense that instruction is the imparting of knowledge, no enterprise can be undertaken from which educational benefits are not incidentally derived.

The test that must necessarily be applied to any enterprise to determine whether it is primarily educational in its nature should exclude the educational results that are purely incidental. The paramount purpose of power of the enterprise must alone determine the nature of its undertaking. The powers and functions of all enterprises are the outgrowth of educational developments, and the common experience of men will determine the application of such powers and functions to any given enterprise. The development of the enterprises known to the world has resulted in the grouping of related functions which have been drawn to specific enterprises, and each of such enterprises is distinguished one from the other by the primary function within each group drawn to it. Such enterprises may embrace common functions that are subsidiary and incidental to the exercise of that paramount function. This is common knowledge, and even the courts of our land would take judicial notice of the fact. It may be safely assumed that a legislative body, whose personnel is composed of men drawn from all the walks of life, in enacting legislation authorizing the incorporation of business enterprises is cognizant of the common experience of mankind that paramount functions are peculiar to certain enterprises. It follows, we think, that the Legislature has classified corporations under our laws according to the principal function exercised by the enterprise from which it has its inception.

The paramount function of an educational undertaking is to impart knowledge by giving instruction in a field of study recognized by society and not inimical to social welfare. The Supreme Court in the case of *Conley vs. Daughters of the Republic*, 156 S. W., 197, gives to the term "education" a broad meaning. Mr. Chief Justice Brown says:

"Whatever educates is within the meaning of educational undertaking. Education in the sense as used in the statute includes in its broadest sense not merely the instruction received at school or college, but the whole course of

training, moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of literature. It comprehends a proper attention to the moral and religious sentiments of the child. And it is sometimes used as synonymous with learning."

It would appear that the foregoing definition is sufficiently broad to include every undertaking that educates or tends to educate, if the principle that the primary function of the undertaking must stamp its character, be ignored. The court does not say that an undertaking is educational in its nature simply by virtue of the fact that incidental educational benefits may be derived from its operation. The court simply holds that the purpose for which the Daughters of the Republic was created were educational in the highest sense of the term, in that the organization was undertaking to preserve the traditions of the Republic of Texas by a study of its history and to educate the rising generation in that history, to the end that the emotions of patriotism might be inculcated in the hearts of our citizenship. This was in effect saying that the primary purpose for which the organization was created was to impart knowledge by giving instruction.

That our Legislature intended that corporations created for education should have their powers defined within a group of powers which was the outgrowth of the developments of strictly educational enterprises, is exemplified by the fact that subdivision 2 of Chapter 9, Revised Civil Statutes, 1925, dealing with educational corporations, defines the powers of the faculty of educational institutions and grants to the trustees of such institutions the authority to provide for teachers and agents. In short, the Legislature has undertaken to authorize the creation of educational institutions under subdivision 2 of Article 1302, Revised Civil Statutes, 1925, and to define the rights and duties of corporations so organized in enactments that relate to colleges, academies, universities and other corporations organized for the purpose of promoting education. Again in Article 7094, Revised Civil Statutes, 1925, the Legislature has exempted from the payment of a franchise tax corporations organized for "strictly educational purposes." It is pertinent to our inquiry to determine whether all corporations organized under subdivision 2 of Article 1302, Revised Civil Statutes, 1925, for educational purposes are exempt from the payment of a franchise tax, or whether the exemption is determined by the powers exercised by the corporation.

In an opinion rendered by Hon. C. M. Cureton, Attorney General, on the 26th of March, 1919, the Secretary of State was advised that a corporation chartered as an educational undertaking is by force of the law a strictly educational institution and that its purpose and only purpose by reason of the law is a strictly educational one. The question for determination was whether a business college incorporated as an educational undertaking under Section 2 of Article 1302 is exempt from the payment of a franchise tax under Article 7094. After discussing the authorities bearing on the question of the exemption of educational enterprises from taxation, Mr. C. W. Taylor, Assistant Attorney General, who wrote the opinion says:

"The above reasoning leads us to the conclusion that the word 'strictly' used in the clause for strictly educational purposes embodies in the statute exempting certain corporations from the franchise tax, has no signification or mean-

ing, because a corporation chartered as an educational undertaking can lawfully engage in no other pursuit. It is bound by the purpose clause of its charter, which is limited by the statute under which it is incorporated. In other words, a corporation chartered as an educational undertaking is by force of the law a strictly educational institution, and its purpose and only purpose is by reason of the law a strictly educational one. So, to our minds, the Legislature has added nothing to the meaning of this clause by inserting therein the word 'strictly.'"

In view of the foregoing, the conclusion seems inevitable that an educational undertaking as contemplated by subdivision 2 of Article 1302, Revised Civil Statutes, 1925, means a corporation having for its primary purpose the giving of instruction in some recognized field of knowledge, and that corporations may not be created under this subdivision of our statute where it is apparent that the instruction to be given and the educational benefits to be derived therefrom are incidental to the exercise of the primary functions of the corporation. The Legislature intended that corporations created under this subdivision of the statute should engage in something more than the incidental education which is necessarily derived from business enterprises whose primary purpose is to advertise the merits of a particular business undertaking.

The purpose clause of the proposed charter you have submitted to us in our opinion indicates on its face that the primary object of the proposed corporation is to advertise well known business undertakings. It does not appear from the proposed charter that it is the purpose of this corporation to instruct those who might be interested in following the occupations of barbering or beauty culture in the science of those callings. There are barber shops and beauty parlors throughout the State of Texas and there are business enterprises engaged in handling cosmetics and other articles and appliances used in these occupations. In attempting to generally instruct the public in the matters indicated, it would appear that primarily a system of advertising will be engaged in, which, as far as the purpose clause contained in the charter is concerned, would be the primary object of the corporation. We do not believe that it was contemplated by our Legislature that the various business enterprises of this State might be advertised by corporations seeking a charter under the educational clause of Article 1302, Revised Civil Statutes, 1925.

Believing that the statement of the purpose clause in the proposed charter shows on its face that the primary object of the corporation is to engage in the business of advertising beauty culture, and that the educational benefits to be derived therefrom are purely incidental, we have concluded that said proposed enterprise may not be engaged in under that part of the law permitting the creation of educational corporations.

You are therefore respectfully advised that the charter submitted with your letter should not be received and filed by you as there is no authority in law for the creation of corporations of this character under subdivision 2 of Article 1302, Revised Civil Statutes, 1925.

Yours truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.



Op. No. 2623, Bk. 61, P. 135.

CORPORATIONS—BLUE SKY LAW—ARTICLE 580, REVISED CIVIL STATUTES OF 1925, CONSTRUED.

1. In all cases where capital stock has been or shall be increased subsequent to the date of August 15, 1923, when the Blue Sky Law became effective, the provisions of said Blue Sky Law must be complied with before offering stock for sale.

2. The phrase "capital stock" as used in Article 580, Revised Civil Statutes, 1925, includes both actual and potential stock, and an increase of either the authorized capital stock or of stock actually paid in will bring a concern within the operation of the Blue Sky Law.

3. The statute construed: Chapter 52, page 114, General Laws, Second Called Session of the Thirty-eighth Legislature, being the Blue Sky Law. A sale of treasury stock by the Rio Grande Valley Dairy Association would violate the laws of this State if a permit for the sale under the Blue Sky Law should not be secured.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 4, 1925.

*Hon. Emma Grigsby Meharg, Secretary of State, Capitol.*

DEAR MADAM: This is in reply to your communication of November 30, 1925, written by Honorable Lee Curtis, Chief of the Blue Sky Division of your Department. The question submitted is quoted from your letter as follows:

"A foreign corporation chartered under the laws of New Mexico in April, 1916, secured a permit to do business in Texas on the 4th day of August, 1916. On the 15th day of June, 1923, the corporation increased its authorized capital stock from \$50,000 to \$100,000 by amendment to its New Mexico charter. A certified copy of this amendment was filed with the Secretary of State of Texas on December 22, 1924. The corporation now desires to sell in Texas the unsubscribed portion of said \$50,000 increase of capital stock. Would the sale of said stock be a violation of the law if a permit for the sale under the Blue Sky Law is not secured?"

Chapter 52 of the General Laws of the Second called Session of the Thirty-eighth Legislature, which is known as the Blue Sky Law, was passed for the purpose of preventing the sale of securities without supervision by the State. This fact clearly appears from the emergency clause, which is Section 29 of said Chapter 52, and which reads as follows:

"The fact 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 less 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 mails and otherwise to people in other States by reason of inadequate laws in this State, called for the enactment of laws to protect the citizens of Texas from such waste and imposition," etc.

The purpose of similar laws has been well stated by Mr. Justice McKenna of the Supreme Court of the United States in the case of *Hall vs. Geiger-Jones Company*, 242 U. S., 539. He says:

"The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "Blue Sky,"' or, as stated by counsel in

another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other fraudulent exploitation.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review. Trading Stamp cases; *Rast vs. Van Deman & L. Company*, 240 U. S., 342; *Hammer vs. Little*, 240 U. S., 369; *Pitney vs. Washington*, 240 U. S., 387."

By Article 580 of the Revised Civil Statutes, which is Section 2 of said Chapter 52, it is provided that:

"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 \* \* \* any stock \* \* \* file in the office of the Secretary of State \* \* \* an application for a permit to sell any of the securities mentioned herein or any other securities offered or to be offered for sale. \* \* \*"

By Article 591, which is Section 9 of said Chapter 52, it is provided that:

"Any person, broker, agent, joint stock company, co-partnership or other company, individual or organization, domestic or foreign, sending advertising matter through the mail, by express, telegram or otherwise, wholly within this State, offering for sale, or selling any of the securities enumerated in the second article of this title without first having been issued a permit as provided herein, shall be deemed guilty of having violated the provision of this title."

Article 1081 of the Penal Code of this State reads as follows:

"Any person who shall sell or offer for sale or in any manner be concerned with selling or offering for sale any stock of any concern embraced within the provisions of this chapter, for whose sale no permit, as herein required, has been issued shall be confined in the penitentiary for a term not exceeding ten years."

It is plainly to be seen that obtaining a permit is a prerequisite for the sale of stock as defined by this law and a sale without a permit is a violation of said law.

By careful reading of Section 2 (Article 580), we find that there are three classes of concerns which are required to obtain these permits. They are as follows:

- Concerns which: (a) "shall hereafter be formed or created,"
- (b) "shall hereafter attempt to increase" their "capital stock," and
- (c) "commence the transaction of business in this State."

It is plain that the Rio Grande Valley Dairy Association was formed and created prior to the passage of the Blue Sky Law and also that it commenced the transaction of business in this State prior to the passage of such law. We do not attempt to construe what is meant by classification "c" inasmuch as we do not consider it necessary in determining the instant case. We proceed then to determine the question whether the corporation in question has attempted to increase its capital stock subsequent to the becoming effective of the Blue Sky Law.

The facts are these: The Rio Grande Valley Dairy Association was chartered under the law of New Mexico in April 1916, and secured a permit to do business in Texas on August 4, 1916. On the 15th day of June, 1923, the corporation increased its authorized capital stock from

\$50,000 to \$100,000 by amendment to its New Mexico charter. A certified copy of this amendment was filed with the Secretary of State of Texas on December 22, 1924. The corporation now desires to sell in Texas a considerable amount of the unsubscribed portion of the \$50,000 increase of its capital stock.

This increase of capital stock by amendment of charter occurred prior to the date when the Blue Sky Law became effective, hence said act of amendment was not effectual to bring the corporation within the operation of the Blue Sky Law. True, this amendment was not filed in the office of the Secretary of State of Texas until the Blue Sky Law had become effective, but the filing of said amendment was not, in our opinion, *an attempt to increase* the capital stock, but, rather, a notice that the authorized capital stock *had been increased*. Hence, it is clear that the increase of the authorized capital stock being consummated prior to the date when the Blue Sky Law became effective did not operate to bring the corporation within the provisions of that law.

Now, it is a cardinal and universal rule that it is not permissible to interpret what requires no interpretation (Sedgwick on Construction of Statutes, 194), but it is an equally strong rule that where the statute is ambiguous reference should first be had to the legislative intent. The clear intention of this law is that all parties proposing to market their stock shall first obtain a permit from the State. Now, if the term "capital stock" in this law be construed to mean *only* authorized capital stock, then the purpose of the law could readily be defeated by an increase of authorized capital stock prior to the date when the Blue Sky Law became effective, the unsubscribed shares of said increase later to be disposed of without a permit. Of course, only foreign corporations and certain domestic corporations excepted from the statutory provision that all stock must be subscribed could take advantage of this apparent loophole in the law, but we do not perceive that this should alter the effect of the legal proposition here involved.

In 14 Corpus Juris, page 383, we find the following discussion of capital stock:

*Actual and Potential Stock.* Actual stock is stock which has been subscribed for and which has either been paid in or is subject, under legal compulsion, to be paid in, while potential stock is merely the power under the charter or governing statute to acquire a capital stock. Merely authorized capital stock has no existence or validity until it is actually issued or subscribed for. Whether the term 'capital stock' or 'capital' refers to the actual capital stock or capital which has been paid in or subscribed or to the nominal or authorized capital stock not fully subscribed depends upon the connection in which the term is used. Ordinarily the term as employed in a statute means the actual capital stock or capital, but it may refer to the potential or authorized capital stock when such an intention appears from the connection. If capital stock has been issued or subscribed for it is actual and valid stock, although it may not have been actually paid in, and in such case it is within the term 'capital stock' as employed in a statute, unless, as is sometimes the case, there is something to show an intention to refer to paid-up capital only."

From this discussion the ambiguity of the term "capital stock" becomes apparent. It may signify authorized stock, stock subscribed, or stock paid in.

In the case of *Commonwealth vs. Railway Company*, 129 Pa., 405, there was under consideration a statute which authorized the railway company to borrow money not exceeding in amount "one-half of the par value of the capital stock." The authorized capital stock of the railway company was \$1,000,000; the amount paid in was 10 per cent of the authorized stock, or \$100,000. The railway company sought to borrow \$250,000 and contended that the term "capital stock" as used in the statute in question meant "authorized capital stock," or in other words, that it was permitted to borrow money not exceeding in amount one-half of \$1,000,000, or \$500,000. The court, however, held that it was the manifest intention of the Legislature that the railway company should be permitted to borrow money not exceeding in amount one-half of its *actual* capital stock or the amount paid in. The railway company accordingly was held to have no right to borrow more than \$50,000, or one-half of the par value of stock *actually paid in*.

In the case of *City of Philadelphia vs. Ridge, etc., Railway Company*, 102 Pa., 190, the Supreme Court of Pennsylvania considered a taxation statute in which it was provided that "said company shall annually pay \* \* \* a tax of six per centum upon so much of any dividend declared which may exceed six per centum upon their said capital stock." The authorized capital stock of the railway company was \$750,000, the amount paid in was \$420,000. The company contended that the term "capital stock" as used in the statute meant "authorized capital stock"; or in other words, that the six per cent tax should be paid upon so much of a dividend as exceeded six per cent of \$750,000, which is to say, \$45,000. The court held, however, that the term "capital stock" as used in the statute meant capital stock *actually paid in* and that the company should pay the six per cent tax of the dividend exceeding six per cent of \$420,000, which is to say, \$22,000. The holding was based upon the ground that where the statute is ambiguous the court will look to the legislative intent, and an interpretation of the statute for its terms will not be adopted which will permit that intent to be defeated if the statute is reasonably susceptible of another interpretation whereby the legislative intent will be secured. In this case it was plainly the intention of the Legislature that there should be an exemption from taxation on an amount of profit aggregating six per cent of the stock actually paid in, or working capital, and not that there should be an exception of an amount aggregating six per cent of the authorized capital stock, since this authorized capital stock might be increased from time to time in such manner as to prevent the payment of any taxes whatsoever. See also *city of Philadelphia vs. Railway Company*, 52 Pa., 177.

In conformity with the logic of these cases, we construe the phrase "shall hereafter attempt to increase its capital stock" to mean an attempt to increase either the authorized capital stock or the capital stock actually subscribed or paid in.

In order to increase the actual capital stock it is of course necessary that the said stock shall be offered for sale. This we understand has been done, and accordingly the concern in question is one which is required to obtain a permit under the Blue Sky Law. By a refinement of logic it might be argued that the concern is not required to obtain a permit before it has advertised its stock for sale *at least once*, inas-

much as until it has done this it does not come within the class of concerns required to obtain a permit. We do not believe, however, that this somewhat hypercritical question enters into the state of facts now before us for discussion.

Accordingly, you are advised that the phrase "capital stock" as used in Article 580 of the Revised Civil Statutes of 1925 includes both actual and potential stock, stock authorized and stock actually paid in, and that an attempted increase of either the actual or potential stock will bring a concern within the operation of the Blue Sky Law. You are further advised that, in view of this definition, a sale of stock by the Rio Grande Valley Dairy Association (taking the facts as submitted by you to be correct, and taking in consideration the additional fact, which we understand to be true, that the said Dairy Association has already offered this stock for sale) would be a violation of the law, if a permit for the sale under the Blue Sky Law is not secured.

Respectfully,

PAUL D. PAGE, JR.,  
Assistant Attorney General.

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Op. No. 2608, Bk. 61, P. 149.

CORPORATIONS—STATUTE AUTHORIZING ISSUANCE BY CERTAIN CORPORATIONS OF SHARES OF STOCK HAVING NO PAR VALUE.

1. Chapter 77, Acts of the Thirty-ninth Legislature, authorizing the issuance by corporations of shares of stock having no par value, does not transgress Section 6, Article 12, of the Constitution, forbidding corporations to issue stock or bonds except for money paid, labor done, or property actually received.

2. Corporations authorized to issue shares of stock having no par value may comply with Section 3, Article 10, of the Constitution, whereby corporations are required to keep for inspection at their public offices books showing the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them, respectively, and the amount of stock paid and by whom, by causing such books to show the amount of tangible assets contributed by the stockholders and dedicated to the corporate purposes, the amount of authorized non par value shares, the consideration for which same may be sold, the amount paid by each holder of such shares for the number held by him, and the names of the respective owners.

3. Satisfactory evidence that at least ten per cent of the authorized shares of stock to be issued without nominal or par value has been subscribed and paid for in an amount not less than twenty-five thousand dollars may be furnished by the incorporators or directors, as required by Section 4, through an affidavit executed in the manner and form prescribed by Article 1127, Revised Civil Statutes.

4. Under the provisions of the act, before a corporation may be authorized to issue shares of stock without par value it must be shown that at least ten per cent of such shares proposed to be issued has been paid for in an amount not less than twenty-five thousand dollars, and this exclusive of the capitalization represented by shares of capital stock having a par value.

5. The act includes all private corporations organized for profit except railroad companies and corporations placed under the supervision of the Commissioner of Insurance or the Commissioner of Banking.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, JUNE 30, 1925.

*Hon. D. A. Gregg, Acting Secretary of State, Capitol.*

DEAR SIR: The Attorney General acknowledges your letter of the 26th instant having reference to Chapter 77, Acts of the Regular Session of the Thirty-ninth Legislature, whereby private corporations created under the laws of Texas are authorized to provide for the issuance of shares of stock without any nominal or par value.

After requesting a general construction of the statute you make the following inquiries:

"2. Is this act constitutional?

"3. In showing the amount of capital stock subscribed and paid, what evidence shall the Secretary of State be authorized, under the law, to require, and how shall it be required to be shown to the satisfaction of the Secretary of State that the amount is paid in?

"4. The act provides that the minimum capital of a corporation created with non par value shares, shall be \$25,000. Where a corporation has both par value and non par value shares, can the showing be made under Articles 1125-1130, inclusive, as to the par value shares exclusive of the non par value shares?

"5. Will the \$25,000 required by this statute have to be shown from the non par value shares, or non par value and par value shares combined?

"6. If from each class of stock combined the \$25,000 is to be taken, then what showing is required to be made as to the amount of non par value shares being subscribed and paid?

"7. What class of corporations does the non par value law apply?"

The statute in question is entitled:

"An Act authorizing any private corporation for profit, hereafter or heretofore organized under the laws of this State, other than corporations authorized to conduct a banking or insurance business, to issue shares of its stock without nominal or par value, in such classes, with such preferences and for such considerations as may be prescribed and specifying the form of certificate for such stock; and providing for filing with the Secretary of State statement showing total shares of all stock to be issued, classes thereof and actual consideration received by the corporation for shares issued without nominal or par value; and providing for not less than ten per cent of authorized number of said shares to be subscribed and paid for; and providing for the payment to the State of filing fees and franchise tax on stock without nominal or par value and determining the basis for computing such fees and tax; and providing for converting outstanding shares of stock with nominal or par value into shares without nominal or par value and regulating and prescribing the method thereof; exempting corporations issuing shares without nominal or par value from provisions of Articles 1125 to 1130, inclusive, and Article 1141 of Revised Civil Statutes; and providing a penalty for a refusal or failure to make and file any report or certificate required by this act; and providing the privileges and powers of this act shall be in addition to and not in restriction or limitation of those now conferred by law and that invalidity of part of this act shall not affect or impair other provisions, and declaring an emergency."

The title fairly covers the subject matter of the act. Prior to the passage of this statute no law of this State expressly provided for the issuance by private corporations of stock without nominal or par value. However, corporations organized under the laws of other States permitting the issuance of such shares of stock have been admitted into Texas. The case of *American Refining Company vs. Staples*, 260

S. W., 614, 269 S. W., 420, involved the basis of computation for the franchise tax of such a corporation. Probably it was a fair implication from the statutes of this State that the capital stock of a private corporation organized under our laws should be divided into shares having a face value equal to a definite portion of the total capitalization. Under Article 1123, Revised Civil Statutes of 1911, articles of incorporation were required to set forth, among other things, the amount of capital stock and the number of shares into which it was divided. The franchise tax provided for by law was to be computed upon the amount of authorized capital stock. In certain instances the maximum or minimum of capital stock was prescribed by statute. All these statutes, taken together, probably indicated a purpose on the part of the Legislature that all corporations should have a definite fixed capital stock to be expressed in terms of dollars and cents, and this amount was to be divided into shares, each representing an aliquot part of the amount for which the corporation was capitalized.

It is a general impression that shares of stock without par value are a recent development of corporate business. As a matter of fact such no par shares are not new, but have existed in England and this country for many years. It is true, however, that for a long time their issuance has not been prevalent until the recent enactment of statutes in several of the States authorizing the formation of corporations with shares of stock having no par value. These statutes have had comparatively little judicial interpretation. A few cases involving their construction are annotated at 19 A. L. R., 131. Wherever the statutes have been attacked they have been upheld. We know of no reason in the public policy of this State which militates against the validity of the Act of the Thirty-ninth Legislature with respect to the organization of such corporation. In *State vs. Sullivan*, 221 S. W., 728, the Supreme Court of Missouri discuss at length the right of the Secretary of State of Missouri to decline to issue a permit to such a corporation to transact business within the State. Since the statutes of Missouri did not authorize the issuance of no par value shares by a domestic corporation the Secretary of State doubted that such a foreign corporation could lawfully transact its business there. The Supreme Court of the State held in favor of the corporation. An analysis of the case will disclose a specific statute upon which the holding could be founded, but the opinion contains an elaborate and valuable discussion of many questions that may arise in connection with a law authorizing no par value stock. We refer you to a report of that case as perhaps the best general construction of no par value statutes which our research has afforded. In the *American Refining Company* case, *supra*, no question was made as to the right of such a foreign corporation to procure a permit to do business in this State, but we are left to infer that the Supreme Court of Texas would have been in accord with the Missouri decision.

In considering your inquiry as to the constitutionality of the Act of the Thirty-ninth Legislature, we have believed it our duty to resolve affirmatively, if possible, any doubt that may exist in our own minds.

Article 12 of our Constitution relates particularly to private corporations. The only limitation upon the issuance of stock is contained in Section 6, as follows:

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

By Section 3 of the statute enacted by the Thirty-ninth Legislature it is provided that:

"Corporations may issue and dispose of their authorized shares having no nominal or par value for such consideration as may be prescribed in the original charter or any amendment thereof; or, if no consideration is so prescribed, then for such consideration as may be fixed by the stockholders at a meeting duly called and held for the purpose, or by the board of directors when acting under general or special authority granted by the stockholders, or by the board of directors when acting under general authority conferred by the original charter or an amendment thereof; *such consideration to be in the form of money paid, labor done, or property actually received.*"

Thus the act specifically provides for compliance with Section 6 of Article 12 of the Constitution. If this were not true it would nevertheless be our duty to give such construction to the statute as would avoid any conflict with the constitutional provision. In *Randle vs. Wynona Coal Company*, 206 Ala., 254, 89 So., 790, 19 A. L. R., 118, it was held that a similar statute, apparently without such provision as that portion of Section 3 above quoted, did not conflict with an identical constitutional requirement.

It is further provided that such shares shall be fully paid stock and not liable for any future call or assessment thereupon, nor shall the subscriber or holder be liable for any future payments. By express requirement the consideration for the issuance of such stock must be in the form of money paid, labor done, or property actually received. It is apparent that fictitious stock of this character may not be created, and that no shares of stock without par value may be issued unless fully paid for at the consideration fixed by one of the methods prescribed in Section 3. Under the law there may be no unpaid balance of the consideration for such stock to which the corporation's creditors may look for payment of their debts. We believe, however, that if such shares were issued in violation of this provision upon credit or for a consideration less than the amount fixed as their selling price, creditors could recover from shareholders the difference between the amount actually paid for their stock and the amount required to be paid through the action contemplated by Section 3. The purpose of the constitutional provision and of all laws relating to the liability of shareholders of an insolvent corporation to its creditors is to prevent the evasion of full payment for stock and to prevent a fictitious capitalization which might induce persons dealing with the corporation to extend credit on the faith of capital stock not actually representing valuable properties subject to seizure for debt. It is the design of our corporation laws to compel the performance of agreements by subscribers to corporate stock that they will contribute a specific sum. The law is satisfied if the shareholders are made to answer creditors in the sum they have agreed to pay, thereby protecting the public against deception by unpaid capital stock, and it is immaterial to creditors whether the shares issued, if paid for, have any nominal value. One of the main arguments for the legislation enacted at the last session was that the public could not be deceived by any inflated capitalization.



A graver question is raised by the language of Section 3, Article 10, of the Constitution, in part as follows:

"Every railroad or other corporation organized or doing business in this State under the laws or authority thereof shall have and maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made, and where shall be kept for inspection by the stockholders of such corporation books in which shall be recorded *the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them, respectively, the amount of stock paid and by whom, the transfer of said stock, with the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers.*"

This article of the Constitution deals particularly with railroads, but Section 3 applies, apparently, to all corporations organized or doing business in this State. The question, therefore, presents itself as to whether a corporation which has issued, or has authority to issue, shares of stock without a nominal value can comply with the constitutional requirement that it keep books for inspection showing the amount of capital stock subscribed, the amount owned by each stockholder, and the amount of stock paid. Does a corporation whose shares of stock are without par value have an "amount of capital stock" which may be shown by its books?

The term "capital stock" has been defined as "the property of the corporation contributed by its stockholders or otherwise obtained by it to the extent required by its charter." *Williams vs. Western Union Telegraph Company*, 93 N. Y., 162-188. It has been said "that the capital stock of a corporation is like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern." *Berry vs. Merchants Exchange Company*, 1 Sandf. Chan., N. Y., 280, quoted with approval in *Williams vs. Western Union Telegraph Company*, supra. The Supreme Court of North Carolina has defined it as "the fund forming the basis of a corporation's business transactions." *Hobgood vs. Ehlen*, 141 N. C., 344, 53 S. E., 857. Like definitions have been offered by the courts of other States, and by text-writers whose works are accepted as authority. In *Clark and Marshall on Law of Private Corporations*, Volume 2, 372, it is said:

"The term 'capital stock,' properly speaking, signifies the amount subscribed and paid in or secured to be paid in by the shareholders of a corporation."

Again the same writers say:

"Capital stock of a corporation as we have just seen is the amount subscribed and paid for by the shareholders or secured to be paid in, and upon which it is to conduct its operations."

The capital stock of a corporation is to be distinguished from its capital, which constitutes the aggregate of its assets or properties. However much the capital of a corporation may increase through accumulation of profits or enhancement in the value of its properties, or however much it may be reduced by losses or by a decrease in property values, the amount of capital stock remains the same unless it is increased or reduced by or under legislative authority. The term "capital stock" indicates a relation between the corporation and its share-

holders. There must be a contract between the corporation and subscribers for stock in order that shares of stock may be issued. The word "capital" as applied to corporations does not involve this implication.

"'Capital stock' of a corporation \* \* \* is the sum of money fixed by the corporate charter as the amount paid in or to be paid by the stockholders for the prosecution of the business of the corporation, and for the benefit of the corporate creditors. \* \* \* The capital stock is to be distinguished from the amount of property owned by the corporation. Generally, capital stock does not vary, although the actual property of the corporation may fluctuate widely in value." *Markel vs. Burgess*, 95 N. E., 308.

In the case of *Turner vs. Cattleman's Trust Company*, 215 S. W., 832, the Commission of Appeals, Section "B" of this State defines "capital" as relating to corporations as follows:

"The term 'capital' is used to designate that portion of the assets of a corporation, regardless of their source, which is utilized for conducting the corporate business and for the purpose of deriving therefrom their gains and profits." 7 R. C. L., 165; *Wright vs. Gas. R. & B. Co.*, 216 U. S., 420; 30 Supp. Cit., 242, 54 L. Ed., 544; *Smith vs. Dana*, 77 Conn., 543, 60 Atl., 117; 69 L. R. A., 76; 107 Am. St. Rep., 51; *Tradesmen's Publishing Co. vs. Wheel Co.*, 95 Tenn., 634, 32 S. W., 1097, 31 L. R. A., 593, 49 Am. St. Rep., 943."

In view of the above definitions, which seem to be everywhere accepted, we think it may be said that the "amount of capital stock" of a corporation as that phrase is used in our Constitution may be measured by the property contributed by the stockholders and dedicated to the corporate purposes.

As we have seen, the Act of the Thirty-ninth Legislature provides that shares of capital stock having no par value may be sold only for a consideration fixed in the charter, or by the stockholders, or by the board of directors acting under authority of the charter or the stockholders. Under Section 4a the corporation taking advantage of the act must, at the time of filing its charter, or amendment authorizing the issuance of non par value stock, file a certificate with the Secretary of State showing, among other things, "the number of shares without nominal or par value that may be issued by the corporation." Thus it is apparent that a corporation availing itself of the provisions of this statute may not indiscriminately issue shares of stock without par value, but is limited to the number stated in the certificate filed with the Secretary of State. Nor may it put these shares of stock upon the market and sell them at whatever price may be obtainable, but it may dispose of these shares of stock only for an authorized consideration. If we are correct in believing that the property devoted by the stockholders to corporate purposes measures the "amount of capital stock of a corporation," then such amount may be reflected by the corporate books, though the shares of stock have no par value, for such shares may be issued only for a specific consideration and the number thereof is fixed by the certificate filed with the Secretary of State at the time the charter is granted or amended. The books of the corporation should further show the names of the owners of the stock, the number of shares owned by them, respectively, and the consideration paid, and, we think, the authorized number of shares together with the fixed consideration to be paid therefor.

We conclude that the requirement imposed by Section 3, Article 10 of the Constitution, will be satisfied by such a showing, and that the enactment of the law authorizing the issuance by corporations of shares of stock without par value was within the power of the Legislature.

Your next three questions relate to details involved in the administration of the act. By Section 10 corporations authorizing the issuance of shares of its stock without nominal or par value are exempted from the provisions of Articles 1125 to 1130, inclusive. That is, it is not mandatory that stockholders in such a corporation subscribe the full amount of its authorized capital stock and pay fifty per cent thereof before the corporation is chartered, nor are they required to furnish "satisfactory evidence" that this has been done. By Section 4d, however, it is provided that at the time of filing the charter or any amendment thereto authorizing the issuance of shares of stock without nominal or par value the incorporators, in the case of an original charter, and the majority of directors, in the case of amendment, must file a certificate authenticated "in the manner required by the laws of this State," setting forth the "number of shares without nominal or par value subscribed and the actual consideration received by the corporation for such shares; \* \* \* provided, however, the stockholders of any corporation authorizing the issuance of shares of its stock without nominal or par value shall be required in good faith to subscribe and pay for at least ten per cent of the authorized shares to be issued without nominal or par value before said corporation shall be chartered or have its charter amended so as to authorize the issuance of shares without par or nominal value; provided further, that in no event the amount so paid shall be less than twenty-five thousand dollars."

Among the requirements of Chapter 2, Title 25, Revised Civil Statutes of 1911, is that those executing the charter of a corporation shall furnish to the Secretary of State, as evidence that the full amount of the authorized capital stock has in good faith been subscribed and fifty per cent thereof paid, an affidavit setting forth the matters shown in Article 1127, Revised Civil Statutes. It seems to us that the Act of the Thirty-ninth Legislature contemplates that a like affidavit shall be made setting forth the things enumerated in Section 4.

We think you have misconstrued the statute as providing only that the minimum capitalization of a corporation authorized to issue non par value shares is twenty-five thousand dollars. The provision to which you refer is contained in Section 4d, from which we have quoted above. It seems to us that the intent of the statute is that the amount paid for the shares of stock having no par value shall be not less than twenty-five thousand dollars; that is, exclusive of the capitalization represented by shares of stock having a par value, at least twenty-five thousand dollars must be paid for the authorized shares without par value before a corporation seeking to avail itself of the advantages provided by the Thirty-ninth Legislature may be chartered or its charter amended. This answers your fourth and fifth questions, and an answer to the sixth question is, therefore, not required.

Lastly, you seek the advice of this Department as to the classes of corporations to which the non par value law applies. By the terms of the act it is made to include "any private corporation for profit

other than corporations authorized to conduct a banking or insurance business." The exception, of course, includes banking corporations organized under Chapter 1, Title 14, Revised Civil Statutes of 1911. We think it includes also bank and trust companies organized under Chapter 2 of the same title, and savings banks organized under Chapter 3. Since loan and brokerage companies are provided for under the same title, we construe the exception as embracing this class of corporations. Indeed, any corporation which, by the law, is made subject to the supervision of the Commissioner of Banking or the Commissioner of Insurance, we think to be included within the corporations which may not issue shares of stock without a par value.

Railroad companies have always been treated by our law as distinct enterprises. They are dealt with separately by the Constitution, and by the statutes. The Act of the Thirty-ninth Legislature does not purport to change or repeal any of the laws relating to railroad companies as distinguished from other private corporations. Under Article 6469, Revised Civil Statutes of 1911, a railroad corporation is forbidden to issue shares of stock except at its par value, and to actual subscribers who pay or become liable to pay the par value thereof. This act was passed in 1876, and has been carried through each codification of our statutes. We do not think that the Thirty-ninth Legislature intended its repeal. You are advised, therefore, that railroad companies are not within the purview of the statute in question.

With the above exceptions the statute is all embracing, and apparently includes every kind of private corporation organized for profit.

Respectfully yours,

WRIGHT MORROW,

First Assistant Attorney General.

ERNEST MAY,

Assistant Attorney General.

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Op. No. 2587, Bk. 60, P. 81.

CORPORATIONS—STATEMENT OF PURPOSE IN CHARTER—PAYMENT OF  
CAPITAL STOCK BY LOAN AND BROKERAGE COMPANIES.

1. The statement in a proposed charter of a purpose of a corporation organized under Chapter 83 of the Acts of the Thirty-sixth Legislature which recites that it is formed "to accumulate and lend money, \* \* \*" states with sufficient specificity the object of its creation in this regard, without mentioning the method by which the money is to be accumulated.

2. Corporations formed under this act are required to have the capital fully paid in and may not organize with less than \$10,000 capital.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 18, 1925.

*Mrs. Emma Grigsby Meharg, Secretary of State, Capitol.*

DEAR MADAM SECRETARY: Replying to your inquires of recent date in which you advise that the Pardue Investment Company has tendered to you for filing its proposed charter, whose purpose is stated as follows:

"The purpose for which it is formed is to accumulate and lend money, pur-

chase, sell and deal in all kinds of notes, bonds, and securities, but without banking and discounting privileges, and to act as trustee under any lawful express trust committed to it by contract, and as agent for the performance of any lawful act,"

upon which you desire to be advised whether the words "accumulate and lend money" are sufficiently specific without indicating the means by which the money is to be accumulated, and in which you inquire as to the amount of capital stock to be subscribed and the amount paid up by such corporation upon filing charter; we have the honor to advise as follows:

1. In an opinion from this Department prepared by Hon. C. M. Cureton, then Assistant Attorney General, addressed to Hon. F. C. Weinert, Secretary of State, on February 14, 1914, in discussing subdivision 29 of Article 1121, part of whose language is identical with the language above quoted, it was said:

"A corporation chartered under this subdivision of the statute may,

"(a) Accumulate money; and

"(b) Loan money.

"But corporations organized for these purposes are subject to two classes of limitations,

"(c) They must not exercise banking privileges; and

"(d) They must not exercise discounting privileges.

"Further analyzed, it would appear to me that companies chartered under this subdivision may accumulate money in any lawful manner, except in the manner which would be the exercise of banking privileges; and that such corporations may loan money, in any lawful way except in a manner which would be the exercise of discounting privileges." Report of Attorney General, 1912-1914, pages 344-5.

If corporations organized under grant of power expressed in this language may accumulate money in any lawful manner with the sole exception that they may not accumulate it by doing a banking business, it would follow that it is not within the province of the Secretary of State to further limit such powers. To be sure, such corporations could not embark in some wholly different line of business such as is authorized by some other subdivision of the law relating to the purposes for which corporations may be formed. However, it is not necessary to recite these exceptions in the charter.

2. The law applicable to corporations in general in regard to the subscription and payment of capital stock at the time of organization is as follows:

Article 1125 prescribes that the full amount of capital stock shall be subscribed and 50 per cent thereof paid as a prerequisite to obtaining charter. Article 1129, which is a part of the same acts of the Legislature, prescribes that subdivision 29 and some others shall be exempt from the provisions of Article 1125, and Article 1130 prescribes that corporations so excepted,

"shall be required to pay in at least \$100,000 in cash of their authorized capital stock, or to subscribe 50 per cent and pay in 10 per cent of their authorized capital before they shall be authorized to do business in this State."

Subsequent to the enactment of these provisions the Legislature in 1919 enacted a law known as Chapter 83 of the Acts of the Regular

Session of the Thirty-sixth Legislature, the caption of which is as follows:

“An Act for the formation of corporations to act as trustee and agent, to accumulate and lend money, purchase, sell and deal in notes, bonds and securities without banking and discounting privileges.”

Section 1 of the act in substance covers the ground indicated in the caption. These purposes are in effect a combination of all or parts of two or three different subdivisions of Article 1121, and authorize a corporation fiduciary in its nature, and distinct from any other corporation whose existence was authorized by our general laws.

Section 2 of this act provides:

“No corporation created under this act shall be authorized to engage in or carry on any such business unless it have an actual paid in capital of not less than \$10,000, and providing that such corporation organized under this act shall publish in some newspaper \* \* \* a statement of its condition on the previous thirty-first day of December, \* \* \* showing under oath its assets and liabilities.”

These corporations are placed under the visitorial powers of the Commissioner of Insurance and Banking.

The above quoted language plainly prescribes that such corporation shall operate with an actual paid in capital which shall not be less than \$10,000. This is the obvious meaning of the language, especially when taken in consideration with the language above quoted from then existing statutes relating in general to the organization of corporations. No reference is made in Chapter 83 to any existing statute as a criterion to determine the method and amount of capital stock to be paid in, and the language excludes such idea. Again, the provisions of Section 2 of this act plainly show the purpose of the law to make the provision for the payment of capital stock of these corporations which should apply to them, and which are distinct from the kindred requirements applicable to other corporations.

In other words, the act is distinct unto itself and corporations created under it must comply with its terms and cannot look to the terms of other acts for relief from its requirements. Accordingly, we have to advise that the purpose clause of this charter is sufficient and that the capital stock of this corporation must be fully subscribed and fully paid in in cash.

Very respectfully,

EUGENE A. WILSON,  
Assistant Attorney General.

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Op. No. 2566, Bk. 60, P. 139.

**ELECTIONS—VOTING MIXED TICKETS—DISTRIBUTING MARKED  
BALLOTS.**

1. It would violate the law directing voters how to vote a mixed ticket for a voter to scratch the name of a candidate printed in the Democratic column and write in the place of it the name of a candidate printed in the Republican column after marking off all the tickets except the Democratic ticket. But the provisions of the law prescribing the method of marking the

ballot are directory and not mandatory, and a vote cast in the manner above described should be counted for all the Democrats so voted for and for the Republican so voted for.

2. The law would not be violated if a voter marks out all the tickets on the official ballot except the Democratic and Republican tickets and then marks out all of the names on the Republican ticket except the one such voter desires to vote for, and also scratches out the name of the person on the Democratic ticket for whom he does not desire to vote. Such a vote should be counted for all the Democrats so voted for and for the Republican so voted for.

3. Where no agreement or proposal to vote for the person on the marked ticket has been entered into or made, and no request has been made to the person receiving or securing such marked ticket to vote for the person on the marked ticket, the law would not be violated by the preparation of a sample marked ballot for distribution among the voters as circulars or for publication in newspapers showing the voters how they may lawfully vote for the Democratic presidential electors and all Democratic nominees except for Governor and also the Republican candidate for Governor.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 10, 1924.

*Hon. John Marshall, 103 Gaston Building, Dallas, Texas.*

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

"As president of the Good Government Democratic League of Texas, an organization of Democratic voters who have endorsed and are supporting George C. Butte, Republican nominee for Governor of Texas, I am writing to submit the following inquiries:

"1. Can a voter lawfully vote for George C. Butte for Governor at the election to be held November 3, 1924, by marking off all the tickets on the official ballot except the Democratic ticket and by scratching the name printed under the caption 'For Governor' on the Democratic ticket and writing in place of it the name 'George C. Butte'? Under the law, should a ballot so marked be counted for Butte for Governor and for all the Democratic nominees for presidential electors and for offices other than Governor?

"2. Can a voter lawfully vote for George C. Butte for Governor by marking out all the tickets on the official ballot except the Democratic and Republican tickets and by marking out all of the names on the Republican ticket except the words 'For Governor, George C. Butte,' and by also marking out the name under the caption for Governor on the Democratic ticket? Under the law, should a ballot so marked be counted for Butte for Governor and for all the Democratic nominees for presidential electors and for offices other than Governor?

"3. Is there any law prohibiting the preparation of a sample marked ballot for distribution among voters as circulars or for publication in newspapers showing the voters how they may lawfully vote for the Democratic presidential electors and all Democratic nominees except for Governor and also vote for George C. Butte for Governor, provided, of course, such marked sample ballots are not carried by a voter into the election booth on election day?

"I am receiving numerous inquiries, showing that there is considerable confusion in the minds of the voters on these subjects, and I think it of the highest importance that the opinion of your Department should be promptly published covering the subject matter of these inquiries."

Replying to your first question, you are advised that it would violate the law directing voters how to vote a mixed ticket for a voter to scratch the name of a candidate printed in the Democratic column and write in the place of it the name of a candidate printed in the Republican column after marking off all the tickets except the Demo-

cratic ticket. But the provisions of the law prescribing the method of marking the ballot are directory and not mandatory, and a vote cast in the manner above described should be counted for all the Democrats so voted for and for the Republican so voted for.

The statute prescribing the method to be pursued by voters in preparing their ballots is Article 2969 of the Revised Civil Statutes, and that portion of it material to your inquiry is in the following language:

"When a voter desires to vote a ticket straight, he shall run a pencil or pen through all other tickets on the official ballot, making a distinct marked line through such ticket not intended to be voted; and when he shall desire to vote a mixed ticket he shall do so by running a line through the names of such candidates as he shall desire to vote against in the ticket he is voting, and by writing the name of the candidate for whom he desires to vote in the blank column and in the space provided for such office; same to be written with black ink or pencil, unless the names of the candidates for which he desires to vote appear on the ballot, in which event he shall leave the same not scratched."

It will be seen that this provision of the statutes directs a different method of voting a mixed ticket from the one described in your first question, and of course it could not be said that the law would not be violated by voting in a different method from the one prescribed by law. However, this provision of the law is directory and not mandatory, which means, in effect, that votes cast in the manner described by you in your question No. 1 should not be thrown out, but, on the other hand, should be counted by the election officers in favor of the person voted for.

In this connection I call your attention to the case of *Moore vs. Plott*, 206 S. W., 958, in which the validity of ballots was attacked on the ground that voters did not follow the terms of the above quoted statute. The following language of the opinion of the Court of Civil Appeals in that case, written by Justice Brady, discloses the grounds upon which the ballots were attacked:

"Because the electors who attempted to vote for Moore prepared their ballots by drawing a line through the name of appellee, and writing in the name of C. O. Moore in the space left for appellee on said Democratic ticket, and that they did not write Moore's name in the blank column on the ballot, in the space left for the office of sheriff, as required by law; further, that some of the said electors did write the name of Moore in the blank space on the Republican ticket, the Socialist ticket, the Independent ticket, and at other places on the ballot used at the election."

In deciding the case the court said:

"If this statute be mandatory, it is clear that most of the votes cast for appellant Moore under the allegations of appellee's petition were illegal and void, and that, so far as this question alone is concerned, it was not error to grant appellee his temporary injunction. On the other hand, if the statute is merely directory, then the failure to observe its directions would constitute, at most, an irregularity which, under the authorities would not avoid the election, or render the votes so cast illegal, and, independently of any other question, the action of the trial court in granting the injunction would be fundamental and reversible error."

And further, we quote from the court's opinion the following excerpts:



"In this case we think it clear, from the averments of appellee's petition, that it was the intention of the voters who cast the votes assailed to choose the appellant C. O. Moore as sheriff of Falls County, rather than the appellee, whose name they scratched. The manner in which they expressed this choice, although not literally following the terms of the statute, was in substantial compliance therewith."

You are, therefore, advised that votes cast in the manner suggested in your first question should be counted for the persons for whom the voter so votes.

In reply to your second question, you are advised that the law would not be violated if a voter marks out all the tickets on the official ballot except the Democratic and Republican tickets and then marks out all of the names on the Republican ticket except the one such voter desires to vote for, and also scratches out the name of the person on the Democratic ticket for whom he does not desire to vote. Such a vote should be counted for all the Democrats so voted for and for the Republican so voted for.

It is our opinion that the method outlined in your second question is the method which the statute contemplates shall be followed when a voter desires to scratch a candidate whose name is printed in the Democratic column and desires to vote for a candidate whose name is printed in the Republican column.

Your third question involves an interpretation of Article 213 of the Penal Code of the State of Texas, which reads as follows:

"Any judge may require a citizen to answer under oath before he secures an official ballot, whether he has been furnished with any paper or ballot on which is marked the names of anyone for whom he has agreed or promised to vote, or for whom he has been requested to vote, or has such paper or marked ballot in his possession, and he shall not be furnished with an official ballot until he has delivered to the judge such marked ballot or paper, if he has one. And any person who gives, receives or secures, or is interested in giving or receiving, any official ballot, or any paper whatever, on which is marked, printed or written the name or names of any person or persons for whom he has agreed or proposed to vote, or for whom he has been requested to vote, or has such paper marked, written or printed in his possession as a guide or indication by which he could make out his ticket, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars, and confinement in the county jail for thirty days. (Acts 1905, p. 536.)"

It will be noted that the first sentence of this article of the Penal Code is designed to prevent a person from going into the voting booth while he has in his possession any paper or ballot on which is marked the name of any person for whom he has agreed or promised to vote, or for whom he has been requested to vote, but this first sentence does not define the criminal offense. There would be some force in the argument that by reason of the language of this first sentence in Article 213 that the prime purpose was to prevent voters from being influenced by marked ballots, and especially from taking marked ballots into the election booths. However, it is the last sentence in the article that defines the criminal offense, and we are not in a position to say that this language limits the offense to situations where marked ballots and papers are taken by the voter to the place of balloting.

After carefully considering this article of the Penal Code we are

of the opinion that where no agreement or proposal to vote for the person on the marked ticket has been entered into or made, and no request has been made to the person receiving or securing such marked ticket to vote for the person on the marked ticket, the law would not be violated by the preparation of a sample marked ballot for distribution among the voters as circulars or for publication in newspapers showing the voters how they may lawfully vote for the Democratic presidential electors and all Democratic nominees except for Governor and also the Republican candidate for Governor.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2615, Bk. 61, P. 161.

EXPRESS COMPANIES—MOTOR TRUCKS—AUTHORITY OF RAILROAD COMMISSION TO REGULATE RATES.

1. Individuals and corporations operating automobile trucks for the carriage of packages, papers, etc., between points within this State having a defined route and definite places of delivery within the communities between which they carry, are doing an express business by railroad or otherwise within Article 3860, Revised Civil Statutes of 1925, and are subject to the jurisdiction of the Railroad Commission with reference to rates of carriage.

2. The words "or otherwise" as used in the statute are not to be limited to means of transportation similar to railroads, the doctrine of *ejusdem generis* having no application.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 10, 1925.

*Hon. Clarence E. Gilmore, Chairman, Railroad Commission of Texas,  
Austin, Texas.*

DEAR MR. GILMORE: Receipt is acknowledged of your recent letter inquiring as to the authority of the Railroad Commission to regulate express rates where the carriage is by automobile. Your inquiry arises under Title 56, Revised Civil Statutes of 1911, wherein persons, firms and corporations "doing the business of an express company upon railroads or otherwise" are declared to be common carriers, and the rates to be charged by them are made subject to the control of the Railroad Commission. After quoting Articles 3819 and 3820, Revised Civil Statutes of 1911, you say:

"There are numerous individuals and corporations operating automobile trucks engaged in the transportation of various articles of merchandise between points in the State of Texas for hire. We are not advised as to the exact name given to these transportation companies; that is to say, whether they operate under the name of express companies or freight companies, but we are definitely advised that they transport for hire, goods, wares and merchandise.

"This Commission has not exercised, nor sought to exercise, any jurisdiction over the rates, fares, charges, etc., made by these respective individuals and companies.

"We will thank you to advise us if the individuals and companies so engaged in the transportation of goods, wares, and merchandise by automobile trucks are common carriers, and further, if the Railroad Commission of Texas has any jurisdiction whatever over them."

The information above given is not sufficiently specific to enable us to say that the individuals and companies referred to are or are not doing the business of an express company within the meaning of our statutes. The phrase "express business" involves the idea of regularity as of route or time or both. *Retzer vs. Wood, Collector*, 109 U. S., 185. If the individuals or companies to which your inquiry relates merely perform carriage services on calls or special request we do not think they could be said to have engaged in the business of an express company. On the other hand, if packages, papers, etc., are left at a particular place in one town to be delivered by them at a regular office or place in another town, and they regularly carry such property along a designated route for hire and hold themselves out to the general public as carriers for hire of such property, we think they are subject to the jurisdiction of the Railroad Commission with reference to the rates to be charged.

This is apparent from the unambiguous language of the statute. Express companies as we know them ordinarily operate in connection with railroads, but the Legislature declared all persons, firms and corporations doing the business of an express company, upon railroads *or otherwise*, to be common carriers, and vested in the Railroad Commission the power and duty to fix and establish reasonable and just rates or charges to be made by such carriers. It has been suggested that Article 3819 is subject to the familiar rule of statutory construction known as *ejusdem generis*; that is, that the general words "or otherwise" as used in the statute are to be limited to means of transportation similar to railroads. We are of the opinion, however, that this well known rule has no application. The rule of *ejusdem generis* is not one of law, but one of construction to aid the judicial mind in determining the legislative intent. It is defined in 19 *Corpus Juris*, 1255, as the doctrine "that where an enumeration of specific things is followed by some general word or phrase such general word or phrase is to be held to refer to things of the same kind." In Article 3819, Revised Civil Statutes of 1911, Article 3860 of the present code, there is no enumeration of transportation facilities. We have simply the one word "railroads" followed by the sweeping phrase "or otherwise." These general words must be given a meaning. If they are to be restricted to means of transportation similar to railroads it is difficult to see how they can include any persons doing the business of an express company otherwise than by railroad, except perhaps express companies carrying over interurban electric lines. The Express Company Act was passed in 1891, prior to the incorporation of any interurban electric companies within this State. It is probable that the Legislature did not have in mind these electric lines. If, at the time of enactment, "otherwise than by railroad" meant to the Legislature only over interurban lines, we may assume that such means of transportation would have been specifically named. If, as is more probable, the Legislature did not know the feasibility of electric facilities for the carriage of express, then, to them, there were no means of transportation similar to railroads, and the words "or otherwise" as used in the statute must be given the broad signification which the term implies. The best criterion for determining the legislative intent is to be found in the language used, and artificial rules of construction

cannot control. When the Twenty-second Legislature placed under the jurisdiction of the Railroad Commission express companies operating on railroads *or otherwise*, we think they included all persons doing an express business as hereinbefore defined, whether by railroad, electric line, motor truck, or whatever means of transportation may be employed.

We cite you to the case of Western Association of Short Line Railroads vs. Railroad Commission of State of California, with its companion case of United Railroads of San Francisco vs. same, 173 Calif., 802, 162 Pac., 391, P. U. R. 1917C, 1 A. L. R., 1455. There the Western Association of Short Line Railroads made application to the Railroad Commission to regulate the business of the Wichita Transportation Company, a common carrier transporting freight in motor trucks upon the public highways of the State of California. The United Railroads case involved the Peninsula Company, a carrier of passengers by automobile between points in the same State. The Constitution of California, defining the powers of the Railroad Commission, provided that it should

"have the power to establish rates or charges for the transportation of passengers and freight by railroads and *other transportation companies.*"

The Railroad Commission dismissed the respective complaints on the ground that motor transportation was not included within the constitutional provision above quoted. The Supreme Court held to the contrary, saying:

"One would have no hesitancy in declaring that the language of the Constitution in conferring upon the Railroad Commission power of regulatory control over *railroads and other transportation companies* embraced within its grants companies of the nature we were considering. \* \* \* Did the Constitution in the language quoted exclude by necessary or even by fair construction control over transportation companies of the character here presented? Assuredly, nothing in the language of the grant excludes them, and no legitimate construction upon the phrase so oft quoted demands their exclusion."

The California court refer in their opinion to a former decision excluding from the jurisdiction of the Railroad Commission a local street-car company in San Francisco, and reiterate such holding on the ground that the constitutional provision was intended to include only concerns doing business between communities or towns. Likewise we think that the act of our own Legislature could not be construed to include persons, firms or corporations doing a mere local express business. The purpose of the Railroad Commission Act was not to regulate local carriage. It is apparent from the language of Article 3819 that only carriage between points outside one locality is contemplated. The carriers in question are required to deliver at the express office "nearest destination." Obviously, it was not the intent that the act should cover draymen or truckmen, even though they may make a regular haul along a defined route within a town or community. We think, however, that individuals, firms and corporations doing an express business within this State by carrying packages, papers, money or property along a designated route between localities by means of motor trucks or motor buses and making deliveries at fixed or designated depots, offices or stations and holding themselves out to the

general public as carriers for hire of such property are within the purview of the statutes cited in your letter.

You are therefore advised that, under the conditions above stated, the individuals and companies named in your letter are common carriers, and subject to the jurisdiction of the Railroad Commission conferred upon it by Article 3820, Revised Civil Statutes of 1911.

Very truly yours,

ERNEST MAY,  
Assistant Attorney General.

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Op. No. 2573, Bk. 60, P. 163.

DISTRICT CLERK—FEE FOR ASSESSING DAMAGES.

The only instance in which a district clerk is authorized to charge a fee for assessing damages is where the same is assessed by him under the direction of the court as provided for by R. S. Article 1938.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 13, 1924.

*Hon. J. L. Chapman, Banking Commissioner, Capitol.*

DEAR SIR: Your letter addressed to this Department received. In it you state: "Article 3855, R. S. 1920, provides that the district clerk may charge fifty cents for assessing damages for each case not tried before a jury. Article 3859 provides that no district clerk shall receive compensation for assessing damages in any case."

Article 3859 referred to by you was repealed by the Act of 1901, page 24. Article 3855 is in force and authorizes the district clerk to charge a fee of fifty cents for assessing damages in each case not tried by a jury. It will be noted that this fee is allowed for assessing damages in each case not tried by a jury.

R. S. Article 1938 provides that when a judgment by default is rendered against a defendant, or all of several defendants, if the cause of action is liquidated and proved by an instrument of writing, the damages shall be assessed by the court or under his direction.

R. S. Article 1939 provides that if in such case (judgment by default) the cause of action is unliquidated, or be not proved by an instrument of writing, the court shall hear evidence as to the damages and shall render judgment therefor, unless the defendants shall demand and be entitled to a trial by jury.

Where a case is tried by the court without the intervention of a jury on issue joined, the court, of necessity, must assess the damages.

In no instance is it provided by our statute that the clerk shall assess the damages in any case tried by the court. The nearest approach to such authority is R. S. Article 1938. That article provides that where a judgment by default is rendered on a liquidated demand that the damage shall be assessed by the court or under his direction. Under this article, when the court so directs, the clerk can probably assess the damages.

Fees being compensated to an officer for services rendered, where there is no power or authority to render the particular service, he can-

not charge therefor even though the statute provides a fee for such service.

You are therefore advised that the district clerk having no power or authority to assess damages in any case, except where he assesses the same under the direction of the court as provided by R. S. Article 1938 (which direction should appear in the judgment rendered), he is not entitled to charge the fee therefor prescribed by statute.

The law as herein announced applies to all proceedings by the Banking Commissioner to procure orders of court in the liquidation of a bank by him. In such proceedings no fee should be taxed for assessing damages.

Very truly yours,

JNO. W. GOODWIN,  
Assistant Attorney General.

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Op. No. 2591, Bk. 60, P. 157.

FEES OF OFFICE—SHERIFF—MILEAGE.

Where there are a number of cases and the sheriff conveys the prisoners to jail and summons witnesses, he is entitled to mileage only for the number of miles actually traveled and is not entitled to duplicate his mileage so as to receive mileage for many times the number of miles actually traveled.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 17, 1925.

*Hon. S. H. Terrell, Comptroller, Capitol.*

DEAR SIR: Attorney General Moody is in receipt of your inquiry of the 11th instant reading as follows:

"I am enclosing herewith copy of a letter dated February 4, 1925, written by this Department to Hon. Lewis Jones, judge of the Twenty-seventh District Court, in regard to a fee bill submitted to this office for approval and payment by Mr. John R. Bigham, sheriff of Bell County. As you will note from copy of said letter I declined to approve the bill in full, for the reasons stated therein.

"Judge Jones has stated to me today that he has taken up with your Department the question as to whether or not the account is a valid and legal one. Under the circumstances I am in doubt as to my duties in the matter and with the facts and data which have been placed before you I will ask that you favor me, at your earliest convenience, with a written opinion advising whether or not I am within my rights in declining to issue warrant covering the account as submitted."

Judge Lewis H. Jones of Belton took this matter up with your Department and also with the Attorney General's Department and has addressed a communication to Attorney General Moody under date of the 5th instant reading as follows:

"An account has been presented to me for approval by Mr. John R. Bigham, sheriff of Bell County, for \$5054.48.

"As the approval of this account involves necessarily the construction of Article 1132 of the Code of Criminal Procedure, 1920, I consider it of such importance, before approving the same, to ask the opinion of your Department as to whether or not the account should be approved, as a legal charge against the State.

"In order that you may understand the exact question presented, you will permit me to say that the grand jury in Bell County in January found 39 bills of indictment against three defendants. That is, 13 indictments against each of three defendants for the alleged burglary of 13 different stores on the same night in the town of Killeen, Texas.

"These cases were set for trial in the usual and regular manner, and process issued by both the State and the defendants for certain witnesses.

"This account discloses that at the time the bills of indictment were returned, two of the defendants were in the Dallas County jail. It also shows that 292 miles—Dallas and return—is charged in 26 cases; that he arrested these two defendants in 13 cases each and brought them back to Belton. In other words, he charged mileage in every case, even though he only made the trip to Dallas and brought back at the same time both prisoners, or an aggregate of 7696 miles or a money value of \$1594.32 for arresting and bringing to Belton these two defendants.

"And for the third defendant, Cecil Henderson, who was in jail at Brownwood, the report shows that the sheriff traveled in each case, going and returning, 280 miles, there being 13 cases, the total mileage being 3640 miles, or a total money value of \$764.40 for bringing this prisoner to Belton.

"This report of the sheriff also shows that the sheriff has charged mileage for subpoenaing the same witnesses, charging therefor the same mileage for each witness in all 39 cases. The account totaling \$5054.28.

"There has heretofore existed confusion as to the law regarding these matters. I have not seen the Code as reported by the Codification Commission, but assume it is the same as the old one. I believe that this matter is of such importance to the State that before the account is approved, it should be passed on by the Attorney General's Department.

"It has been my impression that your Department has heretofore held that accounts of this nature, prepared as this one, should be paid by the State. Before approving it, however, I desire to know whether or not these items are a proper charge.

"I am sending you under separate cover the original account presented to me, to better enable you to ascertain the facts. This you will return to me when you shall have examined it.

"Will you be so kind as to furnish me as soon as may be your opinion:

"First, as to whether or not the sheriff's account in going after the prisoners at Dallas and Brownwood is proper and correct charge against the State; and

"Second, whether or not the sheriff's account shows duplication of mileage and should not be allowed."

Article 1122 of the Code of Criminal Procedure of 1911 as amended by Chapter 181 of the General Laws of the Regular Session of the Thirty-eighth Legislature, in so far as material, reads as follows:

"Article 1122. Fees to Sheriff or Constable. The sheriffs and constables of this State shall receive the following fees:

"1. For executing each warrant of arrest or capias, for making arrest without warrant when so authorized by law, the sum of one dollar, and in all cases five cents per mile for each mile actually and necessarily traveled in going to the place of arrest; and, for conveying the prisoner or prisoners to jail, he shall receive the mileage provided in subdivision 5 of this act.

"2. For summoning or attaching each witness, fifty cents.

"3. For summoning a jury in each case where a jury is actually sworn in, two dollars.

"4. For executing death warrant, fifty dollars.

"5. For removing or conveying prisoners, for each mile going and coming, including guards and all other necessary expenses, when traveling by railroad, ten cents. When traveling otherwise than by railroad, fourteen cents; provided, that where more than one prisoner is so conveyed or removed at the same time, in addition to the foregoing, he shall only be allowed eight cents per mile for each additional prisoner; provided, that when an officer goes beyond the limits of this State after a fugitive on requisition of the

Governor, he shall receive such compensation only as the Governor shall allow for such service.

"6. For each mile the officer may be compelled to travel in executing criminal process, summoning or attaching witnesses, five cents; provided, that in no case shall he be allowed to duplicate his mileage when two or more witnesses are named in the same or different writs in any case, and he shall serve process on them in the same neighborhood or vicinity during the same trip, he shall not charge mileage for serving such witness to or from the county seat, but shall charge only one mileage, and for such additional only as are actually and necessarily traveled in summoning and attaching each additional. When process is sent by mail to any officer away from the county seat, or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process; and the return of the officer shall show the character of the services, and miles actually traveled in accordance with this subdivision; and his account shall show the facts."

These provisions must be read and considered in connection with Article 1132 of the same Code, which reads as follows:

"Article 1132. Officer Shall Make Out Cost Bill, and What It Shall Show. Before the close of each term of the district court the district or county attorney, sheriff and clerk of said court shall each make out a bill or account of the costs claimed to be due them by the State, respectively, in the felony cases tried at that term; the bill of account shall show:

"1. The style and number of cases in which the costs are claimed to have accrued.

"2. The offense charged against the defendant.

"3. The term of the court at which the case was disposed of.

"4. The disposition of the case, and that the case was finally disposed of, and no appeal taken.

"5. The name and number of defendants; and, if more than one, whether they were tried jointly or separately.

"6. Where each defendant was arrested or witness served, stating the county in which the service was made, giving distance and direction from county seat of county in which the process is served; and mileage shall be charged for distance by the most direct and practicable route from the court whence such process issued to the place of service.

"7. In allowing mileage, the judge shall ascertain whether the process was served on one or more of the parties named therein on the same tour, and shall allow mileage, only for the number of miles actually traveled, and then only for the journey made at the time the service was perfected.

"8. The court shall inquire whether there have been several prosecutions for an offense or transactions that is but one offense in law; and, if there is more than one prosecution for the same transaction, or a portion thereof, that could have been combined in one indictment against the same defendant, the judge shall allow fees to sheriffs, clerks and district and county attorneys in but one prosecution.

"9. Where the defendants in a case have served on the trial, the judge shall not allow the charges for service of process and mileage to be duplicated in each case as tried; but only such additional fees shall be allowed as are caused by the severance. (Acts 1879, S. S., ch. 46.)"

From these provisions and particularly subdivision 7 of Article 1132 we are of the opinion that a sheriff is not entitled to mileage except for the number of miles actually traveled and then only once for such number of miles. It will be noted that the statute has made clear that the sheriff is entitled to mileage only for the number of miles actually traveled.

Take the case of the sheriff in going to Dallas to get two prisoners. He actually traveled only 292 miles. In allowing fees and mileage the



law contemplates that the same shall be for services actually performed and, therefore, how could it be said that the sheriff is entitled to charge for 7696 miles in the instance just referred to, when he only traveled 292 miles?

In this instance you and the district judge are seeking advice as to what the law is in order to determine his duty in approving or disapproving the account submitted by the sheriff, and we are giving our opinion as to whether the sheriff is lawfully entitled to this duplication of mileage in conveying these prisoners and summoning these witnesses. We hold that the law does not entitle him to this duplication of mileage as shown in his account.

The accounts have not been approved by the district judge in the Bell County cases; that is, the accounts totaling \$5054.48. Since the accounts have not been approved by the district judge, the question decided in the case of Rochelle vs. Lane, 148 S. W., 558, is not involved. The question as to what the law is in determining what the district judge should do with these accounts is not the same as to the question which would be presented if the accounts were approved by the district judge and presented to the Comptroller.

We are not unmindful of the decision in the case of G., C. & S. F. Ry. Co. vs. Dawson, 7 S. W., 63, but that case involved mileage of the sheriff in a civil case and involved the construction of a different statute to the one confronting us here. No court, so far as we are informed, has had occasion to pass upon the question we are passing upon in this opinion.

Very truly yours,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2570, Bk. 60, P. 166.

FEES OF OFFICE—TAX COLLECTORS' COMMISSIONS.

Officers are not entitled to fees unless such fees are provided for by law.

The words "collection of taxes" as used in Article 3872, Texas Complete Statutes of 1920, means to obtain payment of same from the taxpayers, and has no reference to taxes collected by some other authority and turned over to the tax collector.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 13, 1924.

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

DEAR SIR: Your letter of October 7th, regarding certain commissions claimed by the tax collector of Willacy County, has been before this Department for some time, and our reply has been withheld in accordance with an agreement between your Mr. McLendon, the tax collector of Willacy County, and myself, in order to give the attorney for the tax collector time to file a brief with this Department if he so desired. No brief having been filed up to this date, I am now at the request of your Department giving you our opinion.

Your letter is as follows:

"Please submit us an opinion on the following: Section 7, Chapter 104, Acts of the Thirty-seventh Legislature, Regular Session, provides that the tax collectors of Cameron, Hidalgo and (Old) Willacy, or Kennedy, Counties remit the collections made for 1921 and prior years upon the persons and property in the territory that was taken from their counties to be made a part of (New) Willacy County; to the tax collector of (New) Willacy County, after making deduction of their commissions for collecting. The tax collector of (New) Willacy County was then to 'remit same to the proper authorities.'

"Would the tax collector of (New) Willacy County be entitled to deduct a commission for collecting before making remittances of the State's portion of such taxes to the State Treasurer?

"If he would be entitled to make such deduction and if the tax collectors of (Old) Willacy, or Kennedy, County and of Cameron County made their reports and remittances of taxes collected as above stated direct to the State Treasurer and only the tax collector of Hidalgo County made his remittance to the tax collector of (New) Willacy County, would the tax collector of (New) Willacy County be entitled to deduct commission on all of the tax collections for the year 1921 and prior years whether remitted to him or remitted direct to the State Treasurer or would he be entitled to deduct commission only upon that portion of the money that actually passed through his hands?"

From a reading of Section 7, Chapter 104, Acts of the Thirty-seventh Legislature, it will be observed that no provision was made for the fees or commissions to the tax collector of (New) Willacy County from taxes collected by the tax collectors of the three counties from which the (New) Willacy County is created, although provision is made in said act for commissions to the tax collectors of each of the three counties from which the (New) Willacy County was taken. The Legislature having been specific in providing that each of the tax collectors of the counties from which (New) Willacy County was created, might deduct and retain their commissions on taxes collected by them on property included in (New) Willacy County, and having failed to provide any fees or commissions for the tax collector of (New) Willacy County on account of the taxes collected by the tax collectors of the three counties from which Willacy County was created, it must be concluded that the Legislature did not intend to allow the tax collector of (New) Willacy County any compensation for receiving from the other collectors taxes on property included in (New) Willacy County, and which taxes were by law authorized to be collected by the collectors of the three other counties. To have allowed the tax collector of (New) Willacy County commissions on taxes collected by the tax collectors of the other counties would have subjected such taxes to the toll of double commissions, and since the Legislature did not so provide, we cannot read into the statutes that which the Legislature failed to include.

Article 3872, Complete Texas Statutes, 1920, provides for the commissions to be paid to the various tax collectors for the collection of taxes. The words "collection of taxes" as used in this article means to obtain payment of same from the taxpayers and has no reference to taxes collected by the tax collectors of the three counties from which Willacy County was created and paid over to the tax collector of Willacy County after having been so collected.

Words and Phrases, 1255.

Taylor vs. Kerney County, 53 N. W., 211.

It is well settled that officers are not entitled to fees unless such fees are provided by law.

29 Cyc., 1422-23.

Hallman vs. Campbell, 57 Texas, 54.

It is, therefore, the opinion of this Department that the tax collector of (New) Willacy County is not entitled to commissions on any of the taxes collected by the tax collector of the other three counties whether same were remitted to him or directly to the treasurer. This holding may appear to impose a burden on the tax collector of Willacy County, but in the language of the Supreme Court in the case of Hallman vs. Campbell, supra, it "is one of the burdens devolving upon the officer as an incident to his office, the relief for which, if any, must be had through the Legislative and not the Judicial Department."

C. A. WHEELER,

Assistant Attorney General.

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Op. No. 2621, Bk. 61, P. 252.

SCHOOL FUNDS—GAME FUND.

The provision contained in Article 5347, Revised Civil Statutes of 1925, providing that certain funds should be credited to the game fund, is the law notwithstanding the fact that it conflicts with an act of the Thirty-seventh Legislature.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, October 16, 1925.

*Hon. J. R. Smith, Chief Deputy, Game, Fish and Oyster Commission, Capitol.*

DEAR SIR: Attorney General Moody is in receipt of yours of the 7th instant, requesting an opinion as to whether the following provision contained in Article 5347 of the Revised Civil Statutes of 1925 is the law notwithstanding the fact that it is in conflict with the provisions of Chapter 55 of the General Laws of the Regular Session of the Thirty-seventh Legislature:

"All proceeds arising from the activities affecting lands other than those belonging to the public free school fund, the University and the several asylums, shall be credited to the game fund."

Substantially this same language appears in Section 2 of Chapter 175 of the General Laws of the Regular Session of the Thirty-ninth Legislature, but this latter mentioned act has been held to be unconstitutional by this Department. See communication signed by Hon. Ernest May, Assistant Attorney General, of date May 6, 1925, addressed to Hon. S. H. Terrell. This act being unconstitutional, the fact that the Legislature included the above language in it is of very little significance.

However, we are of the opinion that the quoted language is the law because it has been included in the Revised Civil Statutes of 1925, and must for that reason supersede any conflicting provision of a prior statute. *American Indemnity Company vs. City of Austin*, 246 S. W., 1019.

We quote the following language from the able opinion of the Supreme Court in the case just cited, prepared by Chief Justice Cureton, which should settle the question as to the authority of the Legislature to change the law in a codification of the statutes:

“Section 43 having given the Legislature authority to revise the laws, without, within itself or by any other section of the Constitution, having prescribed the method of revision, or without having limited the legislative power, except in so far as this power is limited in the enactment of any other law, the Legislature has plenary authority to revise, and may do so in its own way and to any extent; provided, always, the substance of the proposed revision is not otherwise prohibited by the Constitution. It may do so by omitting laws from the Code which, when done, under the repealing clause, are repealed. It may do so by changing words or phrases for the purpose of harmony or brevity, without in fact changing the meaning, or it may do so by the incorporation of new and material matter in the revision. The term ‘revise’ is broad enough to permit the amendment of existing laws or statutes in these several ways.”

The following language may also be quoted as showing very forcibly the futility of authorizing a revision if such revision is not to be regarded as the law when adopted by the Legislature:

“To say that the citizen, in order to know the law by which his rights are to be determined, must go through the many volumes of session laws enacted by nearly 40 different Legislatures, and examine the original acts, including the captions and repealing acts and clauses, is not to be seriously considered. The Roman citizen who had to read only 3000 plates of brass, on which his laws were recorded, had, as compared to this, an easy undertaking. The session laws are for all practical purposes inaccessible to the average citizen, and the task of searching through them to ascertain the law an insurmountable one. These laws, as republished by Gammel, down to 1919, occupy nineteen huge volumes, aggregating approximately 30,000 pages. And yet, unless the Revised Statutes constitute the law—are the law—citizens and courts alike will be compelled to seek it in the Session Acts of the Legislature.

“But the Revised Statutes, as we have seen, are the law, and are to be looked to with safety and confidence by the citizen; nor need one, under the rules of construction shown in the authorities cited, look into the original acts, except to explain ambiguities in the Code. The Revised Statutes of this State, when once adopted, become the entire law on the subjects they purport to cover, unless specially excepted, and any inquiry into matters of legislative procedure by which the original session acts were adopted, for the purpose of impeaching the constitutional integrity of that procedure, is wholly inadmissible.”

We have not overlooked the provision in the final title of the late revision of the Civil Statutes contained in Section 6, in reference to the public school fund, etc. The repealing clause of the final title provides “that all Civil Statutes of a general nature in force when the Revised Statutes take effect and which are not included herein or which are not hereby expressly continued in force are hereby repealed.”

Section 6 of the final title reads as follows:

“School Funds. That no law relating to the University or public school fund, or to the Agricultural and Mechanical College fund, or the investment of any such funds, or making any reservation in favor of the same, and no law affecting Federal aid for vocational education in this State, shall be affected by the repealing clause of this title, except where altered or amended by the Revised Statutes.”

It will be noted that under Section 6, no law relating to the public

school fund shall be affected by the repealing clause of the final title *except where altered or amended by the Revised Statutes*. We believe that this saving clause is insufficient to preserve the provisions of an act of the Thirty-seventh Legislature which are in direct conflict with an express provision brought forward in the body of the Revised Civil Statutes. It follows that we are of the opinion that all proceeds arising from the activities affecting lands other than those belonging to the public free school fund, the University and the several asylums, are required by law to be credited to the game fund.

Very truly yours,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2575, Bk. 60, P. 179.

GAME, FISH AND OYSTERS—STATUTORY CONSTRUCTION—PUBLIC  
WATERS DEFINED.

1. The Game, Fish and Oyster Commissioner is authorized to collect a fisherman's tax as well as dealer's tax on all fish taken and sold from private waters by virtue of Article 10, Chapter 73, General Laws of the Second Called Session of the Thirty-sixth Legislature.

2. The title and subject matter of an act are liberally construed to sustain legislation.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 6, 1924.

*Mr. H. W. Wells, Chief Deputy Game, Fish and Oyster Commissioner,  
Austin, Texas.*

DEAR SIR: This Department is in receipt of your letter of 26th ultimo reading as follows:

*"W. A. Keeling, Attorney General, Capitol.*

"DEAR SIR: There is located in Calhoun County a lake known as Green Lake, the bed of which was patented by the Commissioner of the General Land Office of Texas to one Howard Kenyon and associates. At the time this patent was issued to Kenyon and associates this lake was dry and was sold as agricultural land. Subsequently due to excessive rains and other causes, this acreage became filled with fresh water, and as a result there is now marketable fish being taken therefrom and sold through regular commercial channels.

"The question we wish to propound is this: 'Can the State, through the Game, Fish and Oyster Commissioner collect a fisherman's tax as well as a dealer's tax on all fish taken and sold from this lake as provided in Articles 10 and 16, Chapter 73, Acts of the Second Called Session of the Thirty-sixth Legislature, or in other words, does Article 10 levy a tax on all fish caught in *private* fresh waters?'

"We are asking your opinion on these questions as certain fishermen have raised the point that Article 10 applies to fish taken from *public* waters *only*, while it is the contention of the Department that the State is entitled to taxes on all fish taken and sold in Texas, regardless of origin.

"We respectfully request that you give us this opinion on this matter at your very earliest convenience.

"Yours very truly,"

Your material inquiry is whether or not Article 10 of Chapter 73, Acts of the Second Called Session, Thirty-sixth Legislature, levies a tax on all fish caught in private fish waters. The article expressly so

states, and unless there is some inconsistency with that article and the caption, it is quite clear your question should be answered in the affirmative.

Said Article 10 is in part as follows:

"There shall be and is hereby levied a tax of not less than 1 per cent per pound on all fish and shrimp taken and offered for sale in this State, and not less than 2 per cent per barrel on all oysters, sold or offered for sale in this State whether from private or public beds," etc.

Thus it will be seen that there is no limitation nor exception in the terms quoted, but the tax is levied upon *all fish*, etc., taken and sold or offered for sale *in this State*.

The caption of the act reads as follows:

"An Act creating the office of Game, Fish and Oyster Commissioner; providing for his appointment; prescribing his qualifications; defining his duties; authorizing the appointment of deputies; prescribing their qualifications; defining their powers and duties; and for the protection of fish, oyster, turtle, terrapins, shrimp, crabs, clams, mussels, lobsters and all other kinds and forms of marine life in the public fresh water, tidal and coast waters of the State and to protect the natural oyster beds and reefs and to provide for the location of private beds, prescribing the terms, tax and conditions upon which fish, shrimp, crabs, clams, turtle, terrapin, mussels, lobsters and all other forms and kinds of marine life may be taken *from the waters of this State*; providing that this act shall be construed to be a continuation of all former laws upon the subject; and providing that all suits now pending involving laws affected by this act shall not abate but shall be prosecuted under such former laws and under this act, and declaring an emergency." (Italics ours.)

The suggestion has been made that since the caption in creating the office states it is for the protection of fish and other marine life in *public* fresh waters, tidal and coast waters of the State, etc., that the tax provided in Article 10 could not apply to private waters. We call your attention to the subsequent part of the caption which is above quoted and you will note that it prescribes the terms, tax and conditions upon which fish, etc., may be taken *from the waters of this State* without limitation or restriction. It might be true that the office was created for the protection of fish and other forms of marine life in the public fresh waters, tidal and coast waters. Even if we concede that that is the primary purpose of the act, yet the tax inquired about is incidental to the maintenance of the office and the propagation of the fish and oysters, therefore the tax declared by the plain language in Article 10 is not only not repugnant or contrary to the caption, but is in perfect harmony with, and in support of the letter and spirit of the act.

In Sutherland on Statutory Construction, page 101, Section 92, the rule is well expressed that the title and subject matter must be liberally construed to sustain legislation. Several illustrations are therein given. For instance, an act, among other things, for "laying out" certain portions of a city and to provide means therefor, might contain provisions for opening streets. An act "to indemnify the owners of sheep in case of damage committed by dogs" properly contained a provision imposing a license fee upon the owners and keepers of dogs. An Act "to authorize the town of P. to raise money to construct a dock" was held

broad enough for provision to maintain it afterwards and to collect forfeits. That case has a striking similarity to act herein discussed.

We might further remark that in addition to our reasons for the construction above given, the contention of your Department should be upheld because you have given it that consistent construction for many years and the relative rights of all interested parties have become more or less fixed by acquiescence in your construction. While the departmental construction is not binding it is uniformly held that it is highly persuasive and should not be overruled without some authority.

Therefore, we specifically answer your question in the affirmative.

Yours very truly,

RILEY STRICKLAND,  
Assistant Attorney General.

Op. No. 2640, Bk. 61, P. 174.

STATE HIGHWAYS—CHAUFFEUR'S LICENSE.

1. Owners, operators or chauffeurs of motor vehicles are not, simply as such, required to have a chauffeur's license.

2. One employed by another to operate the latter's motor vehicle, either for a stipulated sum or for wages or for part of the profits that might arise from the use of the vehicle for hire, whether the car be for pleasure or otherwise, is required to have a chauffeur's license, even though as an incident of such employment or business he operates such motor vehicle in the hauling of passengers or goods.

3. One employed by another to deliver goods or haul passengers, this being the business or work for which he is paid, and having duties distinct from and not simply incident to the operation of the motor vehicle, is not required to have a chauffeur's license, even though he may operate a motor vehicle as a means of carrying on such business.

4. One driving his own motor vehicle for hire, whether hauling passengers or freight, is not a chauffeur within the intent and meaning of the law, and is, therefore, not required to have a chauffeur's license.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 1, 1926.

*Mr. W. P. Kemper, Acting State Highway Engineer, State Office Building, Capitol.*

DEAR SIR: This Department is in receipt of your inquiry under date of February 18, 1926, reading as follows:

"We will appreciate your written opinion on the following:

"Would a person who operates a truck either owned by himself or by another, hauling goods, wares or merchandise of any description when a fee is charged for so hauling, be subject to payment of chauffeur license?

"Would a person who operates a service car, either owned by himself or by another, when such car is used for transporting passengers for a fee, be subject to chauffeur license?

"We ask your opinion on the above in the broadest and fullest sense possible."

This presents, as you know, some questions of serious difficulty, but it shall be our purpose to give you an answer as comprehensive, complete and practical as possible. These questions arise upon the following statutes:

"Art. 6675. Every owner of a motor vehicle, tractor, trailer, semi-trailer,

or motorcycle used on the public highways of this State, and *each chauffeur, shall annually file in the office of the county tax collector of the county in which he resides or in which the vehicle to be registered is being operated, an application for the registration of each such vehicle owned or controlled by him, or for a chauffeur's license.* The county tax collector shall not issue a license to any person until such application has been filled out in full and signed by the applicant, and until the requisite fee for the number of unexpired quarters for the calendar year is paid." (Acts Thirty-ninth Legislature, p. 155.)

"Art. 6687. A 'chauffeur' is one whose business or occupation is operating a motor vehicle for compensation, wages or hire. Each chauffeur shall pay an annual fee of three dollars for the whole or part of any year he is so engaged. The Department shall prescribe the form of application for chauffeur's license, and shall require the same to be sworn to by the applicant, indorsed and vouched for by two reputable citizens of the place where the applicant lives or resides when making application, setting forth that they have known or been acquainted with the applicant for a period of not less than sixty days prior thereto, and that he is trustworthy, sober and competent to operate motor vehicles upon the highways of this State. No license shall be issued to an applicant unless he is over eighteen years old. He shall be issued a certificate and a metal badge with a distinguishing number, free of charge. Said badge shall at all times be prominently displayed on his clothing while engaged as a chauffeur, and shall be valid only during the term of his license." (Substantially, Sec. 25, Ch. 207, Thirty-fifth Legislature.)

Prior to the 1925 codification the definition of "chauffeur" followed the word in parentheses when first mentioned in the act, being expressed, "and by 'chauffeur' is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire." The difference in phraseology is, we believe, immaterial.

The legislative definition of the word "chauffeur" is in itself confusing, though at least it is plain that the intention is to restrict the requirement of a chauffeur's license to a particular class of those who would otherwise be included in the term. For instance, there could be no doubt that owners of automobiles, as such, are not to be considered chauffeurs; nor are operators of cars, as such; nor are chauffeurs who do not operate automobiles for compensation, wages or hire.

Authoritative construction of a statute is, of course, as much a part of the law as the statute itself, and so if the construction given to this statute by the Court of Criminal Appeals in *Matthews vs. State*, 214 S. W., 339, and approved by the San Antonio Court of Civil Appeals in *Insurance Co. vs. Struwe*, 218 S. W., 534, 537, is less obvious it is, nevertheless, just as conclusive as the deductions independently drawn from the law itself. It was there held that one employed by an oil company as salesman, who drove an automobile truck to transport the oil which he sold, but who received no pay from his employer for driving the truck as a means of carrying on its business in soliciting and delivering, for which he was paid, was not a chauffeur within the intention of our license law. It was said by Judge Davidson:

"If appellant was driving the auto truck for a stipulated sum or wages, or part of the profits that might arise from the use of the vehicle, when used for others, he might be within the definition given by the Legislature, but the relation, however, seems to be direct, that the chauffeur must operate the vehicle as such and for the purpose of so making money, and should as chauffeur receive compensation for operating it. \* \* \*

"The chauffeur as contemplated by the statute has a direct relation to the hire for operating of the vehicle, while in soliciting and delivering goods it is



an incident to his employment as a means of carrying on the business for which he receives no direct pay, as in this case. \* \* \*” See also *People vs. Dennis*, 166 N. Y. Supp., 318.

In other words, if one is employed by another to operate the latter's motor vehicle, either for a stipulated sum or for wages, or for “part of the profits that might arise from the use of the vehicle for hire,” whether the car be used for pleasure or otherwise, he is required to have a chauffeur's license, even though as an incident of such employment or business he operates such motor vehicle in the hauling of passengers or goods. On the other hand, one employed by another to deliver goods or haul passengers, this being the business or work for which he is paid, and having duties distinct from and not simply incident to his operation of an automobile, is not required to have a chauffeur's license, even though he may operate an automobile as a means of carrying on such business. Service car hired chauffeurs would, as a rule, seem to fall in the first class, and the ordinary delivery clerks of both wholesale and retail houses in the latter class, there being, however, conceivable variances of these general rules in particular instances.

So much is reasonably clear under the statute in the light of the decision in the Matthews case. It is with the next step that we reach the question of serious difficulty—namely, are owners of motor vehicles when engaged in the business of operating their own cars for hire chauffeurs within the meaning of the statute and required to get a chauffeur's license?

This question has heretofore been answered by this Department in the affirmative, the opinion to this effect being written by Judge Looney while Attorney General, his conclusions being expressed as follows:

“For your general guidance we believe the following general rules may be stated, to wit: The term ‘chauffeur’ includes:

“First. All those who, for wages or salary, engage themselves to operate motor vehicles, whether for pleasure or in connection with the pursuit of any business.

“Second. All those who operate for hire for the transportation of persons or property their own motor vehicles or vehicles under their control.

“It will be borne in mind that in order to be taxed at all one must be engaged in the making of a livelihood chiefly by driving or operating a motor vehicle, either for himself or for another. *Casual* or *incidental* employment of this kind falling short of being the *chief* employment a person pursues for a living would not render such liable to pay this tax.” (Reports and Opinions of Attorney General, 1916-1918, p. 597.)

With the first conclusion and the limitations expressed in the final paragraph above quoted we still agree; as to the second, the members of this Department have to this time been in hopeless conflict.

It may be that a purely literal construction of the statutory definition supports the inclusion of one whose business is that of operating a motor vehicle for hire, whether such vehicle be owned or simply used by him as an employee; but, as is said in Lewis' Sutherland Statutory Construction,

“The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention.”

In addition to this, executive construction sustained by able lawyers supports the opposite opinion to that at which we have now arrived, but having arrived at that opinion after a thorough investigation, we have become so impressed with the fact that owners operating their own cars for hire are not within the intent of the law as expressed, that upon your pointed interrogation on the matter we feel it our duty so to declare.

In our consideration of the matter, we have sought, first of all, to get at the meaning in the statutory definition of its various terms, keeping in view, of course, the intent of the Legislature in the use of those terms; for its intent not being clear in the definition, the legislative meaning of the word defined, as well as the words used in defining, must be determined under the usual rules of construction.

What is the ordinary and generally accepted meaning of the word "chauffeur"? That must control in the absence of a contrary intent. Art. 10, subdiv. 1; *Hindes vs. Locke*, 259 S. W. (Com.), 156.

Expressions in a court's opinion not essential to a decision of the questions before it are not, strictly speaking, authoritative, but they carry a certain weight, not simply because of the legal ability of the judges responsible for them, but also because they are preserved in the court reports and thus made available as persuasive, if not controlling, guides. Perhaps more important, such expressions, which are termed "dicta," are very practical indications, prejudgments, if you please, of what that particular court will probably do when the question finally gets before it for decision.

We make this extended explanation because, though the definition of the word "chauffeur" in the following quotation from Judge Davidson's opinion in the *Matthews* case may be considered dicta, it is perfectly clear that in and of itself it refutes the idea that one operating his own car for hire requires a chauffeur's license.

"The accepted meaning of the word 'chauffeur' in every State where the term is used in a motor vehicle statute is a *paid operator or employee*, and includes in it the idea of compensation for the operation of the vehicle. In some of the States, such as Massachusetts, New Hampshire, and Vermont, the clear distinction is made between the license of an 'operator' and the license of a 'chauffeur,' and in other States, such as Connecticut, Rhode Island, District of Columbia, Delaware, and Maine, where the law provides that all operators shall be licensed, the word 'chauffeur' is not used at all in the statutes, but the more inclusive word 'operator' is used. \* \* \* 'As far as the automobile industry and users of motor vehicles are concerned,' it would only be by a strained and unnatural construction, and foreign to the accepted usage, *that the term 'chauffeur' could be made to include operators other than employes for hire.* The 'National Association of Automobile Manufacturers' and the 'American Automobile Association' use the word 'chauffeur' to mean 'an operator for hire,' and it is the opinion of the court that the word, as we believe we have shown, has always been used in that sense in dealing with motor vehicle legislation'—citing *Commonwealth vs. Cooper*, 37 Pa. Co. Ct. R., 277, 282, 285."

It is only by a strained and unnatural construction that even in general parlance we speak of one being "his own chauffeur." Generally the expression when so used has a jocular and applied meaning, just as when we speak of one's being his own barber or his own lawyer. These terms all three designate a business or occupation, a chauffeur being a professional operator of a motor vehicle. Under all rules of

statutory construction the word "chauffeur" should, therefore, be given its usual or ordinary meaning when used in the law, unless there exists some special reason to give it a particular or applied meaning so as to include an owner who is acting as his own chauffeur. This rule is not varied by the fact that the term is itself defined in the law, for the very obvious reason that the statutory definition fails to define what is meant, and such meaning is the very point of inquiry.

"Motor vehicles" are defined in Article 6701, Section 1(a), so as to make the terms virtually correspond with what are more familiarly known as automobiles. The words "operating" or "operate" are undoubtedly used throughout the road law as signifying a personal act in working the mechanism of the car,—not a vicarious act as in operating a motor bus line or hired cars generally. Thus the driver operates the car for the owner, but the owner does not operate the car unless he drives it himself. *Witherstine vs. Insurance Co.*, 139 N. E. (N. Y.), 229, 230. This is forcibly illustrated by the use of the word in the penal provisions of the road law, which is in *pari materia* as the act of the same Thirty-fifth Legislature. (P. C., 801.) Certainly the owner of a car could not have been intended to be held responsible for violations of the speed law by the driver or for the operation of the car by an intoxicated driver. Though the words "operate or drive" are used disjunctively in some of these provisions, it is bound, in the nature of things, to be without any real intended distinction.

As for the words "business or occupation," they have a synonymous and well defined meaning in license fee or occupation tax laws. They mean simply a calling, trade or vocation which one engages in for the purpose of profit, as distinguished from casual or incidental acts or employment. *Shed vs. State*, 155 S. W., 524, 526; *Love vs. State*, 20 S. W., 978; *Robbins vs. State*, 123 S. W., 695. This is really the only matter discussed in the opinion of this Department already referred to, and with that much of said opinion we concur.

Under the ordinary acceptation of the terms used, the statutory definition reading:

"A chauffeur is one whose business or occupation is operating a motor vehicle for compensation, wages or hire."

should be interpreted as though it read:

"One whose employment is driving automobiles is, within the terms of this law, required to have a license if he drives automobiles for compensation, wages or hire."

If, on the other hand, one's chief business is transporting passengers or freight, his business does not become that of a chauffeur because he always drives his own car for the hire of such passengers, any more than he would become a barber by virtue of the fact that he daily shaved himself.

Indeed, this is virtually the distinction that is made in the *Matthews* case, for if one whose business is selling oil does not become a chauffeur within the intent of the law by reason of the fact that he always drives an oil truck, we do not see why one whose business is transporting passengers should become a chauffeur simply by virtue of the fact that he drives his own car for the hire of such passengers. If he is trans-

porting freight, instead of passengers, he is even more plainly upon the same footing as the oil salesman driving his employer's truck, more especially so since it could only be by a strained construction that we could speak of a hauler of freight as operating his truck for hire (See *Orr vs. State*, *infra*); yet there is no sufficient ground for distinction as between a hauler of freight and a hauler of passengers for hire. Upon the authority of the *Matthews* case the test in every instance is: What is the real and essential business of the driver? If it is driving the car, he is required to have a license; if it is transporting goods or passengers, the automobile simply being used to that end, he is not required to have a license. In the latter instance, his business would be the same, whether owner or employee, if he used a horse and wagon for the purpose. The essential principle controlling the decision in the *Matthews* case, it seems to us, should also decide the question here at issue.

After all, the application of a license fee or occupation tax must necessarily turn on the question of one's business or occupation. In other words, it is the business or occupation that is licensed or taxed and not the individual who casually or incidentally happens to perform some act, which, if he constantly performed with the end of profit within itself, might constitute his business. Persons who do not clearly come within the terms of an occupation tax or license fee statute cannot be held liable thereunder; and there is no essential distinction in this rule as between statutes of the two classes. 37 C. J., 168, 249. The confusion here comes about through the fact that the hire is paid by the passenger without distinction as to whether it is for the use of the car or for the driver's services in operating the car. We think that the common sense of the situation is that a passenger pays for his transportation without regard to the compensation of the driver, and that the hire he pays is for the use of the car and not its operation, though the latter may be incidental to the former. If this is so, his relation of hirer is with the owner as such, and not with the owner as a driver. The chauffeur's hire, as distinguished from his compensation or wages, would arise, as suggested in the first quoted excerpt from the *Matthews* case, from the use of the vehicle by others upon his agreement with his employer that he should have a part of the profits so derived. At least it is clearly apparent that the Legislature, in prescribing this definition of a "chauffeur," must have had in mind the idea of an *employment for hire*, rather than a hire of the car, since by Section 14 of the same act (Ch. 207, 35th Leg.) they said:

"No person shall *employ for hire as a chauffeur* of a motor vehicle any person not licensed *as in this act provided*."

This makes the definition of a chauffeur consistent throughout, whether his remuneration be called compensation, wages or hire. It gives a meaning to every one of those terms, without confusing their application to the car and the driver, thus complying with the *sui generis* rule. It avoids the necessity of giving a double meaning to the term "chauffeur," as we do when we include in such meaning not only the driver as an employee working for compensation or wages, but also the driver as the owner of a car for hire.

It is the occupation of the driving of cars, and clearly not the occupation of the hiring of cars, that is intended to be taxed. Section 14 of the act, just quoted, is, in our opinion, practically conclusive of the intent of the Legislature.

There are several cases somewhat illustrating the distinction here made. For instance, in *Orr vs. State*, 44 S. W., 1102, a conviction, under a vehicle license tax applicable to vehicles "let for hire," was reversed upon proof that the owner himself drove the wagon in question to move household furniture, charging so much a load or so much for the job, and never hired out his wagon to any other person.

Again, in the case of *Mullinnix vs. State*, 60 S. W., 768, a conviction for violation of a statute making every owner of a photograph gallery amenable to a tax was reversed upon a showing that the defendant was merely a photographer operating for a photograph gallery, the tax not being levied on the vocation of photographer, but on the owners of photograph galleries.

In *Norris Coal Co. vs. Jackson*, 141 N. E., 227, it appears that the term "chauffeur" in the license law of Indiana is defined as "any person operating or driving a motor vehicle as an employee for hire," and it was held that one who was hauling and delivering coal for another with a truck borrowed by him from a third party "was in no proper sense a chauffeur, and he needed no license as a chauffeur before driving said truck upon the public highways of this State, since he was using the truck as his own property."

A consideration of the purpose of the law suggests no important reason against the construction here given to it. The requirement of license fees is not a revenue measure, but designed primarily in the interest of public safety and welfare, and the license is purely personal to the driver. This is clearly apparent from the provisions of Article 6687 heretofore quoted, and also from the provisions of Article 813 of the Penal Code. Subdivision 4 of the latter article provides that no owner of a motor vehicle shall permit said vehicle to be driven by a chauffeur upon a public highway unless the requirements applicable to chauffeurs have in all instances been complied with. Of course, it may be asked why a distinction should be made between an owner and any other operator of a hired car. To this the counter question might be asked as to why there should be any distinction between the owner-operator of any car and the regular chauffeur. The answer lies in the simple fact that one is ordinarily more careful with his own property than he is with someone else's, and this would apply for the benefit of the public on the streets as well as those in the same automobile with the operator. If there were no reason for this distinction the law would be unconstitutional as making an unwarranted distinction between owner-operators in general and ordinary chauffeurs. This idea is well exemplified in the case of *Ex Parte Storke*, 139 Pac. (Calif.), 684, where it appears that a chauffeur who had been arrested for non-payment of his license fee had sued out a writ of habeas corpus questioning the constitutionality of the distinction made in the law as between chauffeurs and other operators. It was said:

"There are unquestionable elements of similarity, even of identity, between

the driving of an automobile by a professional chauffeur and the driving of a like vehicle by a private owner, designated in this act as an 'operator.' Thus it may not be gainsaid that the ignorance of the one is as likely to result in accident as the same ignorance upon the part of the other. The recklessness of the one is as likely to result in injury as the recklessness of the other. It is equally dangerous to other occupants and users of the highway whether the unskilled or reckless driver be a chauffeur or 'operator.' All these matters may be conceded, and yet there are others of equal significance where the differences between the two classes of drivers are radical. Of first importance in this is the fact that the chauffeur offers his services to the public, and is frequently a carrier of the general public. These circumstances put professional chauffeurs in a class by themselves, and entitle the public to receive the protection which the Legislature may accord in making provision for the competency and carefulness of such drivers. The chauffeur, generally speaking, is not driving his own car. He is entrusted with the property of others. In the nature of things, a different amount of care will ordinarily be exercised by such a driver than will be exercised by the man driving his own car and risking his own property. Many other considerations of like nature will readily present themselves, but enough has been said to show that there are sound, just, and valid reasons for the classification adopted. The argument of the peril attending the public at the hands of the unlicensed operator driving his own car is not without force, but it can only successfully be presented to the legislative department, and not to the courts." (See also *Ruggles vs. State*, 87 Atl. (Md.), 1080, 1082.)

There is another reason, perhaps more persuasive than any so far mentioned, as limiting the application of the license fee to ordinary chauffeurs as distinguished from owners driving their own cars for hire, and that is that the Legislature, by Article 820 of the Penal Code (Acts of the Thirty-eighth Legislature, p. 158), evinces the intention of there separately taxing *owners of passenger motor vehicles operating for hire*, by requiring them to pay, in addition to the motor vehicle fee based on horsepower and weight, registration fee of four dollars (\$4.00) for each passenger such vehicle will seat. If the owner of a car for hire has paid this fee as such, we know of no reason, founded on natural justice or otherwise, why he should also be required to pay an additional license fee simply because he drives one of his passenger motor vehicles himself, when all other owner-operators pay no license fee whatever.

It should also be remembered that though, under Article 6698, the automobile and chauffeur's license fees are in lieu of all other registration fees, the right of incorporated cities and towns to license and regulate the use of motor vehicles for hire in such corporations is expressly preserved. In other words, as this article is construed in *A. B. C. Storage Co. vs. City of Houston*, 269 S. W., 882, 885, a city may require those who operate vehicles in its streets for hire to procure a license so to do, even though it is forbidden to require the payment of a license fee for the issuance of such license. See also *Gill vs. City of Dallas*, 209 S. W., 209. This leaves the cities and towns of the State with ample power, in the interest of safety, to control jitneys and service cars.

In conclusion, we think that all considerations of statutory construction, authority and public policy point to the proposition that the term "chauffeur," as defined in Article 6687, means a paid operator of an automobile; and that one driving his own car for hire, whether hauling passengers or freight, is not a chauffeur within the intent and mean-

ing of the law, and is, therefore, not required to have a chauffeur's license.

Yours truly,

C. W. TRUEHEART,  
Assistant Attorney General.

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Op. No. 2636, Bk. 61, P. 167.

HIGHWAYS—STATE HIGHWAY DEPARTMENT.

An interpretation of the State Highway Act of 1925.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 9, 1926.

*Hon. Hal Moseley, Chairman State Highway Commission, Austin, Texas.*

DEAR SIR: This is in reply to your communication dated January 8, 1926, reading as follows:

*"Hon. Dan Moody, Attorney General, Austin, Texas.*

"DEAR SIR: We hereby request from the Attorney General's Department legal opinion and advice with reference to letting of contracts for construction of State and Federal aid projects.

"We would appreciate your answering each question in the order given.

"1. Will it be legal for the State Highway Department to authorize and permit counties to advertise for bids and let contracts for projects on designated State highways subject to the approval of this Department—

"(A) Where Federal aid funds (and no State aid funds) have been granted by the State Highway Commission to a county to match county funds;

"(B) Where Federal aid and State aid funds have been granted by the State Highway Commission to a county to match county funds;

"(C) Where State aid funds (and no Federal aid) have been granted by the State Highway Commission to a county to match county funds.

"2. Would it be illegal for the State Highway Commission to authorize or permit a county to advertise for bids and let contracts for projects on designated State highways subject to the approval of the State Highway Department in any instance where the county has applied to the State Highway Commission for State or Federal aid, and where such State or Federal aid, or both, has been granted to such county?

"3. Would it be legal for the State Highway Commission to advertise for bids, receive bids, and let a contract at Austin on a project in some county on which—

"(A) Federal aid (and no State aid funds) has been granted;

"(B) State aid (and no Federal funds) has been granted;

"(C) State and Federal aid has been granted.

"4. Assuming that all questions under No. 3 are answered in the affirmative, and that it would be legal under the new Highway Law (S. B. No. 74) for the State Highway Commission to let contracts for construction of State highway projects, either with or without county aid, or where State and Federal aid has been granted to counties, would it be legal in such cases for the State Highway Department to enter into a project agreement with the county commissioners court of the county where such project is contracted for, whereby the county would agree to place its share of such funds in escrow to be released only by written authority of the State Division Engineer, under direct control of the State Highway Department, for payment of the full amount of each monthly estimate as the improvement progresses; the State Highway Department in turn reimbursing the county its pro rata share of Federal aid, State aid, or Federal and State aid, for the payment of such estimates as the improvement progresses, to replenish such escrow funds.

"In answering this question No. 4, we would appreciate it if you will advise if there is any distinction to be made (by strictly complying with the provisions of Section 7 of S. B. No. 74), as to what constitutes 'county aid,' and what constitutes 'State or Federal aid' granted to counties.

"5. Is it optional with the State Highway Department to let contracts, either at Austin or at the county seat of the proposed construction projects, where—

"(A) Federal aid (and no State aid) has been granted;

"(B) State aid (and no Federal aid) has been granted;

"(C) State and Federal aid has been granted.

"In answering this above question, a full interpretation of the second paragraph of Section 4 of the new Highway Law (S. B. No. 74) is respectfully requested. This paragraph reads as follows: 'Nothing in this section or this act shall be construed as prohibiting the granting of State aid under the provisions of Chapter 190, General Laws of the Regular Session of the Thirty-fifth Legislature,' etc.

"6. What provisions, if any, are there in the new Highway Act which would prevent the State Highway Department from operating at the present time under the old law relative letting contracts—

"(A) Where State aid (and no Federal aid funds) is granted or has been granted to a county to match county funds for construction of a proposed project;

"(B) Where State aid and Federal aid both is granted or has been granted to a county to match county funds for construction of a proposed project;

"(C) Where Federal aid (and no State aid) has been granted to a county to match county funds for construction of a proposed project.

"NOTE: When the new Highway Law (S. B. No. 74) was enacted by the Legislature, it was for the purpose of authorizing the State Highway Department to let contracts direct, and to enable the State of Texas to comply with the Federal Aid Act and the requirements relative to same in order to permit the State to continue receiving Federal aid funds (Sec. 17 of new law). The question in our minds is to what extent must the new law be complied with now, and under what conditions would it be possible in emergency cases to operate under the old laws.

"The new law went into effect June 18, 1925, but the new law states in effect that the State is not prevented from operating under the old law in the granting of State aid, etc. (Sec. 4 of the new law). The State has until November, 1926, to comply with the full provisions of new Highway Act necessary to comply with the requirements of the Federal Aid Act, and in answering (B) and (C) of the above question, it is desired to know if contracts for construction of Federal aid projects may, at the present time, be legally let under the provisions of the old highway law."

Subdivision (A) of your first question is answered in the negative for the reason that the State Highway Act (Chapter 186, Acts Thirty-ninth Legislature) provides in Section 4 that all further improvement of said State highway system and Federal aid shall be made under the exclusive and direct control of the State Highway Department. Considering the purpose and intent of the Legislature in passing the act to meet the requirements of the Federal Highway Act, we are of the opinion that this provision in the State Highway Act means that the State Highway Commission must let contracts on State designated highways where Federal aid moneys are involved. You will note that the statute requires that improvement with Federal funds shall be made "under the exclusive and direct control of the State Highway Department." If a county were allowed to make a road contract on a State designated highway the improvement would not be under the exclusive and direct control of the State Highway Department.

Subdivision (B) of your question No. 1 is also answered in the negative and for the same reason.



In reply to subdivision (C) of question No. 1, you are advised that where State aid is granted to a county without any Federal aid the county has authority to let the road contract on State designated highways. This is made clear by Section 4 of the State Highway Act, which provides that no further improvement of said system shall be made under the direct control of the commissioners court of any county unless and until the plans and specifications for said improvement have been approved by the State Highway Engineer. Section 4 also provides that nothing in Section 4 or in the act shall be construed as prohibiting the granting of State aid under the provisions of Chapter 190, General Laws, Regular Session, Thirty-fifth Legislature, and amendments thereto. Under the Act of the Thirty-fifth Legislature mentioned and the amendments thereto, State aid could be granted and counties had authority to let road contracts, using such State aid together with their own funds.

Answering your second question, you are advised that under the State Highway Act the State Highway Commission cannot grant aid to a county and permit the county to let contracts on designated State highways using Federal funds. However, where only State aid is granted to a county, without any further agreement or stipulation, the county lets the contract. We do not wish to be understood in this connection as holding that the State Highway Commission cannot make an allotment to a county and at the same time make an agreement that the county is to grant what is known as county aid. In such event the State Highway Commission would let the contract. The county money, however, would remain in the county depository until paid into the State Highway Fund as provided in Section 7 of the State Highway Act.

In answer to your third question, beg to advise that where an allotment of Federal aid is made to a county under an agreement that the county is to match it with county funds, the contract may be, and in fact must be, let by the State Highway Commission, in which event bids must be advertised for and the bids could be received and the contract let at Austin.

In reply to subdivision (B) of your third question, you are advised that where the State Highway Commission makes an allotment of State aid to a county, the State Highway Commission would have authority to make the contract in the manner inquired about by you if the county should grant county aid to the State Highway Department in the manner set forth by the State Highway Act. In such event the county money cannot be paid to the State Highway Department in a lump sum, but must be paid into the State Highway Fund in the manner set forth in Section 7 of the State Highway Act.

Answer to subdivision (C) of question No. 3:

Where both State and Federal aid are granted, the State Highway Commission could make a contract as suggested by you in subdivision (C) of question No. 3 in the event the county granted county aid to the State Highway Department.

Answer to question No. 4:

We think your fourth question should be answered by stating what we believe to be the authorized procedure in the event the State Highway Commission is to let any particular contract where county money

is involved. In such cases there must be county aid granted by the commissioners court to the Highway Department, in which event the money could be set aside in the county depository (but not elsewhere) under an agreement not to release it except upon the proper order of the Highway Department on approved certified accounts as provided in Section 7 of the State Highway Act. It is paid on such certified accounts directly to the State Highway Fund. This seems to be the only method authorized where the State Highway Commission lets a contract itself using county and State funds.

You ask whether there is any difference between State and Federal aid on the one hand and county aid on the other. There is this distinction: County aid to the State is where financial assistance is granted by a county to the State Highway Department to improve State designated highways. State and Federal aid is the granting or setting aside of State and Federal funds to aid counties in the building of roads in the county which is being assisted. Where Federal funds are involved it practically means that the county aid method must be used, since we have held that only the Highway Commission can let contracts where Federal aid is involved. Where no Federal funds are to be used and State aid is granted, without any reservation as to who shall let the contract, the county lets the contract. This is State aid. If the Highway Department is to let the contract involving only State and county funds the county must set aside a certain amount to be paid into the State Highway Fund as provided in Section 7 of the Highway Act. This is county aid.

Answer to your fifth question:

There is nothing in the Highway Act stating where the contracts shall be let, and in view of this we think the contracts could be let at Austin or at the county seat of the county in which the work is done. However, we call your attention to the provision in the Highway Act to the effect that all bids shall be opened at a public hearing of the State Highway Commission. See Section 9. You will readily see that if bids should be opened and contracts awarded at the county seat of a county the State Highway Commission would have to be there and have a public hearing. In other words, if bids are to be opened at a county seat the State Highway Commission would have to be there and hold a public hearing in order to open them.

We note your request for an interpretation of the second paragraph of Section 4 of the State Highway Act. The language there used evidently means that the Highway Commission may still grant State aid to counties with the understanding that such counties may make contracts on State highways in the same manner as they were made under the old law. That is, the counties themselves may make such contracts where only State aid is involved. The same is not true where Federal funds are involved.

Answer to your sixth question:

By "operating under the old law" we, of course, assume you mean granting aid and the counties let the contracts. There is nothing in the State Highway Act which would prevent this being done as it was done under the old law, except where Federal aid is involved. We have amply explained why the State Highway Department must let contracts itself where Federal aid money is to be used.

We note what you have to say in the latter portion of your letter. While there would be no necessity, so far as the Federal act is concerned, to comply with it until some time in November of this year, still the Legislature did not wait until the last minute to comply with the Federal act and made no provision to postpone the taking effect of the State Highway Act of 1925 until the expiration of the time limit mentioned in the Federal act. Nor is there anything in the State Highway Act which would authorize any different procedure now than the procedure which will be authorized after the time limit prescribed in the Federal Act expires. In other words, our State law has prescribed the methods to be followed and it is the law now just as much as it will be after the time limit in the Federal act has elapsed.

As we have made plain, however, the old method can be followed even under the new State Highway Act where only State and county funds are involved.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2605, Bk. 60, P. 183.

HIGHWAY OFFICERS—CONSTITUTIONAL LAW—SUFFICIENCY OF THE  
TITLE.

1. The statutes have vested the commissioners court with authority to employ not more than two regular highway officers and not more than two additional officers for special emergency, but such statute does not make it mandatory that such officers shall be employed and it is within the discretion of the commissioners court to employ them or not as such court may see fit, and to dispense with their services if they have been employed.

2. Other officers than these highway officers are not deprived of authority to make arrests authorized by law for violation of laws relating to highways in this State, notwithstanding the provisions of the act of the Thirty-ninth Legislature purporting to deprive them of this authority; the latter mentioned provision being void because it is not within the purport of the title of the act and is therefore contrary to Section 35 of Article 3 of the Constitution of the State of Texas.

3. No fees can be charged by any county highway officer for any service performed by him, and no fee for any of his services can be charged up as costs in any case, but this rule does not apply to other officers, but the rules will apply in reference to fees and costs of other officers as if this provision in the new Highway Traffic Officer Statute had not been inserted.

4. Other peace officers may make arrests for violation of laws relating to highways to the same extent as if this inhibitory provision had not been inserted in the law, and this is true whether the commissioners court furnishes any traffic officers or not.

5. The new act does not prevent arrests by city officers.

6. It is doubtful whether the Legislature has constitutional authority to deprive sheriffs and constables of authority to make arrests under penal laws.

7. That officers make arrests after setting trap or after hiding would not be a defense in a criminal prosecution.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, June 19, 1925.

*Hon. Jewel N. Baldwin, County Attorney, Johnson County, Cleburne, Texas.*

DEAR SIR: We have inquiries from several sources in reference to

the provisions of the statute relating to county highway officers as amended by the Thirty-ninth Legislature (Chapter 58, General Laws, Regular Session), and since your letter of the 16th inst. is typical, we address our opinion to the questions therein propounded and shall take the liberty of mailing others a copy of this opinion written to you. Your letter reads as follows:

"I submit the following questions to you for your opinion, with reference to the provisions of House Bill No. 27, passed by our recent Legislature:

"1. Is it mandatory, under the terms of said bill, on the commissioners court to appoint one or more highway officers?

"2. Do the terms of said bill prohibit the sheriff and constables and other officers of the county (other than the highway officers) from making arrests for violations of law relating to highways?

"3. Shall the fees of the officers of the court, other than the highway officers, be taxed as costs against the defendant, in cases for violations of the highway laws?

"4. If it is not mandatory on the commissioners court of the county to appoint one or more highway officers, and said court fails and refuses to make such appointments, can the sheriff and constables and other officers of the county make arrest for violations of the highway laws and charge and collect fees for such arrests?

"Thanking you in advance for your opinion with reference to the above matters, I remain,"

The first question is whether it is mandatory upon the commissioners court to furnish these highway officers.

The Act of the Thirty-ninth Legislature simply amends Section 4 of the original act, which is Chapter 127 of the General Laws of the Regular Session of the Thirty-sixth Legislature. The Act of the Thirty-ninth Legislature is not the statute which confers authority upon the commissioners court to appoint these officers.

The original act above referred to provides, in substance, that to insure the adequate enforcement of the traffic laws of this State, and especially the laws regulating the use of motor vehicles and motorcycles on the public highways contained in the Acts of the Thirty-fifth Legislature creating the Highway Commission, and also the acts regulating the use of the public highways by motor vehicles, and other laws amendatory thereto, the right is conferred on the commissioners court of each county to employ special deputy sheriffs for that purpose.

The work of said officers is declared by the statute to be the efficient enforcement of the traffic and highway laws of this State; and to promptly arrest and prosecute all offenders of said laws and to that end shall diligently patrol the highways and keep a vigilant lookout for all violations of said laws.

Section 3 of the original act provides that these officers may be dismissed from service on request of the sheriff, whenever approved by the commissioners court or by the commissioners court upon their own initiative, whenever their services are no longer needed or have not been satisfactory.

Section 3 also provides that no county shall be authorized to employ more than two regular deputies under this act, nor more than two additional deputies for special emergencies to aid said regular deputies in their work.

The new statute enacted by the Thirty-ninth Legislature amends Section 4 of the original act so as to read as follows:

"Section 4. Said deputies shall be paid a salary out of the general county fund not to exceed one hundred and fifty (\$150) dollars per month, the salary to be fixed by the commissioners court, and in addition thereto the commissioners court is hereby authorized to provide at the expense of the county such necessary uniforms, caps and badges, such badges to be not less than two inches by three inches in dimensions, and other necessary equipment, to include a motorcycle and its maintenance, as is necessary for them to discharge their duties. The salaries paid to said deputies acting as such highway officer shall be paid direct to said deputies by the commissioners court, and such salaries shall be independent of any salary or fee paid to the sheriff and all of his deputies not so acting as highway officers, and the sheriff shall not be required to account for the salaries provided for herein as fees of office or as salary to the sheriff or his other deputies. Such deputies as are provided for herein shall be appointed by the commissioners court and be deputized by either the sheriff or any constable of the county in which they are appointed, and no other officers shall make arrests in this State for violation of laws relating to highways now in effect in this State. Such deputies as provided for herein shall at all times when in the performance of their duties wear a full uniform with a cap and badge, the badge to be displayed on the outside of the uniform in a conspicuous place. Such officers shall remain in and upon the highway, and at all times patrol the same while in the performance of their duties, only leaving the highway to pursue any offender whom such officers were unable to apprehend upon the highway itself. No arrest by any such officer shall be binding or valid upon the person apprehended if the officer making such arrest was in hiding or if he set a trap to apprehend persons traveling upon the highway. No fees or charges whatever shall be made for the service of such officers provided for herein, nor shall any fee for the arrests made by such officers be charged and taxed as costs or paid to such officers in any case in which such officers shall make an arrest. Such officers shall perform all their duties and make arrests for violation of any law of this State appertaining to the control and regulation of vehicles operating in and upon any highway, street, or alley of this State. The district engineer in whose district the county in which such officers operate shall advise with such officers as to the enforcement of the various State laws pertaining to control and regulation of traffic upon the highways, and in case such officers shall not perform their duties in enforcing such laws, the district engineer may complain to the commissioners court, and upon the filing of such complaint in writing duly signed by the district engineer, the commissioners court shall summons before them for a hearing the officer or officers so complained of, and if such hearing develops that such officer or officers are not performing their duties are required of them, then such officer or officers shall immediately be discharged from all of their duties and powers as herein provided for, and other officers shall forthwith be appointed. Should any portion or section of this act be held invalid and unconstitutional, such holding shall not affect the validity or constitutionality of any other portion of this act, and all other portions not held invalid or unconstitutional shall remain in full force and effect."

From the foregoing it will be seen that it is not mandatory upon the commissioners court to furnish these highway officers. The statute provides that "the right is hereby conferred on the commissioners court of each county to employ one or more special deputy sheriffs for that purpose," etc. The statute also expressly authorizes the commissioners court to dispense with such officers whenever their services are no longer needed.

Your first question, therefore, is to be answered in the negative.

Your second question is whether the terms of the new act prohibit the sheriff and constable and other officers of the county (other than the highway officers) from making arrests for violation of laws relating to highways.

The new statute contains the following provision:

"Such deputies as are provided for herein shall be appointed by the commissioners court and be deputized by either the sheriff or any constable of the county in which they are appointed, and no other officers shall make arrests in this State for violation of laws relating to highways now in effect in this State."

This provision in the new law is far-reaching and will have a serious effect if it is to be given effect according to its literal wording. In this connection, it might be mentioned that there are many laws under which arrests must from time to time be made relating to highways in this State. For instance, there are the following laws: the Headlight Law, the Muffler-cutout Law, the law prohibiting the driving of automobiles while intoxicated; the law preventing the obstruction of highways; the law prohibiting the depositing of glass on public roads; the law against wilful and negligent collision on the highways, amounting to aggravated assault; the laws against faulty braking equipment; the law prohibiting chauffeurs from operating without license; the law making it a penal offense for any person to fail to stop and give aid in case of injury by automobile accident on the highways; the law against homicide and wilful or negligent driving of automobiles on highways; the laws relative to number plates, the statute covering the operation of automobiles on the highways commonly known as "the law of the road"; the law prohibiting racing on the highways; the law prohibiting the operation of automobiles without the consent of the owner; the law prohibiting the operation of unregistered cars; the law relative to the width of tires, heavy vehicles, and perhaps many others.

All of these laws would seem to relate to the highways of this State, and this new statute, according to its wording, appears to prohibit any other officer than these highway officers from making arrests in this State for violation of any such laws. This is true, notwithstanding the fact that it is discretionary upon the part of the commissioners court to furnish these officers or not furnish them as they may deem proper. Moreover, it might be seriously questioned whether in the larger counties of the State the number of these traffic officers provided will be adequate to make a reasonably sufficient effort to enforce these various laws. We cannot come to the conclusion that the Legislature intended to make practically impossible the enforcement of these various statutes, unless such a conclusion is inevitable. There are many sparsely settled counties in this State that have no need for regular traffic officers and such counties can ill afford to pay such officers out of the meager funds at their disposal, and yet, even in such counties, violations of the various highway laws may occur and it would be impossible to make arrests for such violations in the absence of such traffic officers, if this new law is effective according to its apparent import.

In such a situation, we are justified in scrutinizing very carefully this new statute in order to determine the validity of this provision which purports to prohibit other officers than these highway officers from making arrests in this State for violations of laws relating to highways now in effect in this State.

Notwithstanding the liberal rule in reference to the sufficiency of titles of acts of the Legislature, we are forced to the conclusion that

this provision in the statute purporting to inhibit other peace officers from making arrests is invalid and unconstitutional because it is not within the purview of the title of the act.

The title of this act of the Thirty-ninth Legislature reads as follows:

“An Act amending Chapter 127 of the General Laws of the Regular Session of the Thirty-sixth Legislature, relating to highway officers, so as to require the wearing of uniforms and badges; and requiring such officers to patrol the public highways in performance of their duties; fixing and providing for the payment of salaries of such officers, and further providing that no fees shall be charged by any officer for arrests made under the laws of the State of Texas regulating the highways and the operation of motor vehicles thereon, and providing for co-operation between the State Highway Department and such officers for the protection of the highways, and declaring an emergency.”

If the title had stopped with the statement that it was an act amending Chapter 127 of the General Laws of the Regular Session of the Thirty-sixth Legislature, relating to highway officers, it would have been sufficient to support all of the provisions in the body of the act. But the title did not stop there. It undertook to state *in what respect* Chapter 127 was amended. The caption states that Chapter 127 is amended so as to require the wearing of uniforms and badges and requiring such officers to patrol the public highways in performance of their duties; fixing and providing for the payment of salaries of such officers and further providing that no fees shall be charged for arrests made under the laws of the State of Texas regulating the highways and the operation of motor vehicles thereon, and providing for co-operation between the State Highway Department and such officers for the protection of the highways, and declaring an emergency. This enumeration of the matters dealt with in the act excludes matters not fairly coming within the purview of such enumeration. There is no notice in the caption that there will be found in the body of the act a provision that no other officers shall make arrests in this State for violation of laws relating to highways now in effect in this State. Having enumerated the matters which the act is supposed to cover, this enumeration is exclusive and any other matters would be outside of the caption. The caption would be misleading if the provision just mentioned is to be included in the effective provisions of the act. It is the office of the title of an act to fairly state the subject, and in doing so it, of course, must not be misleading.

Ex Parte Faison, 248 S. W., 343.

De Silvia vs. State, 229 S. W., 543.

Giddings vs. San Antonio, 47 Texas, 548, 26 Am. R., 321.

Albrecht vs. State, 8 Texas App., 217, 34 Am. R., 737.

Gunter vs. Mortgage Co., 82 Texas, 502, 17 S. W., 840.

City of Austin vs. McCall, 95 Texas, 575, 68 S. W., 791.

Ex Parte Segars, 32 Texas Crim. R., 553, 25 S. W., 26.

Ratigan vs. State, 33 Texas Crim. R., 305, 26 S. W., 407.

Ex Parte Herman, 45 Texas Crim. R., 346, 77 S. W., 225.

Joliff vs. State, 53 Texas Crim. R., 63, 109 S. W., 176.

Ex Parte Walsh, 59 Texas Crim. R., 415, 129 S. W., 118.

We shall not discuss all of the cases above cited, but two of them may be mentioned. In the case of De Silvia vs. State, above cited, the Court of Criminal Appeals held invalid a statute creating a court in Jefferson County to be known as the County Court of Jefferson County

at Law No. 2. The caption of the act provided that it was an act to establish and create a court to be known as The County Court of Jefferson County at Law No. 2, and to prescribe its organization, jurisdiction and procedure and to conform the jurisdiction and procedure of other courts thereto, and to declare an emergency. This caption was held to be misleading in that it led to the belief that the act created a county court at law having county-wide jurisdiction, when as a matter of fact the body of the act created a court having jurisdiction over a territory of much less than the entire county.

The case of *Ex Parte Faison* was also a case decided by the Court of Criminal Appeals in which the court declared invalid a provision of a law because it was not supported by the title of the act. The law under consideration in that case was Chapter 52 of the General Laws of the First Called Session of the Thirty-seventh Legislature. The caption of the act indicated that the act amended Section 16, and repealed Section 16a and Section 4, of a prior act of the Legislature, and it undertook to state in what respect the act amended and repealed these sections. The body of the act, however, went further, and in addition to amending Section 16, and repealing Section 16a and Section 4 of the prior act, it included a Section 3, which in nowise related to nor was connected with either of the sections named in the caption. It was held that the subject matter under consideration which appeared in Section 3 was not included in the caption and was, therefore, invalid.

We have a similar situation here. Chapter 58 of the General Laws of the Regular Session of the Thirty-ninth Legislature undertakes to state the substance of the amendment to Section 4 of Chapter 127 of the General Laws of the Regular Session of the Thirty-sixth Legislature, but the body of the act goes further and legislates upon the matter we now have under consideration which is not within the provisions of the title of the act.

We are forced to conclude, therefore, that that provision in the act to the effect that no other officers shall make arrests in this State for violation of laws relating to highways now in effect in this State, is invalid and of no effect. It necessarily follows that sheriffs, constables and other officers are not deprived of authority to make arrests for violations of the law relating to highways, notwithstanding the provisions of this new act.

You do not expressly incorporate in your letter any question as to whether or not the terms of this provision of the statute under consideration would prohibit city marshals and city policemen from making arrests for violation of laws relating to highways. We have received a number of inquiries as to whether or not this provision of the statute makes it unlawful for city marshals and city policemen to arrest persons violating laws relating to the highways; and we, therefore, will dispose of those inquiries in this opinion.

What we have said above to the effect that the provision of the act prohibiting other than the deputies appointed under this act from making arrests for violations of the laws pertaining to highways, also answers the question with reference to city marshals and city policemen. If this provision of the statute, attempting to limit the right of these officers to enforce the law, is invalid and of no effect, as we conclude it to be, then there would be nothing in the statute to pro-



hibit such city marshals and city policemen from enforcing laws applicable to highways by making arrests of offenders.

The Constitution provides for the election of a sheriff for each county and also for the election at each biennial election of one constable for each justice precinct within each organized county. It is true that the Constitution does not define the duties of these officers, but there are well established and recognized rules for determining their duties, even in the absence of statutes expressly defining them. We suggest at this time that any statute undertaking to deprive the sheriffs of the various counties and the constables of the various precincts of the right to arrest offenders for violating the Penal laws, or otherwise attempting to deprive such officers of their functions in the enforcement of the law, would subject the validity of such an act to considerable doubt as being an attempt by legislative enactment to take away from these offices, created by the Constitution, duties properly resting upon them and impliedly fixed as duties of the office when the office finds its origin in the terms of the Constitution. It is our judgment that the provision in the statute that no officers other than the deputies appointed by the commissioners court shall make arrests for violation of laws relating to highways is invalid because of the deficiency in the caption of the act, and to this we add the suggestion that the provision is subject to considerable doubt as an attempt to deprive the sheriffs and constables of rights and duties properly belonging to their offices.

Answering your third question, you are advised that this new statute in no way affects fees of officers other than these highway officers. As to these highway officers, however, no fees or charges whatever can be made for their services and no fees for arrests made by such officers can be charged or taxed as costs or paid to such officer in any case in which such officers shall make arrests. These officers are to be paid a stated salary and they are to receive no fees in connection with their services.

If, after the arrest of an offender by a deputy appointed under the authority of this act, all other process in the case is served by officers other than the deputies so appointed, the officers actually executing the process, other than the deputy appointed under this act, would be entitled to the fees allowed under the statutes of this State for such service. As, for example, if the arrest was made by a deputy appointed under authority of the act in question, but a *capias pro fine* was served by the sheriff or constable, such sheriff or constable would be entitled to his fees for the execution of such process. Likewise, the county attorney is entitled to his fees, and if the case is prosecuted in the justice court, the justice of the peace is entitled to fees allowed him under the general provisions of the law.

Consistent with what we have heretofore said, you are advised in answer to your fourth question that sheriffs, constables and other officers may make arrests for violations of the highway laws and may charge and collect fees for such arrests wherever authorized by law, and their authority to do so is not affected by this new act of the Thirty-ninth Legislature.

Your letter does not contain any question as to the effect of the provision in the bill that "no arrests by any such officer shall be binding or valid upon the person apprehended, if the officer making such

arrest was in hiding or if he set a trap to apprehend persons traveling upon the highway." We have received a number of inquiries with reference to this provision and will dispose of these inquiries in this opinion.

The provision is that the arrests shall not be valid or binding if the officer making such arrests was in hiding or if he set a trap to apprehend persons traveling upon the highway. We do not understand that this provision intends to excuse a violation of the law because of the fact that the person making the arrest was in hiding or had set a trap to apprehend the violator of the law. The provision of this act may make an arrest illegal which is effected by the means denounced by the language used, or it may excuse the non-appearance of the offender when arrested under such circumstances, or it may excuse resistance. We refrain from an expression of opinion on those questions. However, if an alleged offender is finally brought before a court having jurisdiction over his person and over the offense with which he is charged, the fact that such offender had been arrested by an officer who was in hiding or that he had been apprehended by means of some trap set by the officer, would not, in our judgment, constitute a defense to his case or absolve him from guilt where the facts showed that he had actually violated the Penal Statutes of this State.

This defect in the caption and this new provision in it prohibiting arrests by other officers, etc., was not in the bill as originally prepared. The first bill that was prepared, it is believed, contained a caption that fairly supported the provisions of the body of the bill. It appears, however, that the caption and the body of the bill were rewritten and a substitute bill introduced and it is in this substitute bill that the discrepancy occurs. See House Journal for February 16, 1925, page 716.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2619, Bk. 61, P. 187.

#### ROADS—AUTHORITY OF STATE HIGHWAY COMMISSION.

1. State Highway Commission has authority to let road contracts only out of State Highway Fund.
2. State Highway Commission has no authority to let county road contracts.
3. Counties have authority to make road contracts even on State designated highways, subject, however, to the plans and specifications being approved by the State Highway Engineer.
4. State Highway Commission has no authority to compel counties to grant road funds to the State Highway Department, but counties may grant county aid to such Department, in which event the moneys become available to the State Highway Commission as a part of the State Highway Fund for such county.
5. The commissioners court has charge of county moneys, including aid granted to the county by the State Highway Commission, and the granting of county aid to the State is voluntary and discretionary on the part of the commissioners court.
6. Where counties vote bonds or raise road funds in any other manner, and desire to make road contracts either with or without aid from the State, the county must advertise for bids and let the contract and the Highway Engineer approves the plans and specifications.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 9, 1925.

*Hon. S. C. Coffee, County Attorney, Albany, Texas.*

DEAR SIR: Attorney General Moody is in receipt of your letter of September 25th, reading as follows:

"Our road improvement program is being carried out under the provisions of Chapter 190, General Laws of the Thirty-five Legislature, and amendments thereto, and in accordance therewith our commissioners court is advertising for bids to do certain work on a part of the roads coming under what is defined by the last Legislature as a part of the State highway system. They have asked my opinion as to whether this can be legally done under the Acts of the Thirty-ninth Legislature, Chapter 186.

"My opinion to the court and the county engineer is that the commissioners court of our county may contract for and carry out to completion the highways of our county for which bonds have been voted and approved, but that all contracts hereafter will have to be submitted to the State Highway Engineer and the plans and specification for such improvement approved by him before the commissioners court can take direct control. This is based on Section 4 of said Chapter 186. Is this opinion correct?

"The real point is: can the commissioners court retain direct control of the State highway system of roads in our county, by first having the approval of each contract, or rather the plans and specifications for each piece of work to be done first approved by the State Highway Engineer? Or will our roads that are a part of the State highway system in our county now come under the direct control of the State Highway Commission under said Chapter 186?

"Practically one-half of the roadbed and bridges and culverts for which our county voted bonds to construct with State and National aid has been completed under contracts let by our commissioners court, but, of course, the State and Federal engineers approved each contract. Can our court continue to carry out this work as begun by getting the approval of the State Highway Engineer of the plans and specifications for each portion of road for which the court desires to let a contract?

"Your earliest opinion, consistent with the other duties of your office, that can be rendered will be greatly appreciated, for the county is now ready to go forward with additional work on our roads."

Your letter raises squarely the question as to the relative authority of the State Highway Commission and the commissioners courts of the various counties of the State. The question is whether all authority has been taken away from the commissioners courts to let contracts for road work on State designated highways and whether this authority now vests exclusively and under all circumstances in the State Highway Commission.

That the Legislature has power to invest a centralized State agency with authority over public roads, may be considered as settled by the Supreme Court in the case of *Robbins vs. Limestone County*, 268 S. W., 915; so that our question here is not whether the Legislature has power to grant any particular authority to the State Highway Commission, but rather what the Legislature has done in this regard.

It will be helpful to consider the state of the law prior to the enactment of the State Highway Act of 1925. The original State Highway Commission law did not grant full and complete authority to the State Highway Commission to construct and maintain State highways except through co-operation with the commissioners courts of the various counties. The Commission did not make contracts for road construction or maintenance directly, but, on the other hand, made allot-

ments of State aid to the various counties, and the counties themselves advertised for bids and made the contracts for the road work. The plans and specifications, however, were subject to the approval of the State Highway Commission.

In 1923 the Legislature increased the power of the State Highway Commission in so far as maintenance of State designated highways was concerned. Under this statute the State Highway Commission had authority to take over and maintain directly State highways. See Article 6673 of the Revised Civil Statutes of 1925. Under this act, however, the State Highway Commission did not assert authority to let road contracts except for the upkeep of roads.

In order to meet the provisions of the Federal Highway Act, the Highway Act of 1925 was enacted, the same being Chapter 186 of the General Laws of the Regular Session of the Thirty-ninth Legislature. This act provides for a designated State highway system. It authorizes, in Section 3, the commissioners court of each county to aid the construction and maintenance of any section or sections of a macadamized, graveled or paved road or turnpike in said county constituting a part of the State highway system and to enter into contracts or agreements with the State Highway Department for that purpose. The act provides that any moneys in the available road fund of the county or any political subdivision or defined district thereof may be appropriated for the purpose of granting such aid, hereafter designated as "county aid."

Section 4 provides that all further improvement of said State highway system with Federal aid shall be made under the exclusive and direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. This improvement without Federal aid may be made by the State Highway Department either with or without county aid. Surveys, plans, specifications and estimates for all further improvement of said system with Federal aid or with Federal and State aid shall be made and prepared by the State Highway Department. Then follows in Section 4 the following significant provision:

"No further improvement of said system shall be made under the direct control of the commissioners court of any county unless and until the plans and specifications for said improvement have been approved by the State Highway Engineer."

Also the following provision:

"Nothing in this section or this act shall be construed as prohibiting the granting of State aid under the provisions of Chapter 190, General Laws of the Regular Session of the Thirty-fifth Legislature, and subsequent amendments thereto, nor shall anything in this act prevent the completion of any highway project already begun or the carrying out of any contract for such improvement."

Section 5 provides that all moneys now or hereafter deposited in the State Treasury to the credit of the State Highway Fund, including all Federal aid moneys deposited to the credit of said fund and all county aid moneys deposited to the credit of said fund under the terms of this act, shall be subject to appropriation for the specific purpose of the improvement of said system of State highways by the State Highway Department.

Section 6 provides that the total cost of all improvement of State highways made with county aid shall be paid out of the State Highway Fund.

Section 7 provides that said county aid shall be paid to the State Highway Department for deposit in the State Treasury to the credit of the State Highway Fund in partial payments as the improvement progresses.

Section 8 provides that all contracts made by the State Highway Department shall be submitted to competitive bids, etc.

Section 12 provides that every such contract for highway improvement under the provisions of this act shall be made in the name of the State of Texas, signed by the State Highway Engineer, approved by at least two members of the State Highway Commission and signed by the contracting party, and no such contract shall be entered into which will create a liability on the part of the State in excess of funds available for expenditure under the terms of this act. This provision in Section 12 clearly applies only to State contracts.

This Highway Act of 1925 does not expressly repeal any prior statutes. It is well known that the commissioners court, under prior acts, which are substantially brought forward in the Revised Civil Statutes of 1925, had authority to let contracts on all public roads in the county. This new act not only does not repeal such prior laws, but it contains the express provision as above indicated that no further improvement of the State highway system shall be made under the direct control of the commissioners court of any county unless and until the plans and specifications for said improvement have been approved by the State Highway Engineer. This latter mentioned provision makes it perfectly clear that counties may still make contracts on State designated highways within the county if the plans and specifications for said improvement are approved by the State Highway Engineer.

From the foregoing discussion, it is clear that the State Highway Department has authority to make road contracts, but this may be done only out of money in the State Highway Fund. Counties may grant county aid to augment the State Highway Fund, and in that event the State Highway Department has authority to use such county money in making State contracts in that county, but the State Highway Commission is not authorized to let county contracts.

You are also respectfully advised that it is not compulsory and mandatory upon the commissioners court to grant county aid to the State Highway Department, but, on the other hand, it is within the discretion of the commissioners court.

We still have State aid to the counties as was provided for in Chapter 190 of the General Laws of the Regular Session of the Thirty-fifth Legislature and subsequent amendments thereto, all of which are included in the Revised Civil Statutes of 1925. Where State aid is granted to counties the contracts may be let by the counties themselves, subject, however, to the plans and specifications being approved by the State Highway Engineer.

The sum and substance of the foregoing is that the State Highway Department may make road contracts on State designated highways, but it must do so out of its own funds; and counties may make road contracts on State designated highways within the county and must

do so out of their own funds, which may consist of local road funds plus whatever financial aid may be granted by the Highway Department.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2595, Bk. 60, P. 196.

HIGHWAYS—ROADS—PUBLIC PROPERTY.

The State Highway Commission is not authorized by law to enter into a contract for the erection and maintenance of mile-posts, sign-posts, guide-posts and highway markers on the State highways, under which contract the contractor is granted the exclusive privilege of using such posts and markers for commercial advertising.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 27, 1925.

*The State Highway Commission, Austin, Texas.*

GENTLEMEN: Attorney General Moody is in receipt of your letter of March 24, 1925, reading as follows:

"Please furnish the Highway Commission an opinion on the enclosed contract between the Texas Road Marking System and the Highway Commission."

The contract mentioned in your letter is dated March 5, 1925, and in substance it is a contract by and between the State Highway Commission and H. Steckol of Harris County, Texas, doing business under the firm name of Texas Road Marking System, by the terms of which contract Steckol is granted the exclusive privilege of erecting mile-posts, sign-posts, guide-posts and highway markers on and along the designated State highways of this State for a period of six years, with the privilege on the part of Steckol of refusal at the end of that time in the event the State Highway Commission should desire to continue said road marking system.

Steckol is granted the privilege of placing commercial advertising on the posts and markers and is to pay the State one dollar for each mile-post, sign-post, guide-post and road marker for the first year, payable monthly as erected, and two dollars and fifty cents (\$2.50) per post for each year thereafter, payable in advance monthly, "said money to be paid into the State Treasury for the use and benefit of the State Highway Commission in maintaining the roads along and upon which the said posts are set." Mile-posts are to be erected at intervals of one mile, road markers on each side of right-hand and left-hand turns, markers at each bridge and railroad crossing, guide-posts at the intersection of all State highways with other highways or roads, guide-posts at places where the road may divide going in different directions. The posts are to be of two-inch iron pipe ten feet above the ground with an ell at least four feet long extending at right angles, the posts to be set in concrete.

The information in reference to the roads is to be placed on material six inches in width and as long as necessary, and the commercial advertising on material not exceeding two and one-half feet wide and four

and one-half feet long. The signs are to be maintained by Steckol and are to be erected within two years at the cost of Steckol. The posts are not to interfere with the proper drainage and maintenance of the highways or obstruct the view of the public in passing along the roads. Steckol agrees to enter into a fifteen thousand (\$15,000) dollar bond for the faithful performance of his obligations under the contract. The Highway Department agrees to notify all persons forbidding the erection of other commercial advertising signs on said State highways when requested by Steckol to do so, and the Highway Commission obligates itself not to grant any other person permission to erect any commercial advertising signs on the designated State highways during the life of the contract.

The State Highway Commission was created by statute and, of course, has such authority only as is granted to it by statute. It is a matter, then, of searching the statutes in order to ascertain whether there is any provision granting authority to enter into such a contract.

If the Commission has authority to erect these signs and markers, it is because they are a proper part of the designated State highways, for the most authority the Commission has is to take over and maintain the various highways designated as State highways in the several counties of Texas. The State highways are, of course, public utilities, and the signs and markers as a part of the State highway system would also be public property or utilities. In view of our holding, it is not necessary to decide whether the Highway Commission at the time this contract was executed was authorized to erect these signs and markers out of funds at its disposal. Our decision turns on another consideration.

This Department is of the opinion that the contract submitted is invalid for the lack of authority in the State Highway Commission to enter into it. The Commission has not been granted authority to lease the public highways or any part of same for the private purpose of commercial advertising.

The Highway Commission, as above stated, is granted authority to take over and maintain the various highways designated as State highways in the several counties of Texas, and the proceeds of automobile registration fees set aside by law to the State Highway Fund are at the disposal of the State Highway Commission for such purpose. The authority of the Commission to maintain these highways is to be found in Section 20 of Chapter 190 of the General Laws of the Regular Session of the Thirty-fifth Legislature, as amended by Chapter 75 of the General Laws of the Regular Session of the Thirty-eighth Legislature, page 161, which is in the following language:

"On and after January 1, 1924, the Highway Commission shall and is hereby authorized to take over and maintain the various highways designated as 'State Highways' in the several counties of Texas and the proceeds from the automobile registration fees herein provided for and set aside to the State Highway Fund shall be deposited in the State Treasury to the credit of said fund, and said fund shall be available for the maintenance of said designated State highways under the direction and control of the State Highway Commission and shall be used in maintaining such highways and shall not be diverted to any other use by said Highway Commission until all such roads are properly maintained, unless said Highway Commission shall be without sufficient funds from other available source to meet Federal aid to roads in Texas and road construc-

tion is thereby in danger and in event said Highway Commission finds such a condition, then said Highway Commission is authorized, by spreading upon its minutes a resolution to transfer a sufficient amount from this fund to match said Federal aid.

"The counties through which said highways pass shall be free from any cost, expense or supervision of such highways and the counties shall be authorized to use the seventeen and one-half cents (17½c) horsepower tax apportioned to them by this act on any county roads that might be necessary or expedient."

The authority to grant the use of the public highways for commercial advertising is not to be implied from this general grant of authority to maintain the highways with funds provided for that purpose. The use of public property for private purposes is one not to be inferred from such a general grant. It is an authority which is not necessarily incident to the carrying out of the express authority granted. It is a matter for the Legislature to determine whether the State highway markers and signs shall be used for private advertising. The Legislature might determine that competitive bids should be advertised for in order to get the best possible contract from the standpoint of the State. The Legislature might desire to prescribe that the State should participate in the profits to a certain extent prescribed by law. The Legislature would also be the proper authority to determine what shall be done with the proceeds derived from such a contract. These are matters of policy that the Legislature has not seen fit to delegate to the State Highway Commission.

The question of the use of public property for private purposes is not an entirely new one with this Department. In 1919 the Attorney General was called upon to give an opinion as to the authority of the commissioners court to lease a portion of the courthouse square to an individual for five years, on which was to be erected a building for an oil station and cold drinks. The consideration of the lease was to be fifty (\$50) dollars per month, together with the additional consideration that the party leasing the ground would build some concrete sidewalks around the courthouse. (1918-20 Report, page 131.) The Department held that the commissioners court had no authority to make such lease of the courthouse property, saying in part:

"This opinion is in line with the universal rule that the commissioners court has no authority except such as is conferred upon it by the Constitution and laws of this State, either in express terms or by implication, and is also in line with the universal rule that commissioners courts have no authority to lease or rent public property which is used for public purposes unless authorized to do so by the laws of the State."

In another opinion, rendered in 1915 (1914-16 Report, page 548), the Attorney General held that the commissioners court was without authority to contract for rental of office space in a county courthouse. We quote the following from that opinion:

"It is a matter of common knowledge that a courthouse is designed for public use and no one should be allowed, or permitted, to occupy it except the public officials named in the statute."

In still another opinion of the Attorney General, given in 1919 (1918-20 Report, page 687), it was held that counties have no authority to lease the public highways for oil and gas purposes. After citing and quoting from authorities the opinion uses this language:



"We find, therefore, that inasmuch as county highways are by statute dedicated to the public, that it is a universal rule that lands dedicated to public use cannot be used for private purposes except by action of the Legislature, and that the statutes of this State nowhere authorize counties to lease their highways for any purpose whatever."

We are of the opinion that these prior opinions of this Department invoke the correct rule; that is, that in the absence of clear legislative authority public property is not to be devoted to private purposes. The public roads are maintained at public expense for the use of the public and it would require an act of the Legislature, in our opinion, to authorize the lease of them for a private purpose. While the contract submitted calls for the erection of posts and markers upon which are to be placed small signs for the information of the traveling public, yet such public signs are of such size in comparison with the commercial advertising that they appear to be merely incidental to the larger purpose of carrying on a general advertising business. A very small sign is to be used for public information, to wit, a sign six inches high and as wide as necessary, whereas, the commercial advertising will occupy a large space of not to exceed two and one-half feet by four and one-half feet. Thus the public purpose is subordinated to the private enterprise of commercial advertising, which was never contemplated by any law now in existence.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2617, Bk. 61, P. 83.

CONSTITUTIONAL LAW—IMPEACHMENT—CONVENING OF SPECIAL SESSIONS OF HOUSE AND SENATE AND MAKING APPROPRIATIONS AT SUCH SESSIONS.

1. The House of Representatives has power and authority to convene in the manner set forth in the statutes for the purpose of impeaching the head or heads of any State department or for the purpose of making an investigation pertaining to a contemplated impeachment of the head or heads of any State department, without being convened by the Governor.

2. Incompetency and the wanton wasting of public funds by the head or heads of a State department would constitute ground for impeachment.

3. Appropriation of public funds out of the State Treasury cannot be made at special sessions except when convened by the Governor, and the subject of such appropriations designated in the proclamation of the Governor calling any such session or presented to them by the Governor. The House of Representatives and Senate cannot convene themselves for legislative purposes and it requires a law to appropriate moneys out of the State Treasury.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 17, 1925.

*Hon. Lee Satterwhite, Speaker of the House of Representatives, Amarillo, Texas.*

DEAR SIR: Receipt is acknowledged of your communication of the 2nd instant, addressed to Attorney General Moody, reading as follows:

"Upon my return home I found a large stack of letters awaiting me, and after

getting the viewpoint from many members of the House I will appreciate your opinion as to the following questions:

"1. Can the House legally and lawfully convene itself for the purposes as stated in Title 100 of the Revised Civil Statutes, 1925? In other words, if as many as fifty members of the House petition the Speaker to issue a proclamation convening the House for the purpose of making investigation as to the truth of alleged charges that heads of certain State departments were conducting the affairs of such departments incompetently and wantonly wasting public funds, can the House lawfully convene itself for that purpose?

"2. If you answer the above question in the affirmative, can the Senate convene itself at the same time for the purpose of joining the House in making such appropriations of funds as will be necessary to pay the expenses of such investigation?

"I hope you catch the point in these two questions, and will answer me as fully as possible."

Responsive to your first question, you are respectfully advised that, in the opinion of the Attorney General's Department, the House of Representatives of this State has authority to convene, pursuant to proclamation of the Speaker, upon a petition in writing signed by not less than fifty members of the House, for the purpose of instituting an investigation pertaining to a contemplated impeachment of the head or heads of any State department. It is our opinion also that incompetency and the wanton wasting of public funds by the head or heads of a State department would constitute a proper subject for such investigation.

It is provided in Article 5961 of the Revised Civil Statutes of 1925 that heads of State departments, among other officers, shall be removed from office or position by impeachment, and Article 5962 declares that the power of impeachment shall be vested in the House of Representatives. Subsequent articles provide that those against whom articles of impeachment are preferred shall be tried by the Senate, sitting as a court of impeachment, in the manner provided by Article 15 of the State Constitution. The statutes also provide methods of convening the House and Senate for impeachment purposes when they are not in session. As to the House of Representatives, the statutes provide that it may be convened for impeachment purposes, "or when it is desired to institute an investigation pertaining to a contemplated impeachment." The methods provided by statute for convening the House of Representatives are the following: (1) by proclamation of the Governor; (2) by proclamation of the Speaker of the House, which proclamation shall be made only when petitioned in writing by not less than fifty members of the House; or (3) by proclamation in writing signed by a majority of the members of the House. Newspaper publication of the proclamation and the mailing of a copy to each member of the House are also provided for.

The constitutional question involved is whether the House of Representatives has authority to convene without a proclamation of the Governor, in view of the provisions in the Constitution providing for regular and special sessions of the Legislature. The Constitution provides for regular sessions of the Legislature every two years and for special sessions to be convened by the Governor. That instrument also provides that at special sessions there shall be no legislation on subjects not designated in the proclamation of the Governor calling the session or presented to them by the Governor.

These times and methods of convening the Legislature must be held to be exclusive, and the Legislature would be powerless to provide by statute for sessions at other times or for the convening of such sessions in any other manner than as provided in the Constitution.

How then, it may be asked, can the House of Representatives meet without a proclamation of the Governor? The answer is simple, when it is remembered that the House of Representatives and the Senate, when convening or sitting in their judicial capacities in connection with impeachments, do not constitute the Legislature. There is a distinction to be drawn between the Legislature and the two houses of the Legislature sitting separately. All legislative power vests in the two houses, which together are called the Legislature, and it is only the Legislature that the Governor is given exclusive power to convene in special session. The Legislature as such cannot impeach, but, on the other hand, the power of impeachment is expressly conferred by the Constitution itself on the House of Representatives, and under the Constitution and the statutes impeachments are to be tried by the Senate. Impeachment is a judicial function, and while it is true that the Legislature as such has no impeachment powers, it is equally true that the House and the Senate cannot make laws except when acting as coordinate parts of the Legislature, and in order to constitute the Legislature they must either meet in regular session as provided by the Constitution and laws or else meet in special session when convened by the Governor.

When meeting for the purpose of impeachment, the House of Representatives is not meeting for legislative purposes, and for that reason proclamation of the Governor is not essential. Those provisions in the Constitution providing for sessions, both regular and special, of the Legislature have reference only to sessions for legislative purposes and not for judicial or impeachment purposes.

The Constitution itself declares that the power of impeachment shall be vested in the House of Representatives. Since one of the officers that may be impeached by the House of Representatives is the Governor, it would be unreasonable to suppose that it was intended by the framers of the Constitution or the people in adopting it that impeachment sessions of the House could be convened by the Governor only. It is hardly to be expected that a Governor would covet his own impeachment. Having the power of impeachment, and there being no express provisions in the Constitution in reference to meetings for that purpose, it must be concluded that the House of Representatives has power to meet for that purpose. In our opinion, it cannot be said, therefore, that a statute providing for the convening of the House of Representatives for impeachment purposes without a proclamation of the Governor, is unconstitutional.

In the year 1917 the question was passed upon by the Attorney General in an opinion prepared by Hon. Luther Nickels, then Assistant Attorney General, as to whether the House of Representatives at a special session had power to consider the question of impeachment of the Governor without the same having been submitted by the Governor. The Attorney General's Department in a well considered opinion held in the affirmative, on the theory that impeachment is not a legislative subject, and that, therefore, the provisions in the Constitution as to

subjects of legislation at special sessions have no application. We quote from the opinion referred to at page 431 of the Reports and Opinions for 1916-18, as follows:

"That the subject matter of impeachment is, generally, within the jurisdiction of the House is the plain and emphatic declaration of Section 1 of Article 15 of the Constitution. The fact that this general jurisdiction is proposed to be exercised at a special session and the fact that the subject thereof has been submitted by the Governor, we think, do not at all detract from the power of the House. This proceeds, inevitably, we think, from the grant of power in all-embracing terms plus the necessarily incidental authority to do what may be essential to the complete exercise of the power expressly granted. That the limitations placed upon the activity of either or both of the two houses, at a special session, by the Constitution refer to the exercise of the power of legislation and have no application to the use of the impeaching authority, we think, is clear from a consideration of the nature of the power and of the machinery provided for its exercise."

After demonstrating that the power of impeachment is a judicial rather than a legislative function, the opinion contains the following language at page 433:

"If, then, the impeaching power is judicial, and is not legislative, it must be clear that the limitation and requirements of the Constitution as to how and when the legislative power shall be exercised have no application to the use of the impeaching power. The procedure for the use of the legislative power is prescribed in Article 3; the power to impeach is vested and controlled by another and wholly different division of the Constitution to wit, Article 15, and Article 15, which deals with the matter as entirely separate from the legislative power, must be primarily considered as to the use of the authority there conferred. And this article provides separate functions for each of the houses. As remarked above, the House and the Senate are both necessary to the judicial result of impeachment, but while both are ultimately necessary, they act separately and within separate spheres."

In the Sulzer impeachment case, which arose in the State of New York (*People vs. Hayes*, 143 N. Y. Supp., 325), a similar question arose. The question involved in that case was whether the limitation in the New York Constitution as to legislative subjects being considered at a special session of the Legislature would prevent impeachment proceedings at a special session without the subject of impeachment having been submitted by the Governor. The court held that the House and Senate had jurisdiction for impeachment proceedings without the subject having been submitted by the Governor. In that case the New York court said:

"The power of impeachment, therefore, being a judicial power of the Assembly, cannot be participated in by the Governor or the Senate, and, therefore, does not constitute a legislative subject. Having no power in the premises, an acting Governor could not call the Assembly into session for the purpose of impeaching an absent Governor. Neither is the Assembly shorn of its impeaching power by the summons of the Legislature in extraordinary session. The whole design of constitutional government would fail of protection of popular rights and relief from oppression and wrong against those in exalted place, if there were no independence nor power in the Assembly to make impeachments."

We also quote the following from the same court decision:

"The argument that the Assembly clothed with the power to impeach has no power to convene itself for such purposes has little to commend it, for it is at war with that interpretation of our Federal and State Constitutions which have

made them equal to all the vicissitudes involved in a century and a third of national life." See also *Ferguson vs. Maddox*, 263 S. W., 888.

We therefore know of no reason why the House of Representatives cannot meet pursuant to the provisions of our statute on the subject of impeachments.

Those interested in a perusal of other authorities bearing on this question are respectfully referred to the opinion of the Attorney General hereinbefore referred to.

Your second question must be answered in the negative. While the House of Representatives may convene in the manner above stated for impeachment purposes, the House and Senate have no power to convene themselves for legislative purposes. It requires a law to make an appropriation of moneys out of the State Treasury (Section 44, Article 3), and only the Legislature can make laws. (Section 1, Article 3.) Only the Governor has power to convene the Legislature in special session and, moreover, there can be no legislation at a special session on any subject which has not been designated in the proclamation of the Governor calling the session or presented to them by the Governor.

The House of Representatives and the Senate have power to meet and sit in their judicial capacities in connection with impeachment proceedings, but as such, like any other judicial body, they have no power of legislation. As other courts of the State must depend upon appropriations made by law for funds, so must the House and Senate depend upon the Legislature, convened as such in the manner provided in the Constitution, for the necessary funds to pay their expenses; and, as before indicated, a proclamation of the Governor is prerequisite and is to be considered as jurisdictional in its nature in so far as the power to meet in special session and make appropriations are concerned.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2610, Bk. 61, P. 218.

RIGHT OF NON-RESIDENT LIFE INSURANCE COMPANIES TO CONDUCT A  
LOAN BUSINESS IN TEXAS—JURISDICTION OF THE INSURANCE COM-  
MISSIONER—REVISED CIVIL STATUTES, ARTICLES 4780, 4781,  
4782, 4783, 4785, 4786, 4790 AND 4799.

1. A foreign life insurance company formerly doing a life insurance business in Texas, which withdrew from this State at the time of the adoption of the Robertson Law, owing no taxes to the State, and which has power under its charter and the laws of the State of its creation to lend its funds in the State of its domicile, may re-enter Texas under Article 4790, Revised Civil Statutes, for the purpose of lending its funds as provided therein.

2. The Insurance Commissioner gains no jurisdiction over such a life insurance company re-entering this State for the purpose of lending its funds as provided by Article 4790.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 28, 1925.

*Hon. Jno. M. Scott, Commissioner of Insurance, Austin, Texas.*

DEAR MR. SCOTT: Your letter of June 17, 1925, addressed to the

Attorney General, has been referred to me for attention. Your letter follows:

"It has been authoritatively stated to this department that one of the large life insurance companies that withdrew from Texas on July 11, 1907, and that has since remained out of the State, though continuing to collect, outside of Texas, premiums maturing on policies issued by it on the lives of Texas citizens, desires to engage in the business of loaning money in Texas, and to qualify for that purpose in pursuance with Article 4790 of the Revised Statutes; provided, however, that by such qualification and engagement in business it does not become liable in any way for the payment of taxes on the premiums that it may collect in the future or that it may already have collected in years past, outside of Texas, on policies of insurance issued by it on the lives of Texas citizens.

"In behalf of such company, this department has been called on for a ruling whether this department would have any jurisdiction over such company in the event it should qualify solely for the loaning of money in Texas under the terms of Article 4790 and thereafter should engage solely in such business in Texas, not soliciting or writing any policies of insurance or otherwise transacting life insurance business in Texas, but continuing to collect outside of Texas premiums on policies already issued by it on the lives of Texas citizens; also, whether under the statutes of Texas, in consequence of its qualification for and conduct of such business of lending money in Texas, it would be or would become liable for the payment of any tax, or other charge, on the premiums already collected by it in the years past or to be collected by it in the future, outside of Texas, on policies already issued by it on the lives of Texas citizens.

"I desire only your opinion on the questions indicated, not only because of the formal request made of this department, but also because the questions touch the public interest and pertain to the performance of my official duties. I need the information for the proper administration of my department, because one or more life insurance companies already have qualified for the loaning of money in this State, without the transaction of any other business therein; and, under the practice of this department in the past, no jurisdiction has been assumed by the Department of Insurance over such companies, nor has any claim been asserted by it of any liability on the part of such companies for taxes on such premiums.

"This practice has existed because of the language of Article 4790 and other statutes, as interpreted by this department, and also because the policy of the State as manifested by such article and by Articles 4775-4779, commonly known as the Robertson Act, and other statutes, notably has been to encourage the investment in Texas of the funds of life insurance companies."

In passing upon the jurisdiction, if any, of the Commissioner of Insurance over a foreign life insurance company which re-enters this State for the purpose of lending its funds, it is necessary at the outset to determine the authority of such company to re-enter the State for such purpose, and what power such company will be authorized to exercise.

In May, 1907, the Commissioner of Insurance requested an opinion from the Attorney General's Department as to whether life insurance companies then doing a life insurance business in Texas, but which had disclosed their intention of leaving the State in July of that year, might properly continue in the mortgage business in the State without complying with the Robertson Law as to the investment and deposit of reserves. The Attorney General advised, in substance, that such companies would, after their withdrawal, be without authority of law to make loans in Texas. In effect, the Attorney General stated that it might be that some foreign insurance companies subject to the provisions of the Robertson Law were organized in the States of their

creation for co-ordinate purposes, that is, to conduct a loan business as well as an insurance business; that in such substances, if any, such company might obtain a permit to carry on a loan business wholly foreign to and entirely disconnected with any insurance business, adding that the determination of such question must in each instance rest upon the facts of the particular case, and stating that if, from the charter of such a foreign company, it appeared that its right to conduct a loan business was wholly incident to and dependent upon its right to carry on an insurance business, it was hardly possible that such company could obtain a permit to carry on a loan business in this State. (Opinions of the Attorney General, 1906-08, pages 475-477.)

On June 29th thereafter, in response to a request, the Attorney General advised that, under the course of business which the Travelers Insurance Company was pursuing in purchasing farm mortgages from the Texas Farm Mortgage Company, as shown in the Commissioner's letter, that such Travelers Insurance Company was not transacting business in Texas, but warned the Commissioner that any matter which differed in the facts presented might well constitute the transaction of business in Texas within the meaning of the statute. (Opinions of the Attorney General, 1906-08, pages 517-518.)

Yet later the Attorney General was advised that the John Hancock Mutual Life Insurance Company of Massachusetts, a corporation, was transacting a loan business in Texas and had been for many years, but had never transacted a life insurance business. It had procured a permit from the Secretary of State to transact a lending business, and was subject generally to the conditions affecting corporations lending money in Texas. It was also learned that, under the charter of the John Hancock Mutual Life Insurance Company, it did not possess the co-ordinate purpose of conducting a loan business as well as an insurance business. The Attorney General instituted a suit against the said company to cancel its permit to do business in this State. The suit was tried in the District Court of Travis County, and judgment entered for the defendant. The case was appealed, but, unfortunately, we are deprived of a decision determining the question here at issue, because the appeal was dismissed under a court rule, the transcript not being filed within twenty days of the date of perfection of the appeal. The Attorney General, however, still retained his belief as shown by the position taken in that case. The mandate of the Court of Civil Appeals in this case issued on February 3, 1909, the Legislature passed Chapter 122 of the laws of that session, Section 18 of which constitutes Article 4790 of the Revised Civil Statutes. That article reads as follows:

"Any life insurance company not desiring to engage in the business of writing life insurance in this State, but desiring to loan its funds in this State, may obtain a permit to do so by complying with the laws of this State relating to foreign corporations engaged in loaning money in this State, without being required to secure a certificate of authority to write life insurance in this State."

We think there can be no doubt of the intention of the Legislature in passing this statute. It was evidently considered desirable in the interest of the public to permit a life insurance company to enter the State for the purpose of lending their funds. It was then evident that a large number of such companies would not enter this State and

conduct a life insurance business within its borders and subject themselves to the provisions of the Robertson Law. Manifestly, this statute was passed to declare specifically that such a corporation was permitted and authorized by the State of Texas to engage in the business of lending its funds in Texas. It is probable, we think, that the effect of the statute was to do away with the Attorney General's action and position taken in the John Hancock case.

On April 7, 1909, at the First Called Session of the Legislature, Chapter 3 of the laws of that session was passed, which was an act imposing an occupation tax upon foreign life insurance companies. The significant part of this act, as it applies to the question here at issue, is expressed in Section 3 of that act, which is the emergency clause. The substance of that section is, that money rates in Texas were so much greater than in other agricultural States, in which the securities were of less value and less desirable from the standpoint of the investor, that it was necessary that the act immediately take effect, in order to invite a heavy inflow of cheap money in the State for investment in land mortgages and to reduce the rate of interest thereon, and thereby promote the development of the State and opportunities for home owning.

It is true, however, and in considering the effect of Article 4790 it is necessary to bear in mind, that any legislative act transcending legislative powers is of no effect. Consequently we must determine the power of the Legislature in this matter.

It is fundamental that a State may grant to a corporation domiciled in a foreign State the right to transact all or any part of the business which the corporation is authorized to transact by its charter and the laws of the State of its domicile. See the opinion of Chief Justice Taney in *Bank of Augusta vs. Earle*, 13 Pet. (U. S.), 519-583, 10 L. Ed., 274.

It is equally true, however, that the restrictions and limitations of the charter of the corporation apply to it in any foreign jurisdiction, as well as in the State of its creation. As it is said by Chief Justice Waite in the case of *Canada Southern Railroad vs. Gebhard*, 109 U. S., 527, 27 L. Ed., 1020:

"A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, though it may do business in all places where its charter allows and the local laws do not forbid. But wherever it goes for business, it carries its charter, as that is the law of its existence, and the charter is the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, but if admitted, it must, in the absence of legislative equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

In *Fletcher's Cyclopaedia of Private Corporations*, paragraph 5737, we find the following:

"It is manifest that a corporation cannot properly exercise in another state or country any powers which are not conferred upon it, either expressly or impliedly, by its charter. \* \* \* Comity, therefore, does not supply cor-



porate powers, nor confer corporate capacity; it merely enables the board of incorporators chartered by one state to act in a corporate capacity in another state, subject to all the laws and regulations of the latter. Consequently, it is indispensable that a corporation seeking to invoke the doctrine of comity first be possessed of some right, power or privilege in the country of its domicile, and unless it has both existence and some right or power there, it cannot, through the medium of comity, be awarded any in a foreign state, nor can the rule of comity authorize a corporation to exercise, in another state or country than that by which it was created, rights or powers that are not accorded to it by its charter or the laws of the state or country by which it was created. The state, in extending comity, may stop short and tolerate but a part of the corporation's charter powers, or a limited, rather than a full, exercise of them, but it will never concede permission to go beyond its charter."

Accordingly, we believe that the State is competent to grant to a foreign corporation the right to exercise the powers found in its charter and in the laws of its domicile, but it is not competent to grant to such corporation any power not found in its charter or any power inhibited by the laws of its domicile. A corporation chartered for the purpose of writing life insurance has, in the absence of statutory inhibition or express limitation found in the charter, the implied power to lend its funds. Upon this point it is unnecessary to cite authorities. It is, of course, competent for the State in creating the corporation to forbid the lending of the corporate funds or to impose upon such loans, if authorized, any conditions it may consider necessary or beneficial. But in the absence of such provision we cannot hold that the power of a life insurance company to lend its funds is contingent upon the writing of life insurance *in the State where the loans are made*. The power may be, and indeed it is, contingent upon the writing of life insurance in the State where the corporation is chartered, and the insurance company, unless specifically authorized to transact a loan business, can lend only funds derived from its insurance business. We do not think that it can be well argued that the power of such company to lend its funds can be exercised only in that State in which it transacts the insurance business. This opinion is, of course, limited strictly to the type of insurance company which we have described, and specific provisions either in the charter of the company or in the laws of the State of its creation may take it entirely without the scope of this opinion.

Article 4790 specifically provides that such a corporation "desiring to lend its funds in this State may obtain a permit to do so." This is to say, that the Legislature authorizes such a company to obtain a permit "to loan its funds in this State." Thus, Article 4790 grants to a foreign insurance corporation the privilege of exercising the power which it possesses under its charter, that of lending its funds. The power is not that of conducting in this State a general loan business. The article of the statutes is not to be so construed. Article 4790 cannot be interpreted to grant such a foreign insurance company any power which it does not possess in the State of its domicile. To hold that, would be to misconstrue the statute and say not only that it meant more than is apparent on its face, but that it meant to bestow on a corporation a power, the exercise of which would be good ground for the forfeiture of its charter by the State of its creation. Hence, it appears that Article 4790 is a valid exercise of the power possessed by

this State, and a life insurance company, as governed by its provisions, may legally be in this State for the purpose of lending its funds.

We do not undertake to discuss the authority of the Secretary of State to issue such corporation a permit for any other purpose, nor do we pass on the status of any similar corporation doing business in this State under any other permit than that authorized by Article 4790, namely, a permit "to loan its funds in this State."

Such companies as are here under discussion are not and will not be writing insurance in this State. We desire to state clearly and definitely that the jurisdiction of the Insurance Commissioner over companies formerly transacting an insurance business in this State has not been and cannot be terminated by the withdrawal of such companies from this State. It is our opinion that this jurisdiction is continuing, that is, that it cannot be terminated so long as policies or claims are in existence or may come into existence, which arise from transactions resulting from business while such companies were in this State writing insurance. The cases of Connecticut Mutual Life Insurance Company vs. Spratley, 172 U. S., 602, and Mutual Reserve Fund Life Association vs. Phelps, 190 U. S., 147, are in point. In both these cases, the courts undoubtedly considered the proposition that, under the statutes enacted in the various States with reference to service of process on foreign corporations engaging in business within their limits, controversies growing out of that business should be submitted to its courts, and a citizen in such a controversy should not be compelled, in order to find redress, to seek the State in which the corporation had its home office. To that view of the courts in these cases, we unqualifiedly subscribe. The logic of these decisions applies directly to the instant proposition; and to the extent of the business originally written within this State, we hold that any insurance company doing business in this State or any other State remains subject to the control of the Insurance Commissioner, and that service may be had in such matters upon the Commissioner of Insurance.

Such jurisdiction, however, is strictly limited to the matter indicated. An insurance company coming into this State under the provisions of Article 4790 does not apply to the Insurance Commissioner for its permit. It must apply to, and the permit must be obtained from, the Secretary of State. It is subject to the control of that officer in such cases as made and provided. It does not enter this State for the purpose of transacting any business which the Commissioner of Insurance is designed to control. Indeed, it is not authorized to transact such a business, and the doing of such business without color of authority would result in the forfeiture of its permit to do business in this State.

It is true that it may be made a condition precedent to the transaction in this State by a foreign life insurance company of all or any part of a loan business, that it should submit to the control of the Insurance Commissioner, but no such demand has been made of insurance companies entering this State to transact other than a life insurance business.

Since there is nothing to indicate that jurisdiction has ever been given to the Commissioner of Insurance over such companies, and the bare presence of a foreign corporation, which may write insurance, and

indeed may be formed for that purpose in the State of its creation, in this State for a purpose other than that of writing insurance is entirely insufficient to operate in behalf of such jurisdiction. The plain language of the statute shows that such an insurance company is subject to the laws governing corporations lending money in Texas. You are accordingly advised that, beyond the limits which we have defined, the Insurance Commissioner has no jurisdiction over life insurance companies entering Texas under the terms of Article 4790 and thereafter engaging solely in the business of lending their funds in Texas.

You have requested us to advise you whether or not a foreign life insurance corporation, by re-entering this State to lend its funds under Article 4790, would become liable for past or future occupation taxes levied upon insurance companies doing an insurance business under our present law. In this connection you refer us to certain articles of the Revised Statutes of this State, namely, Articles 4779, 4780, 4781, 4782, 4784, 4785 and 4786. We have determined that a foreign life insurance company having the power under its charter and the laws of the State of its creation to lend its funds, may, by virtue of Article 4790, enter this State, not desiring to engage in the business of writing life insurance, but to lend its funds in this State, and may obtain a permit to do so by complying with the laws of this State relating to foreign corporations engaged in lending money in this State, without being required to secure a certificate of authority to write life insurance in this State. A permit to lend its funds would be issued by the Secretary of State and not by the Insurance Commissioner. (Article 1314.) Such money lending corporations are not placed under the supervision of the Insurance Commissioner, but under that of the Secretary of State.

In view of our holding that a foreign life insurance company, which at one time was transacting a life insurance business, but which withdrew, owing no taxes to the State at the time of its withdrawal, and which now desires to secure a permit to lend its funds in this State as provided by Article 4790, but not to engage in the insurance business, will not be under the supervision of the Commissioner of Insurance, but under the charge of the Secretary of State, and subject to all the laws relating to foreign corporations engaged in lending money in this State, we deem it unnecessary to determine the liability of such company for any taxes claimed by the State to be due from such company as a life insurance company. We expressly but respectfully decline to answer that portion of your inquiry. We content ourselves in advising you that, so far as the Commissioner of Insurance is concerned, such a foreign life insurance company entering the State for the purposes named will not come under his supervision.

We also advise that it is our judgment that when such an insurance corporation re-enters this State for the purpose of lending its funds under and by virtue of Article 4790, and thereafter engages solely in such lending business in Texas, it does not change its status or relation in any manner as to the matter of collecting outside of Texas premiums on policies already issued by it on the lives of Texas citizens. Without deciding the liability of such companies for the payment of such taxes, we believe that the situation of such companies would not be changed by reason of their securing a permit under Article 4790

to lend their funds in Texas. If they are liable for such taxes, they would still be liable after such a permit is granted. If they are not liable prior to the granting of such permit, the mere authority given by the State to lend their funds in Texas would not cause them to be liable for such taxes.

The writer of this opinion desires to express his appreciation of the careful examination of authorities and valuable assistance given him by Paul D. Page, Jr., who is doing special work in the Attorney General's Department at this time.

Respectfully submitted,  
WRIGHT MORROW,  
First Assistant Attorney General of Texas.

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Op. No. 2630, Bk. 61, P. 198.

IMPEACHMENT—COMPENSATION OF MEMBERS OF HOUSE—CERTIFICATES  
OF ATTENDANCE.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 21, 1925.

*Hon. Lee Satterwhite, Speaker of the House, Amarillo, Texas.*

DEAR SIR: The Attorney General is in receipt of your inquiry of the 19th inst., reading as follows:

"It has been suggested that in the event the Speaker of the House of Representatives should issue a call for convening the House as is provided by law to make certain investigations, and there being no funds appropriated to pay expenses of such a session of the House, that certificate of attendance and service can be issued by the Speaker and that certificate be presented to some future Legislature as a claim against the State, of course it being wholly within the judgment of the Legislature as to whether or not an appropriation should be made to liquidate such certificates of attendance. May I ask if in your opinion the issuance of such certificates will be in violation of any statute now in effect?"

We assume you have reference to the mileage and per diem of members of the House of Representatives at a session convened under the power of impeachment by the Speaker in the manner provided for in the Revised Civil Statutes. Your attention is directed to an opinion which this Department is rendering to Hon. George C. Purl of Dallas, a member of the House, to the effect that members would have a valid claim against the State for mileage and per diem for attending a session of the House of Representatives convened by the Speaker for the purpose of impeachment or investigation pertaining to a contemplated impeachment, notwithstanding the fact that at the time of the holding of such session no previous appropriation had been made by the Legislature to take care of mileage and per diem.

If we assume that the members of the House are entitled to mileage and per diem as provided by law, it is the opinion of this Department that the House could direct that proper evidence of such claims be issued to the members. We know of no law that would be violated if this should be done. The form in which such a claim is evidenced is immaterial. It could be in the form of a certificate or a voucher or a verified claim. A future Legislature in making the appropriation

to pay such claims would have authority to require sworn statements or the like before State warrants were issued and the claims paid. In view of this and the general laws now in force, the certificates about which you inquire could be issued pursuant to direction of the House, but should be issued upon sworn accounts showing the number of days served and the miles traveled.

For fear that it might be thought by some that State warrants could be issued in view of the decision of the Supreme Court in the case of *Lightfoot vs. Lane*, 140 S. W., 89, we call attention to the fact that that decision of the Supreme Court was based upon a statute which has no application to such claims as are inquired about by you. It was held in that case that by reason of Article 4854 of the Revised Civil Statutes of 1895 (Art. 7087, R. S. 1911), it was the duty of the Comptroller to issue a State warrant to the Attorney General for his constitutional salary even though there was no appropriation to pay the warrant. However, the statute under which this holding was made applied only to salaries which were payable monthly. Moreover, the article of the statute referred to was changed in the new codification of the statutes recently made so that it now applies only to "annual salaries" provided for in Title 117 of the Revised Civil Statutes of 1925. It is plain, therefore, that the decision of the Supreme Court in the case of *Lightfoot vs. Lane*, does not require or authorize a holding that State warrants may be issued by the Comptroller based upon claims such as are inquired about by you.

We deem it proper to call your attention to the fact that no court has held that the members of the House are entitled to mileage and per diem at such a session, and while this Department does not feel justified in holding the act of the Legislature unconstitutional in so far as it purports to allow such mileage and per diem, still the question is not entirely free from doubt. In other words, there may be some doubt as to whether members would be entitled to such mileage and per diem, and our holding to the effect that they are entitled to same is only pursuant to the rule of constitutional construction that every doubt should be resolved in favor of the constitutionality of an act of the Legislature.

We direct your attention, also, to that portion of the opinion of Mr. Purl, copy of which is herewith enclosed, which holds that a session could be convened by the Speaker only for impeachment purposes or for investigation in connection with an actual contemplated impeachment, as distinguished from a session for investigation only.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2596, Bk. 60, P. 88.

#### INSPECTOR OF HIDES AND ANIMALS—CATTLE INSPECTION.

Where a herd of cattle originates and is inspected in Deaf Smith County and is driven into Parmer County for shipment, the circumstances under which another inspection is authorized by the hide and animal inspector of Parmer County, stated.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 9, 1925.

*Hon. A. B. Crane, County Attorney, Parmer County, Farwell, Texas.*

DEAR SIR: Attorney General Dan Moody has received your letter of the 1st instant, the following portion of which sufficiently discloses the question which you propound:

"Recently this question has come up: a herd of cattle were gathered in Deaf Smith County, the south line of which county is near a station in Parmer County, then brought to Friona for loading to be shipped to market; the cattle were inspected by the hide and animal inspector for Deaf Smith County, but when they arrived at Friona in Parmer County, our inspector wished to inspect them again and the railroad refused them till they were so inspected; the question was laid before me.

"Now our advice to the inspector is that this is a herd of cattle passing through this county under the inspector's certificate from Deaf Smith and that he has no right to inspect such cattle unless requested to do so by some citizen or other person, and our advice is to the railway company that it cannot require a new certificate from our (Parmer County) inspector for the reason that the cattle have been inspected in Deaf Smith under Article 7267, and that if the railway should require them to be inspected, it might do so lawfully, but that it must pay the bill if there are no cattle found not covered by the Deaf Smith inspector's certificate.

"This letter is to ask if we have made the correct ruling for the railway company and the Parmer County inspector."

Article 1413 of the Penal Code reads as follows:

"If any agent of any railroad, steamship, sailing vessel, or shipping company of any kind, shall receive for shipment any horses or cattle, unless such horses or cattle have been duly inspected according to law, he shall be fined not less than twenty-five nor more than one thousand dollars for each animal so unlawfully shipped."

It is therefore incumbent upon the agent of the railroad company to see to it that cattle have been inspected according to law before he receives them for shipment.

The hide and animal inspector of Deaf Smith County was clearly within his authority and duty in inspecting this herd of cattle before it left his county. This is made plain by Article 7267 of the Revised Civil Statutes, which provides in part as follows:

"It shall be the duty of the inspector, in person or by deputy, to faithfully examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment, and all animals driven or sold in his district for slaughter, packeries or butcheries."

Upon inspecting the cattle the inspector is required to give a certificate, and in reference to this certificate Article 7276 provides as follows:

"Such certificate shall be then delivered to the purchaser or purchasers, and shall protect him or them from the payment of inspection fees in any other district for the animals therein described, except from the county from which the same may be exported."

This provision, however, does not mean that under all circumstances a herd of cattle is free from further inspection after an inspection has been made by the inspector of the county in which the cattle originated.

The statutes recognize the possibility that after the cattle leave a county there may arise a necessity for further inspection. A herd of cattle may by accident or otherwise be added to after the original inspection is made, or an entirely different herd might be substituted for the one inspected by the original inspector. To meet this situation the Legislature has enacted Articles 7280, 7281 and 7289 of the Revised Civil Statutes, which read as follows:

"Art. 7280. Herds in Transit May Be Inspected.—Whenever a drove of cattle may be passing through any county, it shall be the duty of the inspector, if called upon to do so by any person, to stop and inspect said drove without any unnecessary detention of the same; and he shall exercise the same powers and perform the same duties in the inspection of such cattle as are prescribed in Articles 7267, 7271 and 7272. (Id.)"

"Art. 7281. Fees, How Paid.—If any cattle be found in said drove not included in the certificate of the inspector of the county in which the drove may have been gathered, the fees of the inspector shall be paid out of the proceeds of the sale of said cattle, but if no cattle shall be found in said drove except those covered by the inspector's certificate, then the inspector's fee shall be paid by the person at whose instance and request said drove was inspected. (Id.; Sen. Jour. 1895, p. 485.)"

"Art. 7298. Inspection Before Exportation.—Whenever any person shall be about to drive or ship any stock out of the State, if the inspector shall believe, or is informed by any credible person, that said person has other stock in his herd than those covered by his original certificate of inspection, or by subsequent purchase duly attested by proper bill of sale, the inspector at said point of shipment, or border county where said person leaves the State, shall be authorized to inspect said stock in the same manner as in the original inspection; and, if any stock is found in said herd other than those covered by his original certificate of inspection, or by subsequent purchase duly and properly authenticated by bill of sale, the fees of said inspection shall be paid as provided in Article 7281 of this chapter; provided, that the said inspector shall in no case be authorized to receive or demand more than three cents per head for each head of cattle inspected; but if not, then said fees shall be paid by the person at whose instance said inspection was made; and, if said inspection is made by the inspector, at his own instance, and no stock is found in said herd, except those properly accounted for under the provisions of this article, then said inspector shall receive no fees for said inspection."

Article 7279 applies to shipments to the Republic of Mexico and appears to be applicable only to border counties and is not involved in your inquiry.

It is clear that Article 7280 applies to the situation inquired about by you, and in cases where the cattle are destined to a point outside the State Article 7298 would apply.

Assuming the cattle were accepted at a station in Parmer County for shipment to a point within the State, there would be no necessity or authority for the hide and animal inspector of Parmer County to inspect the cattle unless called upon to do so by some person. If the inspector should be called upon by some person to inspect the cattle and he should inspect them, then the fees of the inspector must be paid out of the proceeds of the sale of said cattle, if any cattle be found in the drove not included in the certificate of the inspector of Deaf Smith County. If called upon by some person to inspect the cattle and the inspector does inspect them and no cattle are found in the drove except those covered by the inspector's certificate of Deaf Smith County, then the inspector's fee must be paid by the person at whose instance and

request the said drove was inspected. The agent of the railroad company would not violate the law by accepting for shipment the herd of cattle without a certificate from the inspector of Parmer County, where no person had called upon said inspector for an inspection of the cattle by him. The agent of the railroad company could, like any other person, call upon the inspector of Parmer County to inspect the cattle, but he would do so under the circumstances and at his own risk outlined in Articles 7280 and 7281. In other words, if the agent of the railroad company should call upon the inspector of Parmer County to inspect the herd of cattle and the inspector should comply and inspect the cattle, the fees of the inspector would have to be paid by the agent of the railroad company in the event no cattle were found in the drove other than those covered by the certificate of the inspector of Deaf Smith County. This paragraph is applicable to shipments to a point within the State and shipments to points outside the State will be covered by the next paragraph.

If the herd of cattle be accepted by the railroad company at its station in Parmer County for shipment to a point outside the State, then Article 7298 would apply, and in addition to being authorized to inspect the cattle at the instance of some other person the inspector of Parmer County would also be authorized to inspect the cattle if he himself should believe that the shipper has other stock in his herd than those covered by the original certificate of inspection or by subsequent purchase duly attested by proper bill of sale. If the inspection should be made by the inspector of Parmer County under these circumstances and any stock is found in the herd other than those covered by the original certificate of inspection or by subsequent purchase duly and properly authenticated by bill of sale, the inspection fees must be paid as provided in Article 7281, except that in no case would the inspector be authorized to receive or demand more than three cents per head for each herd of cattle inspected. But if no stock is found in said herd other than those covered by the original certificate of inspection or by subsequent purchase duly and properly authenticated by bill of sale, then the inspection fees must be paid by the person at whose instance said inspection was made. The agent of the railroad company could call for an inspection, but would do so at the risk of having to pay the inspection fees in the event no cattle were found outside of the original inspector's certificate. If the inspector inspects the cattle at his own instance, then he takes the risk of having to inspect the cattle without compensation in the event no cattle are found in the herd not covered by the original inspection certificate. The law does not compel the railroad agent, under the circumstances mentioned in your letter, to require a certificate of inspection from the Parmer County inspector unless the inspection be made by the inspector himself under Article 7298 at his own instance, in which event the inspector runs the risk of doing the inspection work without pay, or unless the inspection is made at the instance of some person who also runs the risk of having to pay the inspection fees.

After writing the above it occurs to the writer that we have done little more than to point out the plain provisions of the statutes, but since the question has been raised by the county attorneys of both Deaf



Smith and Parmer Counties, as well as by the railroad company, we have deemed it proper to give this information in the form of an opinion.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2624, Bk. 61, P. 201.

INSURANCE—RESIDENT AGENT LAW—NATURE OF INSURANCE CONTRACT—CHRYSLER PLAN—FORFEITURE OF PERMIT.

1. A contract, called a Master Policy, undertaking to cover with fire and theft insurance automobiles sold by a company, effective at date of sale of the car for protection of the purchaser and his mortgagee, is not a policy of insurance but an offer to insure; and only becomes an insurance contract when accepted by the purchaser.

2. The acceptance being the final act consummating the contract, and the car at that time being in Texas, the company is thereby writing insurance on property located in this State, and is violating the resident agent law, if its policies are not issued through a local licensed agent.

3. The permit of a foreign insurance company may be forfeited for violating the "resident agent" law.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 5, 1925.

*Hon. R. L. Daniel, Commissioner of Insurance, Austin, Texas.*

MY DEAR MR. DANIEL: This Department received from your predecessor, the Hon. John M. Scott, a short while before his retirement from office, a letter transmitting certain documents in connection with what is now known as the Chrysler Plan of automobile insurance and we were asked to pass upon the right of the company to issue policies of insurance under this plan covering automobiles sold in Texas and were asked what course, if any, should be pursued by the Insurance Department if we were of the opinion that the plan is in violation of the laws of this State.

It seems that in June of this year the Palmetto Fire Insurance Company, which is a corporation organized under the laws of South Carolina, entered into a contract in writing with the Commercial Credit Company, likewise a corporation, engaged in the business of financing credit sales of automobiles, and the Chrysler Sales Corporation, a corporation organized under the laws of the State of Michigan and engaged in the sale of Chrysler automobiles. On August 4, 1925, this contract of writing was reformed or rewritten and changed in some particulars from the original contract, and this latter document is the one which is before us for consideration. It involves the same parties as the original contract and is designated and referred to as the "Master Policy" or "Running Policy." This contract of August 4th is in the form of a policy of insurance and begins in these words:

"Palmetto Fire Insurance Company, Sumter, South Carolina, in consideration of the warranties and the premium hereinafter mentioned does insure the assured named herein and the legal representatives for the term herein specified to an amount not exceeding the amount of insurance herein specified against direct loss or damage from the perils insured against to the body, machinery and all standard factory equipment of the automobiles described herein while within

the limits of the United States, including while in building, on road or railroad car or other conveyance, ferry or inland steamer," etc.

Then follow forms and provisions which occur uniformly in the ordinary automobile fire and theft insurance policy, and attached to this contract is a rider, made a part of the contract, "which supersedes and takes the place of anything to the contrary in the conditions and provisions" of the Master Policy.

In Section I of this rider, containing definitions, it is set out that the "term" of the policy shall mean the period during which insurance *may become* effective from July 1, 1925, to June 30, 1926. Section II provides that the "insurer does hereby insure finance companies, dealers and purchasers as their interests may appear against loss or damage caused by any of the hazards mentioned in the printed part of the policy," including among those assured, banks, trust companies or persons to whom may be pledged notes and security instruments covering the car. This section likewise stipulates that:

"Coverage hereunder and under certificates issued hereunder shall be for one hundred per cent of the list price, f. o. b. Detroit, of each Chrysler car insured hereunder on the date of the purchase of lease of same by the purchaser. \* \* \* Coverage hereunder and under certificates is *automatically effective from the date on which each purchaser takes delivery of a Chrysler car or receives a bill of sale whichever shall be earlier* and shall extend for twelve months. \* \* \* It is specifically agreed that every Chrysler car sold during the term of this policy shall be automatically covered hereunder notwithstanding any failure to issue a certificate or to report a sale of such car as may be required."

Section III of this rider provides for the issuance to purchasers of cars certificates setting forth the terms of the insurance.

The rider further provides for the making of reports by the Chrysler Corporation showing all cars with respect to which insurance is contemplated and provided by the contract, showing in detail the character of the model of the car sold and to be covered with other data which would be necessary for the protection both of the Palmetto Fire Insurance Company and the purchaser of the car.

Attached to this contract of August 4th is also the form certificate to be filled out and delivered to the purchasers of Chrysler cars. This certificate sets out that under a certain policy (being the policy constituting the Palmetto-Chrysler contract) the Palmetto Fire Insurance Company insured for the account of whom it might concern a certain Chrysler passenger or commercial car delivered to the purchaser, naming him, and describing by numbers the car delivered. This certificate then restates for the protection of the purchaser the obligation of the insurance company as it is set out in the master contract or policy.

You have transmitted to us in addition to other documents a certificate which was issued by the Palmetto Fire Insurance Company to the purchaser of a Chrysler car in Texas as evidence of the fact that this company is carrying on business under this plan.

In our opinion this practice is in violation of the law and it is our further opinion that it is your duty to cancel the permit of the Palmetto Fire Insurance Company to do business in Texas.

The "Resident Agent Law" contained in Articles 5058 to 5062, R. S. 1925, inclusive, provides that no company authorized to do business in this State shall write any policy of insurance upon property in

this State unless the same be issued through regularly commissioned agents of the company in Texas. This law is violated in the practice outlined above.

It will be noted that under the Master Policy no insurance liability attaches as against the Palmetto Fire Insurance Company until the Chrysler Corporation parts with its title to the automobile to be covered and such automobiles have passed into the possession and ownership of the ultimate user. It does not insure the Chrysler Corporation because expressly the insurance is not effective until Chrysler parts with its title to the property, at which time it has no insurable interest in the property. After title has passed from it, Chrysler cannot effect insurance on a car except for the benefit of another. This insurance is designed to operate as a coverage *for the protection of the purchaser* of the car, and of any person holding a secured claim against the car.

Under these facts we do not believe that any insurance can be said to have been written on the car until it came within the bounds of the State of Texas. The Master Policy, so called, is not in fact a policy of insurance. It insures no one, but is merely an offer by the Palmetto Fire Insurance Company that it will insure any person who may purchase from the Chrysler Corporation one of its cars, and such insurance may never be in effect on any property. It can only become effective at the election of the purchaser of the car. Insurance is not something which attaches itself to the corpus of the property which it covers. An insurance contract is not a covenant running with the property. The transfer of property covered by insurance does not transfer the insurance to the purchaser unless there be also a specific assignment of the right of the insured in his policy or contract of insurance. (14 R. C. L., p. 996.)

Insurance is a personal matter. A policy of fire and theft insurance is merely a contract of indemnity whereby the insurer agrees that it will indemnify the insured against loss occasioned by the specified causes to specific property. There must be a definite contract between the insurer and the insured and the terms of this contract must be understood and negotiation for such contract must be begun with an offer and consummated by an acceptance. (14 R. C. L., pp. 894-7.) It is our view, and we think it is a sound proposition of law, that a contract of insurance cannot be thrust upon an assured. The provision in the Master Policy, therefore, to the effect that the car is automatically covered when it is purchased from a Chrysler dealer is almost absurd. It is at least wholly ineffectual, because it lacks the essential element of mutuality, in so far as the purchaser's consent is concerned.

This view of the law is supported by a long line of decisions emanating from the courts of this country, including conspicuously the Supreme Court of the United States. In a series of authorities beginning with *Paul vs. Virginia*, 8 Wall., 168, this doctrine has been announced by that court. In the case noted the court used this language:

"The policies are simple contracts of indemnity against loss by fire entered into between a corporation and the assured for a consideration paid. They are like other personal contracts between parties which are completed by their signature and the transfer of a consideration."

The contract of insurance which is effected by the Palmetto Fire

Insurance Company on cars purchased in this State through the Chrysler Sales Corporation depends for its validity upon the acquiescence or acceptance of the contract by the purchaser in each instance. This acceptance may be overt and express or it may be implied from the fact that the purchaser takes the certificate tendered to him, but in any event he must accept the policy in one way or another before it becomes effective. Each obligation of insurance under which Palmetto is bound which may be related to this "Master Policy" is, nevertheless, a separate and distinct obligation, arising by virtue of the fact that the purchaser, after acquiring the car, accepted the policy of insurance offered him by the insurance company through the medium of this joint contract. We think it is clear, therefore, that under the plan as outlined above the Palmetto Fire Insurance company is writing business covering property in this State when it issues these certificates of insurance. Since these certificates are not issued through a local agent the company violates the provisions of the law above referred to.

Under the provision of Articles 5059 and 5062, Revised Statutes, 1925, the license of the company may be forfeited. This last article makes it the duty of the Commissioner, when he shall have received notice of any violation of the provision of the law, to investigate, and if he shall discover such violation, he shall immediately revoke the license, which, of course, he may not reissue so long as the violation continues.

It is contended by the proponents of this plan that this is a Michigan contract, made in Michigan, and that any Texas law which has the effect of defeating it is violative of the rights of the insurance company guaranteed to it under the Constitution. In support of this contention, reliance is placed principally in the case of *Allgeyer vs. Louisiana*, 165 U. S., 578. Our reply is that the Resident Agent Law does not affect the validity of the contract between the insurance company and the Chrysler Corporation, but that this law, which is on the statute books of this State, is a proper regulation of the business of a foreign corporation operating in Texas under a license from this State, and that if it does not see fit to abide by those restrictions, it is not entitled to the benefit of this license. It is to be remembered that the Palmetto Fire Insurance Company has no inherent right to come into this State, but operates here under a permit, and the law makes it an express condition to the granting of this permit that the company abide by the regulations imposed upon it by statute. This situation is clearly distinguishable from the *Allgeyer* case. In that case a citizen of Louisiana went outside of the State and made a perfectly lawful contract with a company not authorized to do business in Louisiana. The State undertook to penalize this individual for this action and the court held that the State had no right to control the lawful acts of its citizens outside of its territorial jurisdiction. That is not the situation here. The principle controlling that case we freely admit; in fact, we assert, to be sound. If a citizen of this State purchases a Chrysler automobile, he may go outside the State and arrange any character of insurance he desires to arrange with any insurer he may see fit to do business with, and doubtless the courts of this State would, in so far as they could possibly do so, help him enforce his rights under that contract. But that is a very different situation from the

one before us. Here the State is undertaking to regulate the business of a foreign corporation done in this State, and it is unquestionably true that the State has a right to control the method under which or by which a foreign corporation shall conduct its business in this State. It may put such limitations upon the business as it sees fit, even to the extent of excluding it from the State. The whole question, therefore, is whether the fire insurance company in covering these automobiles with fire insurance under these circumstances is writing this business in Texas. This Department conceives the fact to be, under the record presented, that the Palmetto Insurance Company is writing insurance business covering automobiles located in this State in a matter which violates the resident agent law above referred to.

The question is also raised that a Chrysler dealer who sells a car and who thereby puts into operation the machinery which later results in a contract of insurance between the Palmetto Insurance Company and the purchaser of a car from him is acting as an insurance agent in violation of the law which requires all persons acting as agent to obtain a license to engage in that business.

There may be some merit in this contention. It seems to be patent that there is no personal contact between the purchaser and the fire insurance company and yet a contract which is personal in its nature arises between them. Some agency of some sort must have brought them together. That agency may have been the Chrysler Sales Corporation; but, since a corporation can act only through individuals, it seems to be at least possible that the agency bringing about this meeting of the parties to the insurance contract was the dealer who sold the car. If that be true, such agents are violating the law requiring them to be licensed.

We are not passing upon this question at this time, however, inasmuch as we assume that the Palmetto Fire Insurance Company will not undertake to continue to write this business in this State if you revoke its license. Should it do so, however, an effective stop could be put to the business if it be the law that Chrysler dealers are acting as Palmetto agents without having obtained the license required by statute.

We trust that we have been explicit in answering the question submitted.

Very sincerely yours,

R. B. COUSINS, JR.,  
Assistant Attorney General.

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Op. No. 2609, Bk. 61, P. 209.

INSURANCE—FOREIGN CASUALTY COMPANIES—CAPITAL STOCK—  
STATUTES CONSTRUED.

1. "Capital stock," as used in Article 4497, and as applied to a foreign insurance company, means the capital stock actually issued and subscribed, as distinguished from unissued or authorized capital stock.
2. A foreign casualty company with an authorized capital stock of \$300,000, and an actual paid in capital stock of \$153,300, may, under Article 4497 and Article 4942c, write two kinds of casualty insurance in Texas.
3. "Capital stock," as used in Article 4497, in its application to a Cali-

ifornia insurance corporation, defined, and the applicable portions of the California law construed.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 26, 1925.

*Hon. Jno. M. Scott, Commissioner of Insurance, Austin, Texas.*

DEAR SIR: Your letter of June 10, 1925, addressed to Dan Moody, Attorney General, has been referred to me for attention.

In order to clearly present the nature of your inquiry, I copy the following portion of your letter:

"The Associated Industried Insurance Corporation of San Francisco, California, has made application to this department for a permit to do business in this State. It has filed its annual statement as of December 31, 1924, together with a Certificate of Compliance from the Commissioner of Insurance of the State of California that the company has fully complied with the laws of that State and has a permit to do business in California.

"The statement filed with this department shows that it has a paid-up capital stock of \$153,300 and a surplus of \$157,872.30. This company has an authorized capital stock of \$200,000, with the paid-up capital stock indicated above.

"Please advise this department as to whether or not a company incorporated under the laws of the State of California, with an authorized capital stock of \$300,000 and a paid-up capital stock of \$153,300 can be licensed in this State to do a public liability and workman's compensation insurance business under the laws of Texas."

The question presented is, whether or not this company, organized under the laws of California, which has filed its application for permit to engage in business in Texas and to do a Public Liability and Workmen's Compensation Insurance business, is entitled to a permit from the showing made by its statement and accompanying papers, including a certificate from the Insurance Department of the State of California, which shows that it has \$153,300 paid-up capital and \$157,872.30 surplus, this certificate being issued under date of the 8th day of June, 1925.

Article 4942e, which is Article 325 of the Insurance Digest of 1924, compiled by you, authorizes the formation of companies in Texas to write casualty insurance, and provides in part that "any company organized under the provisions of this act shall have not less than \$100,000 capital stock subscribed paid in in cash, with an additional \$50,000 capital subscribed and fully paid in in cash for every kind of insurance more than one which it is authorized to transact." It appears that if this company were organized in Texas, it would be entitled to do two kinds of casualty insurance enumerated in Article 321, Insurance Digest. It would have a capital stock of \$153,300. It is here asking for permit to do two kinds of such insurance.

Section 40 of the Act of 1909, Chapter 108, of the Acts of the Thirty-first Legislature, provides in part as follows:

"Should the Commissioner of Insurance and Banking be satisfied that any company in applying for certificate of authority has in all respects complied with the law and that, if a stock company, its capital stock has been fully paid up, that it has the required amount of capital and surplus to policyholders, it shall be his duty to issue to such company a certificate of authority under his seal authorizing such company to transact insurance business, naming therein the particular kind of insurance. \* \* \*"

Article 4765, which is Article 85 of the Insurance Digest, provides in part as follows:

"Any life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, incorporated under the laws of any other State, Territory or country, desiring to transact the business of such insurance in this State, shall furnish said Commissioner with a written or printed statement under oath of the president or vice-president, \* \* \* which statement shall show: \* \* \* 2. The amount of its capital stock. 3. The amount of its capital stock paid up."

This is Section 26 of the Act of 1909 referred to above. Section 55 of the same act provides in part:

"All of the provisions of the laws of this State applicable to life \* \* \* 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 the provisions of law made specially applicable thereto."

This provision of the law, though it was not included in the caption of the Act of 1909, has now been held constitutional because brought into the codification of 1911. *American Indemnity Co. vs. City of Austin*, 112 Texas, 239.

Under these provisions of the law, and treating the Act of 1909 as applicable to this foreign casualty company by virtue of the terms of Article 4955, above quoted, the question arises as to what is the proper construction of the applicable portion of the Act of 1909, the sections of which have above been copied. The specific question is: what is the meaning of Section 40 of the act wherein it is provided that the Commissioner shall issue a certificate of authority if he is satisfied that any company applying therefor has in all respects fully complied with the law, and if a stock company, "*its capital stock has been fully paid up*"?

Under the Texas law, corporations must subscribe their full capital and usually fifty per cent must be paid in. Insurance corporations, generally, must have their capital stock fully paid. It must all be subscribed. The law of Texas determines the right of the foreign corporation to come into the State to do business. The law of Texas, however, in speaking of *capital stock*, probably means capital stock as it exists in Texas, that is, subscribed capital stock. In determining what constitutes *capital stock* of a foreign corporation, it seems to me necessary to examine the law of the State of its creation. The law in that State determines its capital stock in that State. It has no capital stock except so far as the law of that State authorizes.

The term "capital stock," as used in this statute, does not include *capital merely authorized* which is not subscribed or issued. The mere *authority* or *power* of the corporation *to issue* additional capital stock upon its compliance with certain legal conditions precedent, does not itself constitute capital stock *until that stock is subscribed and issued*. It is necessary to have more than the lawful authority to issue the stock. It must be subscribed. The term "capital stock," within itself, implies a relation between a corporation and a stockholder. Unless there is a subscription contract on the part of the stockholders to take the stock, then no stock exists. This corporation has authorized capital of \$300,000. It has subscribed and issued stock of \$153,300 fully paid in. Under the laws of California the corporation must comply with certain conditions precedent before issuing any additional stock

within the authorized issuance thereof. There must be subscriptions and the same must be paid for. Under the law of California, after the board of directors has so determined, the corporation may sell additional stock, reporting the same to the Secretary of State of that State, and paying the required additional fees. It seems to me, therefore, to be logical that until these conditions precedent have been performed, the *balance* of the *authorized capital stock* which the corporation has power to issue, but has not issued, is not "capital stock" within the meaning of the Texas statute.

The term "capital stock" has been correctly defined, I think, as follows:

"Capital stock of a corporation, in its primary sense, means the fund, property or other means contributed or agreed to be contributed by the share owners as the financial basis of the corporation's business, either directly through stock subscriptions or through the declaration of stock dividends." Words and Phrases, Vol. 1.

It is the dedication of resources to the business of the corporation which is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication, becomes irrevocably devoted to the satisfaction of all obligations of the corporation. 75 *All.*, 90.

"The capital stock of a corporation consists of the property and money subscribed and paid in for the purpose of carrying on its business."  
Jones vs. Davis, 35 Ohio St., 474.

It has been defined as the sum total fixed by the charter or articles of incorporation as the amount paid or to be paid in as the capital upon which the corporation is to do business.

14 Corpus Juris, 379, Section 499.

Properly speaking, there is a distinction between "capital" and "capital stock." The property of the corporation fluctuates and may be greater or less than the capital stock invested, but the capital stock remains fixed and unaffected until changed by operation of law.

Wells vs. Green Bay Co., 64 N. W., 69.

Farrington vs. Tenn., 95 U. S., 679.

Marco vs. Burges, 95 N. E., 308.

In the case of Turner vs. Cattlemen's Trust Co., 215 S. W., 832, the Commission of Appeals of Texas defines *capital* as it relates to corporations as follows:

"The term 'capital' is used to designate that portion of the assets of a corporation, regardless of their source, which is utilized in conducting the corporate business and for the purpose of deriving thereupon their gain and profits." Citing many authorities.

Texas corporations may *increase* or decrease their capital stock by statute only. They have no *authorized* capital as distinguished from *subscribed* capital. All the capital stock must be subscribed at the beginning of the corporation, and in order to increase it, an amendment has to be filed. This is not true in California. We must consider the law of that State in determining what the capital stock of



this corporation is at the time it makes application for permit to do business here.

Section 290, Kerr's Civil Code of California, provides in substance:

"That each application for a corporate charter shall state the amount of its capital stock (subdivision 6) and the amount of capital stock actually subscribed and by whom (subdivision 7.)" The authorized capital represents merely the power of the corporation to issue and sell other stock under the terms and provisions of the law, within the limit of authorized capital.

Section 362 of the above Code governs the amendment of charters and authorizes the amendment of a charter with respect to the amount of its "capital." This must refer, in my judgment, to its so-called "authorized capital," because the same section provides that there shall be no amendment of the statements made in the charter with respect to the capital stock subscribed.

Section 359 of the above Code covers the increase of the capital stock. That section refers to the increase of subscribed capital stock apparently, because it provides that after the stockholders have voted for the increase and the same has been subscribed, a statement shall be filed with the Secretary of State showing the number of new shares subscribed and the number issued. These two sections (359 and 362), taken together, show that the *authorized* capital of a corporation is increased by a *charter amendment*, while the amount of *subscribed capital stock* is increased by a *vote of the stockholders by actual subscription* and a report to the Secretary of State. It is further provided by Section 359 that no capital stock shall be paid except in money, property, or services performed, and the same section provides: "That fictitious increases of capital stock shall be void." Obviously the fictitious increase mentioned refers to *subscribed* capital, because all *nominal* or *merely authorized* capital stock *not subscribed* is in its nature fictitious.

Section 594 of Kerr's Political Code of California provides that *all of the capital stock of an insurance corporation must be paid up in cash*, subject to one exception which is immaterial here. As stated above, the certificate of the Insurance Department of California shows that it has fully complied with the law of that State. This seems to eliminate any doubt about the construction given, because the certificate of the Insurance Department of California *could not be true* unless all of its *capital stock, as that term is meant in California law, had been fully paid up in cash*. The Insurance Department of that State must treat the \$153,300 actually subscribed and paid in as the capital stock of the corporation and as being the capital stock required by Section 594 of the Code referred to. The remainder, or so-called authorized capital, is no more than the *power* of the corporation to issue and sell the additional stock upon fully complying with Section 359 of Kerr's Civil Code.

It seems to me that the authority of the California corporation, as provided in Section 359 of the Civil Code, to issue and sell additional capital stock within the limit of its fixed authorized capital, amounts to practically the same thing as the power of a Texas corporation to increase its capital stock. In Texas, all the capital stock shall be subscribed, and in order to increase it there must be an amendment. In

California the law evidently does not require a charter amendment, but requires the *subscription* of the balance of the stock *in order for it to ever become stock*, and an insurance company must have a fully paid in capital stock. No other inference can be drawn from the certificate of the Insurance Commissioner of that State.

In *Stempel vs. Bruin*, 49 So., 151, The Supreme Court of Florida makes a distinction between authorized capital and actual capital stock:

“Authorized capital may never become actual capital, and actual capital is the amount of its authorized capital that has been bona fide subscribed for and paid.” See also Clark and Marshall on the Law of Private Corporations, Vol. 2, Sec. 372.

Bearing in mind that, under Section 26 of the Act of 1909, above referred to, a foreign life insurance company in submitting its annual statement, must show not only the amount of its capital stock, but “*the amount of its capital stock paid up*,” it seems evident that the Legislature recognized the distinction. Likewise, the same may be said of Section 28 of the Act of 1909, which provides that no foreign life insurance company shall transact any business of insurance in this State, unless such company is possessed of at least \$100,000 of actual paid-up in cash money capital invested in such securities as provided under the laws of the State, territory or country of its creation.

It is apparent from the certificate of the California Insurance Commission that the \$153,300 is regarded as representing the present *capital stock* of the corporation under the California law, because, as shown above, *that law requires that all the capital stock of insurance corporations shall be fully paid up in cash*. The Legislature of Texas, in enacting Section 40 of the Act of 1909, must have had in mind *capital stock* as it is meant in Texas—that is, *subscribed stock*. It evidently intended that a corporation having subscribed the stock must have fully paid up in cash whatever amount had been subscribed. That is the rule in Texas and that must be the manner in which the legislators considered it. The very fact that in California all of the capital stock of an insurance company must be paid in cash, but that there may be authorized capital (which is merely the power to increase without amendment in that State), shows the wisdom of the Legislature of Texas in enacting this provision.

This corporation presents its statement showing the solvency required of a corporation doing the same character of business in Texas organized under the laws of Texas. If it were a Texas corporation it would doubtless have a capital stock, as we call it, of only \$153,300. Later, if it desired to increase its capital stock, it would file an amendment. In California this corporation may increase its actual capital stock without filing a charter amendment, by simply subscribing and paying for new shares up to the amount to which it is authorized to issue them. In view of what has been said, and since this corporation meets the solvency test fixed by Article 4942e of our statutes relating to domestic casualty companies, it is my judgment that the permit should be granted. It is not intended herein to decide that a foreign corporation which does not have the same amount of actual paid-in capital as is required of domestic corporations doing the same character of business, would be entitled to the permit, but as applied to

this situation, it is my belief that Section 40 of the Act of 1909 refers to issued capital stock.

Yours very truly,

WRIGHT MORROW,  
First Assistant Attorney General.

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Op. No. 2601, Bk. 60, P. 69.

LLOYD'S INSURANCE, CORPORATION ACTING AS AGENT AND ATTORNEY  
IN FACT FOR—INSURANCE.

1. Construction: Chapter 83, Acts 1919; Chapter 127, Acts 1921; Articles 4955, 4960, 4961 and 4969.

2. A corporation with the purpose clause as shown, organized under Chapter 83, General Laws of the Thirty-sixth Legislature, may not be licensed to act as the attorney in fact or agent for a Lloyd's insurance association, as provided in Chapter 127, General Laws of the Thirty-seventh Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 20, 1925.

*Hon. Jno. M. Scott, Commissioner of Insurance, Austin, Texas.*

DEAR SIR: In a communication of recent date addressed to the Attorney General you have presented to this Department for its ruling the question of whether or not a corporation organized under the provisions of an act of the Thirty-sixth Legislature, Regular Session, being Chapter 83 thereof, page 134, and shown as Articles 385a and 385b, Complete Texas Statutes, 1920, might be authorized to act and granted a license, first, as agent for a Lloyd's insurance association organized in compliance with and under the provisions of Chapter 127, General Laws of the Thirty-seventh Legislature; and, second, whether such corporation might act as attorney in fact for such a Lloyd's insurance association.

An answer to these inquiries has necessitated a close examination of the Acts of the Legislature above referred to, and statutory provisions of the general insurance laws applicable, especially to insurance agents, and particularly Articles 4960, 4961, 4969 and 4955, Complete Texas Statutes, 1920; and an interpretation of their meaning and application.

It has been argued, and with reason, that the above named four articles of the statutes, which are within the general provisions of the insurance laws of this State, are not applicable to insurance on the Lloyd's plan, by reason of Section 2 of the Lloyd's Act. If these articles apply to the situation confronting us, the matters may be easily solved. If they do not apply, then it becomes necessary to undertake to determine the intention of the Legislature in the passage of the two acts above mentioned, in the light of the policy of the State as declared by the Legislature in the general provisions of the insurance law. It is plain that a corporation may not be granted a license by the Commissioner to act as insurance agent for another insurance corporation, by virtue of the four above named articles of the statutes. A Lloyd's insurance association is, however, composed of individuals who subscribe to a common guaranty fund and act through attorneys who carry on their business.

Article 4960 provides in substance that it shall not be lawful for any person to act within this State as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever, or to in any manner aid in the transaction of the business of any insurance company incorporated in this State or out of it, unless first procuring a certificate of authority from the Commissioner. Article 4961 defines agents. Article 4969 provides that no corporation or stock 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 in this State. Article 4955 provides that all the provisions of the laws of this State applicable to life, fire, marine, inland, lightning or tornado insurance companies shall, so far as 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 the provisions of law made specially applicable thereto. Article 4955 was first held unconstitutional because of failure of proper caption. *Western Indemnity Company vs. Free and Accepted Masons*, 198 S. W., 1092. Later, after being enacted into the Revised Statutes of 1911 as Article 4955, the article was held valid. *American Indemnity Company vs. City of Austin*, 246 S. W., 1019.

As heretofore stated, it appears to be plain that, by extending the provisions of Article 4955 so as to make Article 4969 apply to all other companies transacting any other kind of insurance business in this State, a corporation cannot be granted a license as agent for any other insurance company, and as limited by the particular provisions of Article 4960 that a corporation may not be granted a license as an agent or to in any manner aid in the transaction of any other kind of insurance business carried on by any kind of insurance company incorporated in this State or out of it.

It is contemplated by insurance under the Lloyd's plan that any kind of insurance, except life insurance, and which is not otherwise unlawful in this State, may be written. The purpose of the individual underwriters who subscribe to the common fund under Lloyd's plan, is to make insurance of any kind not prohibited by law, except life insurance. The attorney, under the provisions of the act, acts for and in behalf of the underwriters. He executes and subscribes policies and contracts of insurance; solicits the insurance; pays and adjusts losses; defends and prosecutes suits; and does everything necessary to carry on the insurance business for such underwriters. The obvious result of this business arrangement is that the corporation proposing to act as attorney under the Lloyd's plan, to all intents and purposes, will be the insurer; that is, it will solicit the insurance through its own agents; write and execute the insurance policies and contracts; make inspections of risks and pass on same; adjust and pay losses; and act for and on behalf of the underwriters, doing everything necessary and convenient to the successful carrying on of such a business. It is proposed that the guaranty fund, which will be subscribed by the individuals who desire to become underwriters under the Lloyd's plan and who name this corporation as their attorney in fact under such plan, shall be \$500,000, and, under Section 5 of the Lloyd's Act, this will allow this group of underwriters the privilege of writing any kinds of insurance that may be written in this State, except life insurance.

We conceive that the Lloyd's Act does not grant any further rights of contract to the citizens of Texas. It is known to most business men that, prior to the passage of the Lloyd's Act of 1921, insurance on the Lloyd's plan was being written in Texas. A group of individuals would agree to bind themselves against certain risks contracted for between them, through their agent or attorney in fact, and the insured. These individuals, no doubt, appointed for their agent or attorney in fact some other individual who carried on the business for them. The Lloyd's Act appears simply to be a declaration by the Legislature authorizing individuals, partnerships or associations of individuals to become underwriters, to make any insurance except life insurance on the Lloyd's plan by executing articles of agreement expressing their purpose so to do, and complying with the requirements set forth in the act. It purports to direct an exclusive method by which these persons or associations may operate an insurance business of this kind in Texas. The act does not authorize corporations to become underwriters. It appears to be an act which is complete within itself. It provides that the policies may be executed by the attorney in fact or other representative designated as attorney therein; that the principal office of such attorney shall be maintained at a designated place; that the attorney shall file with the Commissioner of Insurance a verified application for license, setting out a number of requirements to be fulfilled by such attorney; that upon compliance with the terms of the act, and a showing of assets provided in Section 5, the Commissioner shall issue a license to the attorney applying therefor, specifying the kind or kinds of insurance he is authorized to write, containing the name of the attorney, location of his office and title of the business. The Commissioner has certain powers of examination of the affairs of the attorney, at the attorney's expense, and certain rights with reference to revocation or suspension of the attorney's license. Additional or substituted underwriters are bound, as provided by Section 7, in the same manner as if they had been original subscribers to the articles of agreement and original power of attorney on file with the Commissioner; the acts of the duly appointed deputy or substitute attorney of any attorney licensed under the act shall be deemed to be authorized by the license issued to the original attorney. A limit is placed on any one risk that may be written, according to Section 8. Section 9 deals with suits on any policies or contracts, and provides that the same may be brought against the attorney or against the attorney and the underwriters or any of them; process may be served on the Commissioner or on the attorney, and when so served it shall have the same force and effect as if served on the attorney and each underwriter personally; and a judgment against the attorney or against any underwriter, when procured upon such process, shall be binding upon and be a judgment against each and all underwriters, as their several liabilities may appear in the contract of insurance on which the action is brought. Section 10 provides that all underwriters, attorneys, agents and representatives transacting business on the Lloyd's plan shall be governed and regulated by the provisions of that act, and stipulates and imposes a penalty for a violation of any provision thereof, which penalty is a fine in an amount not exceeding \$500.

Section 11 is as follows:

"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 Insurance Department of this State in 1904 interpreted the definition of "agent" and the word "person," as used in Article 2961, so as to include only individuals or natural persons and not corporations or firms, so that under that ruling it became necessary for a firm consisting of more than one person to have a separate license for each such person desiring to solicit insurance. A corporation was not included within the definition and was, therefore, not authorized to be an insurance agent and was not permitted to be licensed as such.

No other law in Texas that we have found undertakes to deal with insurance on the Lloyd's plan. The Lloyd's plan of insurance was not known to the statutes until this act was passed in 1921. No law has been passed since that time, so far as we know, dealing with insurance on this plan. It may be said without reserve that it has been the law for many years that a corporation could not be licensed to act as agent for an insurance corporation in this State, and, as indicated from these express enactments of the Legislature, it is plainly the legislative policy to refuse to authorize the issuance of a license to a corporation to act as an insurance agent.

Under an opinion rendered by this Department on November 14, 1923, reported in the Reports of the Attorney General for the years 1922-1924, page 361, it is held that a corporation there considered may not act as insurance agent, because the Commissioner may not license a corporation as an agent, and the statute made it unlawful to so act without a license. The corporation was seeking to act as agent and attorney in fact in that case for the Automobile Underwriters of America, a reciprocal insurance organization operating in Texas under a permit. In that opinion authorities were cited to uphold the view which we think sustains the conclusions so reached. It was emphasized in that opinion that the business of writing insurance required skill and a high degree of intelligence, and in carrying out such agency there was a trust and confidence imposed upon the agent both by the insurance company and by the insured. Doubt was expressed as to whether or not a legal fiction might possess such qualities in law. Whether or not a corporation may legally qualify as attorney in fact or agent, as required by the Lloyd's Act, or whether the fact that the business of an insurance agent or attorney in fact requiring skill and implying the placing of trust and confidence both by the insurer and the insured, militates against the right of a corporation to act in this capacity, are matters that may have some persuasion in determining this question, but are not decisive. It is probable that the weight of authority in recent years upholds the right and power of a corporation organized for a proper purpose to delegate to its president or other executive officer the right or authority to make an oath and to select as its agents persons of skill and ability and in whom confidence may be imposed.

The Lloyd's Act does not expressly state or impliedly provide that a corporation may be the attorney in fact or attorney as therein designated. On the other hand, it appears throughout the provisions of the act that the Legislature was referring to the attorney, as therein

designated, as an individual or natural person. In many instances the pronoun "he" is used. In Section 4, with reference to the license to be issued; in Section 5, "if any such attorney or other person"; in Section 6, "the attorney and his deputies," and "so that he may appear"; in Section 7, providing for appointing deputies by the attorney, which in relation to corporations would require the delegation to a deputy or substitute of a complete and express power which the corporation itself was organized to perform; in Section 9, "as if served on the attorney and each underwriter personally"; in Section 10, "any person who, as principal attorney, agent, broker or other representative." If it had been intended by the Legislature that such a privilege should have been granted and that a corporation should be licensed to act as attorney in fact, it would have been quite easy and proper for it to have expressly so provided. There is no suggestion of any such intention on the part of the Legislature. It may be presumed that the members of the Legislature knew the long continued and well established policy of the State against permitting a corporation to be licensed as an agent for an insurance company. It is not apparent from this act that they intended to change the existing policy. It is common knowledge that for many years there have been concerted efforts made to secure an enactment of the Legislature which would specifically authorize corporations to be organized for the purpose of acting as agents of insurance corporations and to be licensed by the Commissioner. Every such effort has failed. While it may not be within the province of this Department to speculate on the reason why such efforts have failed, we may say that it was probably the motive of the Legislature, in refusing to enact such a law, to keep local representation of insurance companies as much a personal matter as possible.

The term "agent" is one of wide signification and in a general sense may, therefore, be said to apply to anyone who, by authority, performs an act for another. The most characteristic feature of any agent's employment is that he is employed primarily to bring about business relations between his principal and third persons. The term "attorney in fact" is frequently used in a loose way to include agents of all kinds, but in its strict legal sense it means an agent acting under a special power granted by deed.

"All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. 'Agent' is a general term which includes brokers, factors, consignees and all other classes of agents. By 'attorneys in fact' are meant persons who are acting under special power created by deed. It is true in loose language that the terms are applied to denote all agents employed in any kind of business, except attorneys at law, but in legal language they denote persons having special authority by deed." Porter vs. Hermann, 8 Cal., 619 (Field, J.). See also Treat vs. Tolman, 113 Fed., 892; Harkins vs. Murphy, 112 S. W., 136; Mechem on Agency, page 1, Section 1.

While agency is a trust or fiduciary relation demanding of the agent loyalty and fidelity to the interests of the principal confided to his charge, it differs in many respects from any recognized class of trust. It may be difficult to define strictly at all times the line between a trustee and an agent. In the ordinary dealings of an agent, however, the title to any property involved and usually the proceeds therefrom remains in

the principal, and the agent acts in the name of his principal. In a trust the legal title is in the trustee and he acts in his own name. "An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another." *Taylor vs. Davis*, 110 U. S., 330. See also *Hartley vs. Phillips*, 190 Pa., 9.

When an agent contracts in the name of his principal the principal contracts and is bound by the terms thereof, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal.

Under the Lloyd's Act, therefore, an attorney in fact is given his powers under the terms of a power of attorney executed by the underwriters, but his judgment and discretion are practically in every instance substituted for that of the underwriters, and he actually carries on the business. It is true that he subscribes the policies and contracts on behalf of the underwriters, but he contracts directly with the insured and passes on the risks and hazards which the underwriters themselves insure.

Section 1 of the act of the Legislature of 1919, which authorizes the formation of the corporation which it is desired to appoint as attorney in fact for a Lloyd's insurance association, provides as follows:

"Corporations may be created for any or all of the following purposes, to-wit: To accumulate and lend money, purchase, sell and deal in notes, bonds, and securities, but without banking and discounting privileges. To act as trustee under any lawful express trust committed to them by contract and as agent for the performance of any lawful act. But no corporation organized hereunder shall act as agent or trustee in the consolidation of or for the purpose of combining the assets, business, or means of any other persons, firms, corporations or associations, nor shall such corporation as agent or trustee carry on the business of another."

The purpose clause of the charter of the trustee corporation under consideration is as follows:

"To act as trustee under any lawful express trust that may be committed to it by contract and to act as trustee and attorney in fact for individuals transacting insurance business under the Lloyd's plan and legally authorized to transact such business in the State of Texas."

This corporation must receive its power to act in the manner proposed by it from the very terms of this act under which it is created. If the language is of doubtful construction or meaning and does not expressly or by necessary implication authorize a corporation to be formed for the purpose proposed, then such doubt must be resolved in favor of the public and against the authority of the corporation. "The charter serves a twofold purpose; it operates as a law conferring upon the corporation the right or franchise to act in a corporate capacity; and, furthermore, it contains the terms of the fundamental agreement between the corporators themselves. The purpose of the corporation organized under the statutes are such and such only as the statutes confer." Sec. 555, *Lewis' Sutherland on Statutory Construction*, Vol. II, Second Edition. This principle is derived from the nature of corporations, the mode in which they are organized and the manner in which their affairs must be conducted, and it is necessary that we keep a steady adherence to the



principles stated. The charter of a corporation is the measure of its powers. Such acts are strictly construed and all ambiguities are resolved against the corporation. *Merrill vs. Smith*, 89 Texas, 529; *Johnson vs. Townsend*, 124 S. W., 417.

We recognize that there may be many benefits to accrue to a corporation acting as attorney in fact and agent for a Lloyd's association, such as continuity of existence, which makes for good will and good management, but the question must be determined from the law existing. We express serious doubt as to whether the language of Section 1 of the act which has for its purpose the performance of the duties of an attorney under the Lloyd's Insurance Act. We entertain doubt also as to whether the language in said section, "to act as trustee under any lawful express trust committed to them by contract and as agent for the performance of any lawful act," is sufficiently specific for the purpose of authorizing such corporation to act as agent and attorney in fact for a Lloyd's insurance association, or as a trustee occupying the same relation. There is little or no element of the ordinary trust as known to law in the relation.

The rule seems to be that where there is a reasonable doubt as to the extent of the privilege conferred in the charter of a private corporation, it is to be construed most favorably to the public. 4 *Thompson on Corporations*, Section 5345. And if the language of the charter cannot be said to be plainly within the act under which the charter is taken, then there must be grave doubt as to the authority of the corporation to so act. We seriously doubt that the Legislature intended to give the right to a corporation organized under the Act of 1919 to act as agent or in this connection as attorney for an insurance company, even when composed of individuals, and not a corporation.

It may be recalled that at the time of the passage of the Act of 1919 it was certainly not lawful for a corporation to act as insurance agent for another corporation. A corporation was not entitled to procure a license as an insurance agent. It may also be stated that in 1919, since the Lloyd's plan of insurance was not known to the statutory law of Texas, the Legislature did not have in view the creation of corporations to act as agent or attorney in fact for such an insurance company or association. The language in Section 1, "and as agent for the performance of any lawful act," cannot, therefore, be said to refer to the lawfulness of a corporation acting as agent or attorney for such an insurance company. It is true that there was no prohibition in the law preventing Lloyd's insurance associations or any other individuals from insuring by private contract. Neither was there any specific authority in the law for the making of insurance on the Lloyd's plan. We believe that the last quoted language should be confined to what was known as lawful business at the time the statute was enacted, that is, lawful business for a corporation to engage in. In a similar situation, it was so held by the Attorney General of Pennsylvania, where the authority was denied to a corporation to form and obtain a charter for a trackless trolley company for furnishing transportation over the streets of a city, under the statute authorizing the formation of corporations "for the transaction of any lawful business." The decision of the Attorney General of that State was influenced, it is true, by the fact that such company would not be subject to the statutory regu-

lations over other corporations doing the same kind of business. In the instant case we are dealing with a corporation desirous of being authorized to do a business under an act which appears to have been primarily for the purpose of authorizing the formation of a corporation for the purpose of accumulating and lending money and in dealing in notes, bonds and securities, but without banking and discounting privileges. Article 385a, as passed in 1919, must have been thought to be for the purpose of authorizing a loan and brokerage business primarily, by the manner in which it is handled in the Complete Texas Statutes of 1920 and the recent codification and Revised Statutes. The case of *State ex rel. Gorman vs. Nickels*, 82 Pac., 741, decided by the Supreme Court of Washington, is indicative of the rule of construction with reference to corporations having powers which might be held to be exclusively within the powers of other companies authorized by particular acts of the Legislature and doing a particular business. See also the case of *Smith vs. Wortham*, 157 S. W., 740.

The case of *Franklin Fire Insurance Company vs. Hall*, 247 S. W., 822, opinion by Chief Justice Cureton of the Supreme Court of this State, was construing the matter of licenses under Article 4960. The court used this language: "This statute confers upon those authorized the special privilege of being local insurance agents, a right not common to but denied to all except upon compliance with the law." Though this is an application of Article 4960, and it has been seriously argued that this article of the statutes as well as other provisions do not apply to Lloyd's insurance associations, nevertheless it is plain that an insurance agency is considered a special privilege proceeding from the Legislature, and a statute authorizing corporations to perform any lawful act or to act as agent in the performance of any lawful act or as trustee under any express trust committed to it by contract is probably insufficient to authorize a corporation to exercise powers which have been heretofore regulated by general provisions of law and relate to a particular and special privilege to be procured only upon compliance with particular laws. This, together with the necessity of construing the Act of 1919 strictly as to the powers of the corporation granted thereby, makes it specially doubtful that it was the intention of the Legislature to authorize the corporation to act as agent and attorney in fact in the insurance business.

Another part of said Section 1 of the 1919 act is difficult to interpret. If it be assumed that the act authorizes a corporation to have the powers this one proposes to use, the last clause of the section, "nor shall such corporation as agent or trustee carry on the business of another," is ineffective. It must have some meaning. It might be explained by assuming that it refers only to a violation of the anti-trust laws, and yet the earlier part of that sentence with reference to combinations and consolidations would apparently cover the anti-trust feature. The word "another" might refer to another corporation, but this is an instance of the indefiniteness of the act causing our inability to believe that it intended to grant the powers which the trustee corporation would assume. The trustee corporation would really carry on the business of the Lloyd's association.

Under these rules of construction and in the absence of a special provision in the Lloyd's act authorizing a corporation to be the agent

and attorney in fact therein provided for, and in view of the policy of the Legislature of this State as shown by the express provisions of the insurance law referred to, we cannot find ourselves able to agree that the trustee corporation may be licensed as an attorney under the Lloyd's act to carry on the business as attorney in fact and through its agents to solicit insurance for the Lloyd's insurance association, as it is proposed to do. Passing the question of whether or not Section 11 of the Lloyd's act exempts associations formed thereunder from the operation and effect of the general insurance laws referred to, we conclude that the Lloyd's act does not disclose the intention of the Legislature to allow a corporation to act as the attorney therein designated and to be licensed as such.

It is upon this belief and the interpretation we have placed on the Act of 1919 under which the trustee corporation is chartered, that we have reached the conclusion stated: that the corporation may not be granted a license to act as it proposes to do.

Respectfully submitted,

WRIGHT MORROW,  
First Assistant Attorney General.

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Op. No. 2603, Bk. 60, P. 215.

CHILD LABOR LAWS—PERMITS—STATUTORY CONSTRUCTION.

1. One of the purposes of a statute forbidding the employment of children in certain places is to protect them from their own immaturity, inexperience and heedlessness.

2. A statute should be given that construction that will effect its purpose, if this can be done without violating the letter of the act, and if possible to avoid unreasonable and unjust consequences and which comports with the public policy of the State and is controlled as far as can be determined by the legislative intent and purpose.

3. County judges may issue permits only when the conditions and requirements made in Section 5 of the act have been fully complied with.

4. The provisions made in Section 5 of the act do not authorize the issuance of a permit to a child, regardless of age, when such child is to be employed in a mine or quarry or other place where explosives are used, or to a child between the ages of twelve years and fifteen years when such child is to be employed in or around a mill, factory or workshop, regardless of whether dangerous machinery is used in connection therewith or not; or employed in or around other places where dangerous machinery is used, or where the moral or physical condition of the child is liable to be injured.

5. Section 2 of the act prohibits the employment of a child under the age of seventeen years for the purpose of laboring or being on duty in or around any mine, quarry or other place where explosives are used.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 5, 1925.

*Hon. E. J. Crocker, Commissioner, Bureau of Labor Statistics, Austin, Texas.*

DEAR SIR: We acknowledge receipt of your letter of April 21st with enclosed copy of Child Labor Law as enacted by the Thirty-ninth Legislature at its Regular Session. Prior to the receipt of this communication we had received your letter and there was enclosed therewith an inquiry by Miss Grace Abbott, Chief of the Children's Bureau of the United States Department of Labor, which we copy below:

"Does the provision allowing judges, under certain conditions, to issue permits to children between 12 and 15 years of age, but stating that such a child shall not be employed in 'any mill, factory, workshop or other place where dangerous machinery is used,' prohibit the issuance of permits for work in *any* mill or factory, or only in mills or factories where it appears that 'dangerous machinery' is used?"

The specific inquiry involves a construction of the language used in Section 5 of such act, but in order to properly understand and construe this part of the act, it becomes necessary to discuss other portions of the act.

While apparently this is recent legislation upon the question of employment of child labor, an examination of our statutes (Penal Code, Articles 1050E to 1050L) will disclose that the Thirty-fifth Legislature at its Regular Session, Chapter 59, page 104, passed an act, the provisions and effect of which are not only similar to, but almost identical with the provisions made by this act. Prior to the enactment of the preceding acts, the Thirty-second Legislature, at its Regular Session, Chapter 46, page 75 (repealing a similar act of 1903), passed an act for the purpose of regulating the employment of children in factories, mills, mines, quarries, distilleries, breweries, manufacturing or other establishments using dangerous machinery or where their health may be impaired or morals debased.

The supervision and control of children, especially with reference to their employment, is a subject which has always been regarded as within the province of legislative authority. Just how far it shall be exercised is a question of expedience which is solely within the Legislature to determine unless its enactments are manifestly unreasonable. One of the purposes of a statute forbidding employment of children is to protect them from their own immaturity, inexperience, and heedlessness. That construction should be given a statute that will effect its purpose, if it can be done without violating the letter of the act; and which, if possible, avoids absurd, unjust and unreasonable consequences, and that construction adopted which comports with the public policy of the State, controlled as far as determinable by the legislative intent and purpose.

Section 1 of this act makes it unlawful and provides a penalty for a violation thereof, for any person, firm or corporation, after the act becomes effective, to employ a child under the age of fifteen years to labor in or about any factory, mill, workshop, laundry or in messenger service in towns and cities of more than fifteen thousand population according to the Federal census, excepting from the provisions of the act children employed on farms, ranches, dairies or other agricultural or stock-raising pursuits.

Section 2 of the act makes it unlawful for any person, or agent, or employe of any person, firm or corporation, after such act becomes effective, to employ any child under the age of seventeen years to labor in any mine, quarry or other place where explosives are used. This section, unlike Sections 1, 4 and 5, does not contain any exception or proviso authorizing the issuance of a permit by the county judge to a child to work in any mine, quarry, or other place where explosives are used. Hence, we conclude that at all times and places it constitutes a violation of the provisions made in this section for any person or agent or employe of any person, firm or corporation to employ any

child under the age of seventeen years to work in any mine, quarry or other place where explosives are used, or to do or cause to be done any act contrary to the provisions made in such section.

The conditions to be met in securing a permit under the terms of Section 5 of this act are: (a) that the earnings of the child are necessary for the support of itself; (b) its widowed mother, or mother in needy circumstances; (c) its invalid father; (d) or other children younger than the child for whom the permit is sought (presumably brothers or sisters of child seeking permit); (e) that the child for whom the permit is sought is more than twelve years of age; (f) that such child has completed the fifth grade in public school, or its equivalent; (g) that it shall not be employed in or around any mill; (h) factory; (i) workshop; (j) or other place where dangerous machinery is used; (k) in any mine; (l) quarry; (m) or other place where explosives are used; (n) where the moral condition of the child is liable to be injured; (o) where the physical condition of the child is liable to be injured; (p) that such support cannot be obtained in any other manner, and that suitable employment has been obtained for such child.

A compliance with the foregoing requirements must have been made before the county judge would be authorized to issue permit. Not only is this true, but such sworn statement must be accompanied by the certificate of a licensed physician showing that such child is physically able to perform the work or labor for which the permit is sought.

We have heretofore stated that regardless of the existing facts, conditions and circumstances, that a child under seventeen years of age could not be legally employed in or around any mine, quarry or other place where explosives are used. Whether a child between the ages of twelve years and fifteen years can be employed in or around a mill, factory or workshop, regardless of whether or not dangerous machinery is used in or around such place, is to be determined largely upon the meaning and significance given the general language, "other place where dangerous machinery is used," which follows the specific words, "mills, factories and workshops."

In consideration of the general phrase, "other places where dangerous machinery is used," it becomes necessary to at the same time consider in connection therewith the language, "nor in any mine, quarry or other place where explosives are used."

We feel warranted in the presumption that the Legislature had in mind that explosives were used in all mines and quarries. And if in this we are correct, it inevitably follows along the same line of reasoning that the Legislature thought that dangerous machinery was also used in and around all factories, mills and workshops. We must keep in mind that the object of the Legislature was to enact an adequate law to prohibit the employment of children of tender age in factories, mills, mines and workshops and other places where their physical or moral condition might be subjected to injury. If the Legislature did not intend to prohibit the employment of such children in or around mills, factories, workshops or other places where dangerous machinery is used, it would have been an easy matter to have said so.

It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute, and since the controlling factor causing the enactment of this statute was the

welfare of the children of this State and of succeeding generations, the Legislature evidently intended to prohibit the employment of children at any time or place where such place of employment was surrounded by dangerous machinery, explosives or other agencies that would be conducive to the injury of the child. We do not think that this is a harsh, unreasonable or unwarranted construction of this statute, but plainly a manifestation of the intent and purpose of the Legislature at the time they enacted such statute. There are many other places where children could be employed that the health, life and general welfare of such children would be endangered or jeopardized to the same extent as it would be in mines, quarries or other places where explosives are used, or around mills, factories, workshops or other places where dangerous machinery is used. For example, such child could be employed in places where it would be subjected to poisonous drugs, paint, lead or gases and fumes arising therefrom, but their employment in places of this kind is prevented by the provisions of the act, which precludes the employment of such children in any place where the moral or physical condition of such child is liable to be injured.

By a compliance with the terms and stipulations of Section 5 of the act, a permit may issue to children between the ages of twelve years and fifteen years allowing them to work in laundries or as messengers, provided that such employment would not injure the moral or physical condition of such child, and dangerous machinery was not used in or around such place of employment. Section 5 of the act does not authorize the issuance of a permit by the county judge, in any event, if the child is to be employed in a mine, quarry or other place where explosives are used, or where the child is to be employed in or around any mill, factory or workshop, or other place where dangerous machinery is used. It is expressly provided in Section 5 of this act that nothing therein shall prevent the working of school children of any age from June 1st to September 1st of each year, except that they shall not be permitted to work in mills, factories or workshops or other places named in Sections 2 and 5 of the act, nor shall their hours of labor conflict with Section 4 of the act. The language, "there shall be nothing in this act to prevent the working of school children of any age from June 1st to September 1st of each year except they shall not be permitted to work in factories, mills, workshops and the places mentioned in Sections 2 and 5 of this act; nor shall their hours of labor conflict with Section 4 of this act," was doubtless placed in the act for the purpose of avoiding a conflict with the compulsory educational statutes of this State. However, let this be as it may. The language has a broader significance for the fact and the reason that it is the third distinct and separate place it appears in the act without modification, making unlawful at all times the employment of children under the age of fifteen years in or around mills, factories, workshops, or other places where dangerous machinery is used, which is at least persuasive, if not convincing, that the Legislature did not intend that children between the ages of twelve years and fifteen years should be employed in or around such places. The Legislature no doubt contemplated that if they did not prohibit the employment of children in or around all mills, factories, and workshops, as well as other places where dangerous machinery was used, that the question of fact as to what

constituted dangerous machinery would necessarily arise, which would be a question entirely within the jurisdiction of our courts to determine and most likely after the evil or injury sought to be prevented has occurred.

The only instances where the courts of this State have had under discussion statutes similar to, if not identical with this act, in so far as the particular question here is concerned, are the cases of *Galloway vs. Lumbermen's Indemnity Exchange*, 238 S. W., 616; *Texas Hardwood Company vs. Moore*, 235 S. W., 630; *Watterman Lumber Company vs. Beaty*, 218 S. W., 364; *G., H. & H. Ry. Co. vs. Anderson*, 229 S. W., 998.

None of the above cases furnish us with authority or information that in any way tends to assist us in a correct determination of the question involved, since they deal with sawmills, which are unquestionably places of employment where dangerous machinery is used. We here refer to Reports and Opinions of Attorney General, 1916-18, page 866, where Section 5 of Chapter 46, Acts Regular Session of the Thirty-second Legislature, is discussed, which embraces the same provisions as Section 5 of this act, with the exceptions noted below, where it was held:

"Section 5 of the act makes it one of the conditions of the granting of the permit that such child will not be employed in or around any mill, factory, workshop or other place where dangerous machinery is used, nor in any mine, quarry or other place where explosives are used, nor in any distillery, brewery or other place where intoxicating liquors are manufactured, sold or kept, or where the moral or physical condition of the child is liable to be injured. These are the employments in which the county judge is not permitted to issue a permit to a child to engage in. All other employments may be permitted."

The difference in Section 5 of the old act quoted above and Section 5 of this act is that the latter makes no mention of "distillery, brewery or other places where intoxicating liquors are manufactured, sold or kept," such places of prohibited employment being eliminated by the enactment of the statutes known as the Dean and Volstead Acts.

You are therefore advised that under the provisions and exceptions made in Section 5 of the act, the county judge is not authorized at any time under any facts, conditions or circumstances, and regardless of age, to issue a permit to a child where such child is to be employed in a mine, quarry or other place where explosives are used, or to a child between the ages of twelve years and fifteen years when such child is to be employed in or around any mill, factory, workshop or other place where dangerous machinery is used, or in or around any place where the moral or physical condition of the child is liable to be injured.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2588, Bk. 60, P. 224.

LEGISLATURE—MILEAGE—FREE PASSES.

1. Members of the Legislature are entitled to the mileage allowed by law whether they actually expend more or less than that amount in traveling to and from the seat of government.

2. A bill has been passed by both houses of the Legislature and is now in the hands of the Governor, purporting to make it lawful for railroad companies and sleeping car companies to issue to members of the Legislature and their families free transportation and free sleeping car accommodations and purporting to make lawful the use of same by such persons. If this measure should become a law members of the Legislature would still be entitled to the mileage of five dollars (\$5.00) for every twenty-five (25) miles in going to and returning from the seat of government allowed by the Constitution and laws.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 19, 1925.

*To Her Excellency, Miriam A. Ferguson, Governor of Texas.*

DEAR GOVERNOR FERGUSON: Attorney General Moody is in receipt of your communication of the 18th inst., reading as follows:

"Under Section 24 of Article 3 of the State Constitution, it is provided that members of each house 'shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed five dollars for each twenty-five miles.'

"Members of the Legislature now traveling by rail, pay not exceeding 3.6 cents per mile for the cost of their mileage in traveling to and from the seat of government. In some instances sleeping cars are used, which will not increase the cost of such mileage above 5 cents per mile. Members of the Legislature also now collect full 20 cents a mile for mileage.

"I have before me now Senate Bill No. 175, providing that railroads may give free transportation over their respective lines, including sleeping car accommodations.

"Bearing in mind these facts, I desire to ask your official opinion on two questions:

"1. Under the Constitution, have members of the Legislature the right and authority to collect 20 cents a mile, when in fact they only expend not to exceed 5 cents a mile?

"2. If, by executive sanction, Senate Bill No. 175 is permitted to become a law, will the members of the Legislature then have the authority to collect from the State, 20 cents a mile, or any other mileage, while riding on free transportation to and from the seat of government?

"An early reply will be appreciated."

Senate Bill No. 175, referred to in your letter, is as follows:

"An Act to permit the issuance to, and use by Senators and members of the House of Representatives and their families, of free railroad transportation and sleeping car accommodations, and declaring an emergency.

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

"Section 1. It shall be lawful for all railroad companies and sleeping car companies to issue unto all Senators and members of the House of Representatives of the State of Texas, and the Lieutenant Governor of the State of Texas, and to all members of their families, free transportation over their several lines of railroad, and free accommodations of all kinds in the sleeping cars operated by them; all of which persons so designated may lawfully accept and use the same.

"Section 2. The importance of this legislation creates an emergency and an imperative public necessity which requires the constitutional rule providing that bills shall be read on three several days in each house be suspended, and the same is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted."

Section 24 of Article 3 of the Constitution of Texas, which fixes the maximum compensation and mileage of members of the Legislature, reads as follows:

"Section 24. The members of the Legislature shall receive from the public



treasury such compensation for their services as may, from time to time, be provided by law, not exceeding five dollars per day for the first sixty days of each session, and after that not exceeding two dollars per day for the remainder of the session, except the first session held under this Constitution, when they may receive not exceeding five dollars per day for the first ninety days, and after that not exceeding two dollars per day for the remainder of the session. In addition to the per diem, the members of each house shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed five dollars for every twenty-five miles, the distance to be computed by the nearest and most direct route of travel by land, regardless of railways or water routes; and the Comptroller of the State shall prepare and preserve a table of distances to each county seat, now or hereafter to be established, and by such table the mileage of each member shall be paid; but no member shall be entitled to mileage for any extra session that may be called within one day after the adjournment of a regular or called session."

Articles 7055 and 7056 of the Revised Civil Statutes of 1911 read as follows:

"Art. 7055 (4819). Lieutenant Governor.—The Lieutenant Governor shall, while he acts as President of the Senate, receive for his services the same compensation and mileage which shall be allowed to members of the Senate, and no more; and during the time he administers the government, as Governor, the same compensation which the Governor would have received had he been employed in the duties of his office, and no more."

"Art. 7056. Senators and Representatives, Mileage and per Diem.—Members of the Legislature shall receive as compensation for their services and attendance upon any regular or called session of the Legislature, five dollars per day for the first sixty days of each session, and after that the sum of two dollars per day for the remainder of the session. Members of the Legislature shall receive as mileage for attendance upon any regular or called session of the Legislature five dollars for every twenty-five miles in going to and returning from the seat of government, to be computed by the nearest and most direct route of travel by land, regardless of railways or water routes; and the Comptroller of Public Accounts shall prepare and preserve a table of distances to each county seat, now or hereafter to be established, and by such table the mileage of each member of the Legislature shall be computed and paid, the calculation to be based in each instance upon the distance to the county seat of the county in which such member resides; provided, that no member shall be entitled to mileage for any extra session of the Legislature that may be called within one day after the adjournment of any regular or called session. (Const., Art. 3, Sec. 24; Acts 1907, p. 10.)"

It is a matter of common knowledge that this allowance of a stated amount of mileage to members of the Legislature has never been considered as allowing only actual traveling expenses; members of the Legislature have never construed this law as requiring them to account for the difference between the actual amount expended for traveling and the amount of mileage allowed.

We find no court decisions holding that where a law allows a fixed amount of mileage the recipient is not entitled to that amount regardless of how much or how little he may use of it in traveling. It has always been customary in this and other States to allow fixed amounts of mileage to certain officers and particularly to officers such as sheriffs, constables and the like in serving process and making arrests and conveying prisoners. These officers have never construed the law to require them to turn in an account for only actually traveling expenses unless there was something in the law requiring deductions to be made.

The word "mileage" is defined in Volume 2, page 2209, of Bouvier's Law Dictionary, as follows:

"A compensation allowed by law to officers for their trouble and expenses in traveling on public business."

In 27 Cyc. at page 487 the word "mileage" is defined as follows:

"A compensation allowed by law to officers for their trouble and expenses in traveling on public business; payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over."

Substantially the same definitions will be found in Words and Phrases.

We call attention to the language used in an opinion of the Supreme Court of the United States in the case of *United States vs. Smith*, 158 U. S., 349, in which was involved a statute allowing certain officers "ten cents a mile for going and ten cents a mile for returning" from the place of abode to the place of holding court. The court said:

"The allowance of mileage to officers of the United States, particularly in the military and naval service, when traveling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of traveling expenses, but for the reason that officers travel in different styles; and expenses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of traveling as of living, and while the mileage in one case may more than cover the actual expenses, in another it may fall short of it. It would be obviously unjust to allow one officer a certain sum for traveling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. The object of the statute is to fix a certain allowance, *out of which the officer may make a saving or not as he chooses, or is able.*"

We are of the opinion that the above quoted language of the Supreme Court of the United States correctly states the nature of an allowance of a fixed amount of mileage; that is, that the object of the law is to fix an arbitrary and certain allowance, out of which the officer may make a saving or not as he chooses, or is able.

It follows that we are of the opinion that your first question should be answered in the affirmative; that is to say, members of the Legislature have a right to collect mileage of five dollars for every twenty-five miles in going to and returning from the seat of government to be computed by the nearest and most direct route of travel by land regardless of railways or water routes, whether they actually expend more or less than such amount in traveling.

In answer to your second question you are respectfully advised that, in the opinion of this Department, Senate Bill No. 175 indicates no legislative intent to repeal or modify the existing statute allowing mileage to members of the Legislature.

This statute authorizes railroad companies and sleeping car companies to furnish free transportation, etc., to members of the Legislature and their families. There is no assurance that railroads and sleeping car companies will furnish this free transportation. There is no necessary conflict between this measure and the provisions of law allowing mileage to members of the Legislature. Legislators are not required to travel by railroad; they have the right to choose other means of conveyance and a free pass would not necessarily supersede the expense of traveling from and to the seat of government. Moreover, there

are frequently other expenses incident to traveling than actual railroad and sleeping car fare. Free passes would not necessarily take the place of traveling expenses.

Having omitted any language that would make it necessary to make a deduction from the amount of mileage allowed when free passes are used, or any language that indicates that free passes are to supersede mileage, a clear legislative intent is shown that no such deduction is required to be made and it was not intended that the free pass system should supersede the mileage system. This conclusion is fairly deducible from the fact that sheriffs and other peace officers are allowed mileage and are also permitted to have free passes issued to them by transportation companies. However, the statute authorizing free passes for sheriffs and other peace officers expressly provides that in the event free passes or transportation are used a deduction shall be made from the amount of mileage due such officers. It was evidently considered necessary by the Legislature to include this express provision in the pass law as to deductions from the amount of mileage in order to deprive the peace officers of any portion of their mileage on account of the use of free passes. It seems reasonable, therefore, that if there had been any intention on the part of the Legislature to require deductions to be made from mileage of legislators on account of free transportation, such intention would have been expressly indicated in Senate Bill No. 175.

You are therefore respectfully advised that if Senate Bill No. 175 should become a law, its provisions would not prevent members of the Legislature from collecting five dollars for every twenty-five miles in going to and returning from the seat of government as provided by the Constitution and laws of this State.

This disposes of the two questions asked in your letter.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2585, Bk. 60, P. 231.

LEGISLATURE—RAILROADS—CERTIFICATES OF INSPECTION BEFORE SHIPMENT.

1. House Bill No. 263, requiring agents or inspectors of railroads or other public carriers on demand of a shipper or consignor to furnish copies of reports or certificates of inspection prior to shipment, and making the failure so to do a misdemeanor, is a reasonable regulation, and such agents or inspectors may not refuse to furnish such copies upon the ground that same are required to be furnished without payment therefor by the shipper.

2. House Bill No. 263 if enacted into law will be effective against interstate as well as intrastate shipments.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 10, 1925.

*Hon. R. L. Bobbitt, Chairman, Judiciary Committee, House of Representatives, Capitol.*

DEAR SIR: The Attorney General is in receipt of your letter of the 9th instant enclosing a copy of House Bill No. 263, as follows:

## "A BILL

## TO BE ENTITLED

"An Act requiring every agent or inspector of any railroad or other public carrier examining any shipment of fruit, vegetable, grain, live stock or other farm product, prior to shipment, on demand of shipper or consignor, to ascertain the condition thereof, to forthwith deliver to the shipper or consignor true copies of any and all reports or certificates by him made concerning the condition thereof; making the failure to observe such a requirement or the wilful making or publication of a false report as to the condition thereof, a misdemeanor, and providing a penalty therefor, and declaring an emergency.

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

"Section 1. Every inspector, agent or employe of any steam or electric railroad or other public carrier who inspects any car or consignment of fruit, vegetable, grain, live stock, or other agricultural or farm product, originating in the State of Texas, prior to shipment, to ascertain the condition thereof shall at the time of such inspection, on demand of shipper or consignor, deliver to the shipper or consignor a true copy or copies, duly signed by him, of any and all reports or certificates by him made or rendered to such public carrier, as to the condition of the contents of such car or consignment.

"Section 2. Every inspector, agent, or employe of any such public carrier who, upon making such inspection, shall on demand of shipper or consignor, fail to deliver to the shipper or consignor at such time a true copy of each and every report or certificate by him made concerning the condition of the car or consignment about to be shipped, and every such inspecting agent who shall wilfully make or cause to be made or published in any such report or certificate any false statement as to the condition of the live stock or commodity by him so inspected, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding three hundred (\$300.00) dollars for each offense.

"Section 3. The fact that inspections and reports as to the condition of live stock and farm products at the time of shipment are now being made and withheld from the producers and shippers to their prejudice and injury creates an emergency and imperative public necessity that the constitutional rule requiring that bills be read on three several days in each house be suspended, and that this act take effect and be in force from and after its passage, and the said rule is hereby suspended, and it is so enacted."

In connection with the foregoing bill you ask of this Department the following questions:

"First. If the bill, as drawn, should be enacted into law, could the agents of the carriers legally refuse to furnish the reports or certificates on the ground that the law requires that they be furnished without any payment therefor by the shipper and at the expense of the agents of the carriers?"

"Second. If the bill becomes a law, as drawn, will it be effective against interstate as well as intrastate shipments?"

Your first inquiry must be answered in the negative. Common carriers are quasi public corporations and their employes are subject to public regulation in the performance of their duties. Such regulations must, of course, be reasonable, and must be in the public interest. But if these requirements are met the agents and employes of common carriers affected thereby may not refuse compliance.

We do not think it an unreasonable requirement upon an agent of a carrier that he furnish upon demand of a shipper or consignor a copy of a report or certificate made or rendered to the carrier in the course of his employment as to the condition of the contents of a car or consignment inspected by him. This is merely a service connected with the contract of carriage that may, we think, be lawfully exacted.

For example, agents of carriers are now required, under Articles 1540 et seq., Penal Code, to issue bills of lading to shippers, and a penalty is imposed for failure or refusal to issue same, and for issuing a wrongful, fraudulent or unauthorized bill of lading. The validity and constitutionality of such penal statute has never been questioned, and we do not think that any question with reference thereto could properly be made. The very purpose of regulation of common carriers is the protection of the public who utilize transportation facilities, and if the proposed regulation will, without imposing unreasonable requirements upon the individual who may be employed by the carriers, inure to the protection of shippers, we think its legality would be upheld.

That the proposed regulation is designed for the public interest clearly appears from the context of the bill. This statement is not intended as a comment on the policy of the legislation, but a consideration of its purpose is necessary in answering your inquiry. It is especially pertinent to a consideration of the second question propounded by your committee.

It is true, of course, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to *regulate* such commerce or impose burdens thereon are invalid. Nevertheless, a State may enact legislation having for its object the protection and welfare of its citizens, and such legislation will be upheld though it may have an incidental effect upon interstate commerce; provided, of course, such legislation does not conflict with an act of Congress upon the same subject. This principle has been affirmed by the Supreme Court of the United States in numerous decisions, among them: *M., K. & T. Ry. Co. vs. Haber*, 169 U. S., 613; *Chicago, Milwaukee, etc., Railroad Company vs. Solan*, 169 U. S., 133; *Pacific Railway Co. vs. Hughes*, 191 U. S., 477; *Patapeco Guano Co., McLean vs. Rio Grande Railway Company*, 203 U. S., 38.

In the last case cited the Territory of New Mexico had enacted a law relating to inspection of hides shipped from points in that State. It was made an offense for any railroad company to receive for shipment beyond the limits of the Territory hides which had not been inspected as required by the law, and a penalty was provided. The court took into consideration the fact that cattle ran at large in the great stretches of country in New Mexico, identified only as to ownership by brands, and concluded that while the law in question incidentally affected interstate commerce, such was not its primary purpose, but that primarily it was to protect the people against the criminal and fraudulent appropriation of such cattle. In the course of the opinion the court said:

"It is evident that the provision as to shipment of the hides beyond the limits of the territory is essential to this purpose (that is, the prevention of fraud and crime as stated above), for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery."

It was therefore held that since the law could be fairly construed as for the protection of the people of the Territory, it was properly within the police power of the State, and was not invalid as an unlawful regulation of interstate commerce.

We think that if the question was presented the same holding would

be made with reference to the bill submitted to us with your inquiry. While it applies by its terms to interstate commerce, and while incidentally it affects interstate commerce, nevertheless, it does not burden or cripple the same, and conflicts with no act of Congress relating thereto. Its obvious purpose is the protection of shippers against false testimony as to the condition of consignments of freight at the time of delivery to a carrier, and to protect the rights of such shippers in litigation involving the condition and value of the articles offered for transportation.

In *State vs. Minneapolis and Northern Elevator Company*, 114 N. W., 482, the Supreme Court of North Dakota construed an act of the Legislature of that State requiring elevator companies transacting within the State the business of purchasing, storing or depositing grain or other farm commodities to return to their local buyer the official certificates of inspection, together with the weighmaster's certificates, "whether said grain is sold in this State or in any foreign state where such grain is weighed and inspected. It was made the duty of the local buyer or agent of such elevator company to post in a conspicuous place within the elevator building the official weighmaster's certificate and the official inspector's certificate, and have the same at all times available for public inspection." Violation of the act was made a misdemeanor, and a penalty was provided.

It was contended that the statute was void as a burden upon interstate commerce. In disposing of such contention the court says:

"We are unable to perceive how the necessary effect of the act in question would be to directly or even remotely interfere with interstate commerce. It is well settled that a State statute requiring inspection of property, the subject of interstate commerce does not violate the commerce clause of the Federal Constitution (citing authorities). \* \* \* Inspection laws being constitutional as a legitimate exercise of the police powers of the State *it is entirely clear that a law requiring the result of such inspection to be made public is also constitutional.*"

In *Globe Elevator Company vs. Andrews*, 144 Fed., 871, it was said by Judge Sanborn for the Circuit Court of the Western District of Wisconsin:

"It seems clear that the Wisconsin Legislature might lawfully prevent fraudulent changes of grades, arbitrary or fraudulent dockage practiced by warehousemen, and shipping out as a higher grade than that at which the grain was taken in. Such regulation would be an aid and furtherance of commerce by protecting the rights of both buyer and seller. \* \* \* Such regulation, although indirectly affecting interstate commerce, would be wholly local in their character, and will undoubtedly be sustained. \* \* \* All this would be local regulation to protect the public from fraud and imposition and as such would not be unlawful regulation of interstate commerce."

We think it clear that the proposed bill does not regulate or impose any unreasonable burden upon interstate commerce, but is properly within the police power of the State of Texas, as for the protection of its citizens against fraud and imposition. That it applies to interstate shipments as well as to shipments within this State does not make it invalid as opposed to the commerce clause of the Federal Constitution, and the commerce clause does not forbid its application to consignments for interstate transportation.

We therefore answer that if the bill as drawn be enacted into law

the agents of the carriers may not legally refuse to furnish copies or reports or certificates of inspection made by them to their employers, and that the law will be effective against interstate as well as intrastate shipments.

Very truly yours,

ERNEST MAY,  
Assistant Attorney General.

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Op. No. 2629, Bk. 61, P. 91.

CONSTITUTIONAL LAW—MILEAGE AND PER DIEM OF MEMBERS OF THE  
HOUSE OF REPRESENTATIVES—IMPEACHMENT SESSIONS.

1. Though the question is not entirely free from doubt, any such doubt should be resolved in favor of an act of the Legislature, and accordingly it is held that members of the House of Representatives attending a session of the House convened upon proclamation of the Speaker as provided by statute for the purpose of making an investigation pertaining to a contemplated impeachment would have valid claims against the State for mileage and per diem, notwithstanding the fact that no previous appropriation had been made for such purpose by the Legislature.

2. The foregoing applies only to sessions held for actual impeachment purposes or for the purpose of investigation pertaining to an actual contemplated impeachment. There is no lawful authority for the House of Representatives to so convene merely for the purpose of investigation without any actual impeachment being contemplated. The privileges surrounding an authorized session would not exist in connection with a session merely for investigation purposes.

3. Such claims are assignable after they accrue, but are not assignable in advance of the earning of such mileage and per diem by members of the House.

4. No law would be violated if a citizen or citizens, other than certain public officers who are prohibited from buying such claims by the Penal Code, should purchase any such claim of members of the House of Representatives or should announce their willingness to do so. But no agreement could lawfully be made in advance that they would do so.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 21, 1925.

*Hon. George C. Purl, Member of the House of Representatives, Dallas, Texas.*

DEAR SIR: The Attorney General is in receipt of your communication of date December 10, 1925, reading as follows:

"Section 1 of Article 15 of the Constitution of the State of Texas provides: 'The power of impeachment shall be vested in the House of Representatives.' Said Article 15 provides that the Governor, Lieutenant Governor, Attorney General and other officers of the State may be impeached and does not provide that the House of Representatives shall exercise the power of impeachment only upon the consent of the Governor or when called together by the Governor, when not in session, but vests the power of impeachment in the House of Representatives independently and unconditionally.

"The Constitution further provides for the payment of such mileage and per diem to Representatives and Senators as shall be fixed by law, not exceeding certain fixed limits.

"Pursuant to these provisions of the Constitution, the Texas Statutes (see Article 6017a) provide for the assembling of the House of Representatives 'when it is desired to make any investigation pertaining to a contemplated impeachment' and provides that 'the members of the House, when so convened,

shall receive the same mileage and per diem pay as is provided for members of the Legislature when in legislative session,' etc.

"In view of these provisions of the Constitution and statutes of Texas, and of the evident confusion and misunderstanding in the public mind, as well as for my own guidance as a duly elected member of the House of Representatives, I respectfully request the opinion of the Attorney General upon the following points, viz:

"1. In view of the constitutional and statutory provisions quoted, would not a member of the Legislature, attending a session lawfully called for the purposes stated, though not called by the Governor, have a valid constitutional claim against the State for his lawful mileage and per diem?

"2. Are not such claims against the State lawfully assignable for value by such members of the House of Representatives?

"3. Is it unlawful, because against public policy, or for any other reason, for any citizen or citizens of this State to purchase such claims of members of the House of Representatives against the State for mileage and per diem, paying therefor the full amount thereof or upon such terms of reasonable discount as may be agreed upon, and to announce their willingness to do so?

"I am requesting this opinion in the conviction that it is highly desirable that members of the House of Representatives, and the public as well, should have a clear understanding of the law bearing upon these questions as construed by the chief law officer of the State."

The Revised Civil Statutes provide for the convening of the House of Representatives upon proclamation of the Speaker pursuant to a petition signed by a certain number of members of the House, for the purpose of impeachment or investigation pertaining to a contemplated impeachment. Article 5962 provides that the members of the House of Representatives when so convened shall receive the same mileage and per diem pay as is provided for members of the Legislature when in legislative session. This statutory provision, if constitutional, would constitute the necessary pre-existing law upon which to base an appropriation by the Legislature at a later date to pay mileage and per diem of members of the House when convened upon proclamation of the Speaker as provided by the statute. Has the Legislature power to allow compensation to members of the House in connection with a session not convened by the Governor?

In an opinion recently rendered this Department held that the House of Representatives may meet in the manner provided by statute for impeachment purposes or for the purpose of investigation in reference to a contemplated impeachment without being convened by the Governor, but that no appropriation could be made out of the State Treasury for expenses except by the Legislature convened in regular session or in special session pursuant to proclamation of the Governor. There being authority for the convening and holding of such a session of the House, this Department is inclined to the opinion that the Legislature is not inhibited by the Constitution from enacting a statute allowing mileage and per diem to members in connection with such a session.

No one would contend that the Legislature could fix the pay of legislators in excess of the maximum prescribed in the Constitution. The Constitution provides, in Article 3, that members of the Legislature shall receive from the public treasury such compensation for their services as may from time to time be provided by law, not exceeding five dollars per day for the first sixty days of each session, and after that not exceeding two dollars per day for the remainder of the session,



and also limits the amount of mileage that may be provided. The statute does not exceed these constitutional maximums if a session of the House not convened by the Governor is a "session" within the meaning of the Constitution.

In making provision for compensation of members of the Legislature at "sessions," does the Constitution contemplate sessions for legislative purposes only, or does it mean any kind of session that may lawfully be held? Does it mean sessions of the Legislature only, or is it sufficient to include judicial sessions of the two houses?

Assuming the power of the House to convene in this manner, we would have no hesitancy in advising you that the Legislature has power to provide compensation up to the maximum fixed in the Constitution for "sessions" were it not for the fact that we are confronted with certain court decisions laying down doctrines seemingly somewhat in conflict with such a theory and throwing some doubt upon the proposition. As an original proposition we would readily assume that the word "session" without any express language to the contrary, means any session of either of the two branches of the Legislature, both of which are dealt with in Article 3. The court decisions adverted to tend to hold that provisions in the legislative article of the Constitution have no application to the exercise of the power of impeachment. The doctrine would tend towards the conclusion that the word "session" means legislative sessions only, and if such were the case the Legislature could not provide compensation for members at other than legislative sessions.

There is a provision in the Constitution to the effect that every order, resolution or vote to which the concurrence of both houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor and before it shall take effect shall be approved by him, etc. Yet it has been held that resolutions proposing amendments to the Constitution, even though a concurrence of both houses is necessary to pass such a resolution, need not be presented to the Governor for approval. Opinions of the Attorney General, 1912-14, page 779; Opinions of the Attorney General, 1916-18, page 760, and authorities cited in said opinions. Again, there is a provision in the legislative article of the Constitution to the general effect that the Legislature may be convened in special session by the Governor, but may consider at any such session such matters of legislation only as are presented by the Governor. In connection with such a provision it has been judicially held that it had no reference to the power of impeachment, but was limited only to ordinary legislative matters, and that, therefore, impeachment may be accomplished at a special session of the Legislature, even though the question of impeachment had not theretofore been presented to the special session by the Governor. See Report and Opinions of the Attorney General, 1916-18, page 427, and authorities cited. The logic of those decisions is that the requirements and limitations in the Constitution in reference to resolutions and special sessions have to do with legislative matters only and not to constitutional amendments and impeachments, both of which are provided for in separate and distinct articles of the Constitution. See *Ferguson vs. Maddox*, 263 S. W., 888.

Conceding the correctness of those decisions, it may be that they may be differentiated, in that the article in reference to constitutional amendments expressly provides that amendments may be proposed by the Legislature, saying nothing about the Governor having any authority over such proposed amendments; and in the other instance it may be pointed out that the inhibition in Article 3 as to no matters being considered at special sessions except such as are submitted by the Governor uses the word "legislation." That is, no "legislation" may be enacted at a special session except upon subjects submitted by the Governor. A prohibition against "legislation," it may be argued, is no prohibition against impeachments, which are judicial in their nature.

These special reasons do not apply in the case of the provision in Article 3 relating to mileage and per diem, and since it is our duty to resolve all doubts in favor of the validity of an act of the Legislature, we are unwilling to hold that members cannot be compensated in attending a session such as you inquire about. We are inclined to hold that "session" is broad enough to include an impeachment session as well as a legislative session of the House.

Answering your second question, you are respectfully advised that it is the opinion of this Department that claims of members of the House for earned mileage and per diem are assignable, but that prospective claims for such mileage and per diem are not assignable. The greater weight of authority, both in England and the United States, is to the effect that an assignment by a public officer of unearned salary or fees of his office is void as against public policy. But the reasons which forbid the assignment of an unearned salary by a public officer do not apply to an assignment of salaries or fees which have been earned, and such an assignment is, therefore, valid. 5 Corpus Juris, pages 866 and 872. To make ourselves clear, you are advised that any attempted assignment of such mileage and per diem in advance of the same being earned by the members of the House would be unlawful and void, but after the service is performed and the claims for mileage and per diem have accrued such claims may be assigned.

Such claims being assignable, it would not be unlawful for any citizen or citizens of this State to purchase them, except certain public officers mentioned in the Penal Code. We know of no law that would be violated if a citizen or citizens should announce their willingness to do so, but, of course, we do not wish to be understood, in this connection, as advising that an agreement or contract could be made to this effect. Any such agreement or contract made in advance would be invalid as being in violation of the rule of law that such claims are not assignable in advance of their accrual.

Since our advice to you is given assuming a lawful session, it is proper to state that authority does not exist for the House of Representatives to convene under proclamation of the Speaker except for actual impeachment purposes or for investigation pertaining to an actual contemplated impeachment. There is no authority to so convene merely to make investigations. We state this also in view of the fact that immunity from the libel laws and other privileges would not follow if a session should be held which is not for a lawful purpose. The power of the House to compel the attendance of witnesses and

incur pecuniary obligations would also depend on the session being convened for an authorized purpose.

Yours truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2631, Bk. 61, P. 310.

REGISTRATION OF MOTOR VEHICLES—TAX EXEMPTIONS—SOLDIERS RESIDING ON UNITED STATES MILITARY RESERVATION.

In the absence of a State or Federal statute or constitutional provision expressly exempting persons engaged in the military service of the United States, residing on one of its military reservations, from the payment of the registration fee imposed by the laws of this State upon the owners of motor vehicles, where operated upon the public highways of the State; held, that such persons are required by the laws of this State to pay such registration fee.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 30, 1925.

*Hon. C. M. Chambers, District Attorney, San Antonio, Texas.*

DEAR SIR: This will acknowledge receipt of your letter of December 22nd, addressed to Hon. Dan Moody, Attorney General, to which was attached a letter of Paul B. Malone, Brigadier General, U. S. Army, in command of Fort Sam Houston, San Antonio, Texas, addressed to you, also brief of Captain Frank E. Taylor, Assistant Judge Advocate of the Second Division. Each of the above communications relate to the following question:

"Are persons in the military service of the United States who reside on the Fort Sam Houston Military Reservation and who have registered their privately owned automobiles with the provost marshal, Fort Sam Houston, Texas, and have attached thereto plates similar to license plates but bearing thereon the words 'Fort Sam Houston, Texas,' required, if they go off of the military reservation and travel on the roads and highways of Texas on purely personal matters, to register their automobiles with the Texas State Highway Department and in all other respects comply with the laws of Texas relating to registering and licensing of motor vehicles?"

This question has been considered and passed upon by the writer in a letter addressed to you dated December 4th, in which it was stated that persons in the military service of the United States residing on the Fort Sam Houston Military Reservation, but operating their privately owned automobiles upon the public highways of this State, do not come within the exceptions made by the statutes of this State exempting motor vehicles from registration and the payment of the required fee therefor.

We are requested by you and General Malone to reconsider this question for the purpose of reaching, if possible, a different conclusion as to the law governing the matters involved.

The statutes of this State require:

"Every owner of a motor vehicle used on the public highways of this State to annually file in the office of the county tax collector of the county in which he resides or in which the vehicle to be registered is being operated, an application for the registration of each such vehicle owned or controlled by

him, and the county tax collector shall not issue a license to any person until such application has been filled out in full and signed by the applicant, and the requisite fee for the number of unexpired quarters of the calendar year is paid." (Art. 6675.)

The statutes of this State exempt:

"Road rollers and other road building equipment owned and operated by municipalities, counties or subdivisions of counties; street sprinklers, fire engines or apparatus, patrol wagons, ambulances owned by municipalities or counties; and motor vehicles owned and operated under the direction of and exclusively in the official service of the United States government, State of Texas, or any county or city thereof." (Art. 6676.)

The motor vehicles coming within any of the above enumerated classes are not required to pay the registration fees imposed by statute on other motor vehicles, but the statutes do require application to be made for, and a registration number and distinguishing seal secured for all motor vehicles exempted from the payment of a registration fee. It is contended by Captain Frank E. Taylor in his brief that persons residing on a military reservation are not residents of Texas, and that they should be regarded as non-residents in the matter of registration and licensing of their privately owned automobiles under the laws of Texas.

Prior to the recent revision or codification of our statutes the laws of this State provided that motor vehicles owned by citizens of other States temporarily in this State were exempt from the provisions of the law relating thereto for a period of ninety days, if they showed the State Highway Department that they had complied with similar laws of some other State or of a municipality of another State, providing adequate identification of such motor vehicle, and making it the duty of the non-resident owner of such motor vehicle, where it remains in Texas longer than thirty days, to apply for and receive from the State Highway Commission a seal bearing such identification as the Commission might require. The last mentioned statutory provisions were designated as Article 7012½-F, Complete Texas Statutes, 1920, but do not at this time, constitute a part of the statute law of this State, due to the fact that they were omitted from the 1925 revision of our statutes by the Codification Commission; the result being that we do not now have any law relating to or regulating the operation of motor vehicles owned by non-residents, upon the highways of this State. It is true that in the case of *Gallagher vs. Gallagher*, 214 S. W., that it was held that a person residing upon the military reservation of Fort Sam Houston was a non-resident of this State. In this case the appellee, Gallagher, was a captain in the Regular Army of the United States, and was and had been for a number of years, as a matter of course, subject to being ordered to any part of the world that his superior officers might deem proper or expedient. He first came, in company with his wife, to San Antonio, Texas, in 1915, remaining in that place for over a year, residing upon the government's military reservation known as Fort Sam Houston, and was from there sent with General Pershing's military expedition into Mexico, returning to San Antonio in July, 1917, where he had remained to the time of the filing of the petition for divorce. The question arose: Can a person in the service of the United States, as a soldier, become an actual bona fide inhab-

itant of the State, and acquiring a residence for six months in the county different from the original residence from which he entered the service, and the court held that a soldier of the United States who was stationed at San Antonio, Texas, under orders of his superiors, though actually there for more than twelve months, cannot be deemed to have been an inhabitant of the State for twelve months, and to have resided in the county for six months preceding the filing of the petition for a divorce within the meaning of the statute requiring such residence, as a condition to the maintenance of a suit for divorce. The principle of law announced in the Gallagher case is only material for the purpose of showing that persons in the military service of the United States who reside on the Fort Sam Houston military reservation are not residents of the State of Texas. It is true that a member of the army can change his domicile, provided the intention to change is clear and associated with something fixed and established as indicating such a purpose. It is also true that a person may have a legal residence in one State and an actual residence in another, but since a soldier in the army of the United States is at all times and places subject to the control of his superior officers, it necessarily follows that such soldier, in so far as his actual residence is concerned, is as much a resident of Texas while in Texas as he would be in any other State of the Union while there, and would, therefore, not be required to register his privately owned motor vehicle at any place under the control of the government of the United States.

We know of no rule of law or reason that would exempt a soldier in the United States Army from paying a tax or license fee imposed by law upon other citizens of the State or nation, unless by statutory or constitutional provision they were expressly relieved therefrom, and are, therefore, unable to agree to the principles of law, as contended for by Captain Taylor in his ably prepared brief on the question. An examination in a limited way of our Federal statutes does not disclose that the Congress of the United States has enacted any statutory provision requiring the registration of privately owned motor vehicles by persons in the military service of the United States, and for such persons to register their privately owned automobiles with the provost marshal of Fort Sam Houston, Texas, or any other military post, and by so doing are entitled to have attached thereto plates similar to license plates issued by the different States, but bearing thereon the words "Fort Sam Houston, Texas," or the name of the particular military post, would not be authorized by any Federal statute, but would be due to some military rule or regulation adopted and put into effect by the commanding officer of such military reservation. We are fully cognizant that under the existing law there are many cases where hardships will be imposed upon persons in the military service of the United States who are frequently changed from various points in different States and thereby required upon such change from one State to another to register and pay therefor a fee upon their privately owned automobiles, as required by the laws of the State upon whose highways such motor vehicle is operated. The registration fee in this State is required for the right and privilege to operate a motor vehicle on the public highways of the State, and the State has sole control of its public roads and highways, and the agents, employes, and soldiers of

the United States are amenable to the reasonable rules and regulations governing the use of the State's highways. The designated streets and public highways of this State are not instrumentalities created by or belonging to the Federal government, but are constructed and maintained by the State and certain municipalities, which have exclusive power, not only of alteration and discontinuance, but to make and enforce reasonable regulations for their use. It is true that the State may not tax the property of the Federal government, nor the instrumentalities which it uses to discharge any of its legal or constitutional functions; nor may the State, by taxation or otherwise, materially interfere with the due, expeditious and orderly procedure of the Federal government while in the exercise of its constitutional powers. The question here involved relates to persons in the military service of the United States residing on the Fort Sam Houston military reservation, but who use their automobiles upon the public highways of Texas on purely personal matters.

It must be conceded that there is no State or Federal statute regulating the use and operation of privately owned motor vehicles upon the public highways of this State by soldiers in the United States Army in so far as the registration of such motor vehicles are concerned, and in the absence of such statute conferring extraordinary rights and privileges upon such soldiers for the use of their automobiles upon the public highways of this State, we must conclude, and you are so advised, that such persons must register their privately owned automobiles before the same can be lawfully used and operated upon the public highways of this State.

Very truly yours,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2598, Bk. 60, P. 309.

**MOTOR VEHICLES—POLICE POWERS—HIGHWAYS—REGISTRATION FEES.**

A contractor for carrying mails for the United States within this State is not exempt from the Acts of 1917, Thirty-fifth Legislature, Regular Session, Chapter 190, with subsequent amendments thereto, requiring every person who operates a motor vehicle on the highways of this State to pay a registration fee on each motor vehicle, the registration fee varying according to the capacity, weight and dimensions of such motor vehicle. This does not constitute a license fee or tax upon the property of the Federal government or its instrumentalities used in the discharge of its governmental functions; nor is it a tax upon the occupation of carrying the mails.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 15, 1925.

*Hon. Frank Lanham, Chairman of the State Highway Commission,  
Austin, Texas.*

Attention: Mr. Cunningham.

DEAR SIR: The letter from Messrs. Boyles, Brown & Scott, attorneys of Houston, Texas, addressed to the State Highway Department, has been referred to us for advice by your Mr. Cunningham. That the question presented in this letter may be fully understood, we quote below the part material to the issues involved:

"We desire to take up with your department the question of license or registration fees alleged to be due by growing and substantial clients of ours, who have a contract to carry United States mail in the city of Houston.

"In carrying out their contract with the government they use regularly six motor trucks, and under their contract must keep three other trucks in reserve for emergencies. These nine trucks are owned by our clients and are used under the terms of their contract; and, under the terms of their contract, can be used only in the business of carrying the mails.

"Before making their contract with the government, our clients were informed by Mr. House, then the postmaster at Houston, that no license or registration fees were due the State of Texas on trucks used exclusively in the mail service, and our clients ascertained from those having the contract before them that no such fees had been paid by them. In bidding for the contract, our clients did not figure in their estimate of expenses any allowance for such fees. Our clients have been operating under the above-mentioned contract nearly three years, and have never paid such fees, and before this year have not been asked to pay them, either by local authorities or by persons representing the State Highway Commission.

"A few weeks ago, however, representatives from your department informed our clients that these fees for 1925 were due, and that our clients were expected to pay them. \* \* \*

"We believe that under the laws of the United States, and of this State, no registration fees on these trucks is due by our clients. We base our opinion on two propositions:

"First. That no instrumentality of the Federal government is subject to taxation by a State, and that these trucks used under the contract of our clients with the government, is such an instrumentality and not subject to the tax on their use.

"Second. We think the trucks in question are exempted from the payment of these registration fees under the Acts of 1917, Chapter 190, Section 17.

"As sustaining the first proposition, we desire to cite your department to the following cases:

"Choctaw O. & G. R. R. Co. vs. Harrison, 235 U. S., 292, 59 L. E., 234.

"Johnson vs. Maryland, 254 U. S., 51, 65 L. E., 126."

Section 16, page 156, Chapter 75, Acts of the Thirty-eighth Legislature, at its Regular Session, provides that in order to provide funds to effectuate the provisions of this act, every owner of a motor vehicle used on the public highways of this State shall file annually in the office of tax collector of the county in which he resides, or in which the vehicle to be registered is being operated, an application for the registration of each motor vehicle owned or controlled by him.

The language "in order to provide funds to effectuate the provisions of this act" as used in Section 16, above referred to, applies to that part of the act that has for its purpose the securing of greater efficiency and durability in the construction and maintenance of a system of public highways in this State. Section 16b of the above-mentioned act fixes and regulates the amount of such registration fee to be paid as prescribed under the terms thereof, and we assume that it will be conceded that the motor vehicles here under consideration, if subject to the payment of a registration fee, come within the class designated in such act as commercial motor vehicles, since they are unquestionably used for the transportation of property. Among the many matters controlled and regulated under the police powers of the State are embraced the establishment, maintenance and control of public highways. The case of Atkins vs. State Highway Department, 201 S. W., 226, upheld the constitutionality of our State motor vehicle statute (writ of error having been denied by the Supreme Court), and further held that the registration fee was a fee for the privilege of operating motor

vehicles over improved public highways, commensurate with the injury done to such highways and the benefit received from them. The motor vehicle registration fee is not an occupation tax, but is a charge incident to governmental regulation under the police power of the State.

The owner of the motor vehicles used in Houston in transporting the mail throughout such city, notwithstanding his contract so to do with the government, comes within the terms of our statute authorizing and requiring the payment of the registration fee, unless plainly and specifically exempted therefrom by the provisions of such act, and we know of no reason for this contention unless it be argued that the language used in Section 17, Chapter 190, Acts of the Thirty-fifth Legislature, at its Regular Session, which appears as Article 7012 $\frac{1}{2}$ aa, Complete Texas Statutes, 1920, has this effect, and which we quote as follows:

“That road rollers and other road building equipment owned and operated by municipalities, counties or subdivisions of counties, street sprinklers, fire engines or apparatus, patrol wagons, ambulances owned by municipalities or counties, motor vehicles owned and operated under the direction and exclusively in the official service of the United States government, State of Texas, or any county or city thereof, shall not be required to pay the fees herein stipulated for motor vehicles.”

The motor vehicles involved in this discussion cannot be correctly or reasonably termed or designated “road rollers and other road building equipment owned and operated by municipalities, counties or subdivisions of counties, street sprinklers, fire engines or apparatus, patrol wagons, owned by municipalities or counties.” It then remains to be determined whether or not they are *“motor vehicles owned and operated under the direction and exclusively in the official service of the United States Government.”* If they do not come within this class, they are subject to the general provisions of our statute requiring the registration of motor vehicles and an accompanying charge therefor. We do not think it could be successfully contended that these motor vehicles come within that class exempted by the provisions of our statute. They are not owned by the United States government, but by a private citizen of Texas as his personal and individual property, and no one would allege that they are not subject to the statutes of this State, as well as its subdivisions which place a property tax upon other property similar in kind and in character. This being true, what reason exists for exempting them from the payment of a registration fee levied against like motor vehicles by the laws of this State?

For such motor vehicles to be exempt from the registration fee they would have to be the property of the government, which they are not. Not only this would have to be true, but they would have to be operated under the direction of the government and used exclusively in the official service of the United States government, which they are not.

Therefore, we do not think that such motor trucks, owned and operated as they are, come within the exceptions made by our statutes, and, as a consequence thereof, are subject to the payment of the required registration fee. The attorneys representing the owner of such motor vehicles contend that the United States government has the legal and constitutional right to carry its mails in any manner it may see fit, and without let or hindrance from any person or State; that in the



use of his trucks he was in the performance of a governmental duty; that he was an instrumentality selected by the Federal government for the purpose of carrying out and putting into effect its constitutional duty of carrying, delivering, and caring for the mails; that such a registration fee could not be lawfully imposed on the government itself, if it had owned the trucks and operated them in the performance of the work which the carrier of the mail was doing, and since he is doing for the government what it might do for itself, to impose a tax on him would be in fact to impose it on the government, because any private person carrying the mail must require the government to pay an additional amount equal to any such registration fee as he may be required to pay. It is stated that the owner of such motor vehicles was informed by Mr. House, the then postmaster of the city of Houston, that he would not have to pay such registration fee, that in estimating or calculating the items of expense incident to the carrying of the mail in the city of Houston, based on the information furnished by Mr. House, the item of the registration fee was not included. This, however, is not necessary or essential to the proper disposition of the question involved.

It is plain to us that the registration fee is imposed for the right to operate a motor vehicle on the public highways of the State, and is not an occupation tax imposed on the right to carry the United States mail. The State has sole control of its public roads and highways and the agents of the United States are amenable to the reasonable rules and regulations governing the use of such highways; the immunity of the Federal government from State taxation is not negotiable to the extent that it can transfer that immunity to every person who contracts with it to do any act for the furtherance of governmental business; the mail contract between an individual and the Federal government does not render the former an essential governmental agent, and confer on him freedom from State control. In support of our contention, as indicated above, we cite the following cases:

- Commonwealth vs. Clason, 118 N. E., 653.
- L. R. A., 1918C., 944.
- Ex Parte Marshall, 77 So., 869.
- L. R. A., 1918C., 839.
- Searight vs. Stokes, 3 How., 151.
- Dickey vs. Maysville Turnpike Co., 7 Dona (Ky.), 113.
- Western Union Tele. Co. vs. Richmond (CC), 178 Fed., 310.
- Western Union Tele. Co. vs. Richmond, 224 U. S., 160.
- Fidelity and Dep. Co. vs. State of Pennsylvania, 240 U. S., 319.
- Lumberville Dela. Bridge Co. vs. Board of Assessors, 26 Atl., 711.
- 25 L. R. A., 134.

It is doubtless true that the State may not tax the property of the Federal government, nor the instrumentalities which it uses to discharge any of its legal or constitutional functions, nor may the State, by taxation or otherwise, materially interfere with the due, expeditious and orderly procedure of that government while in the exercise of its constitutional powers. When it acts within its powers it is supreme and all the States are subordinate to it. Being supreme, it must maintain its supremacy in order that our form of government shall continue to be stable and lasting. It is on this broad principle, as we understand it, that the Federal Supreme Court has always held that a State

may not tax the Federal government or its instrumentalities, or do aught which would directly interfere with its lawful operations, because, had the various States such powers, they might slowly but surely undermine and weaken its foundation and acknowledged supremacy. It was on those grounds and for these reasons that the United States Supreme Court held, in the epoch-making cases of *McCullough vs. Maryland*, 4 Wheat., 316, and *Osborne vs. United States Bank*, 9 Wheat., 736, that a State did not have the power to tax the right of the United States Bank to do business in such States. But the law in those cases is not applicable to the facts here, as in the former the bank was chartered by the United States and controlled by national legislation as to their manner of doing business. It was the direct issue and instrumentality of the government. Its private property in the State might be taxed like any other property, but for the State to require it to pay a tax for the right to do business was equal to requiring the government itself to pay a tax for the privilege of performing, within the borders of the State, functions authorized or imposed on it by the Federal Constitution.

Here, there is no effort to tax a business of carrying the mail. The owner of such motor vehicle is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he an agent of the government nor an integral part of it. As was said by the Federal Supreme Court in the case of *Fidelity Deposit Co. vs. Commonwealth of Pennsylvania*, *supra* (which case later notice will be given in more detail), "but mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from State control."

A person building a State road is nothing but a contractor; he is no part of the State or its agencies, and does not thereby inherit the various immunities of the State. There is nothing shown in the contract between such mail carrier and the government to indicate that the government intended to pass its immunities to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the State.

The attorneys for the owner of the motor vehicles, so used in the transportation of the mails in the city of Houston, cite us to the case of *Johnson vs. State of Maryland*, 254 U. S., 51, and also *Choctaw, Oklahoma & Gulf R. R. Co. vs. Harrison*, 235 U. S., 292, as sustaining their contention that the motor vehicles are not subject to the registration fee imposed by the statutes of this State. The case of *Johnson vs. Maryland*, *supra*, is probably more nearly in point, and we will now attempt to distinguish that case from the one we are considering.

*Johnson* was an employe of the Post Office Department of the United States, and, while so employed, in driving a government (owned) motor truck in the transportation of mail over certain public highways in the State of Maryland, was arrested, convicted and fined for driving such truck without having a personal license, as required by the laws of that State. The court stated the question involved to be "whether the State has power to require such an employe to obtain a license by submitting to an examination concerning his competence and paying three dollars before performing his official duty in obedience to his

superior command." In determining the matter adversely to the State, the court said:

"It seems to us that the immunity of the instruments of the United States from State control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a State officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work and that duty it must be presumed has been performed." (Keim vs. United States, 177 U. S., 290, 293.)

There is a wide and fundamental distinction between that case and this one, in that in that case the government owns the motor vehicle and the person required to pay the fee and obtain the license was a direct employe, engaged in the performance of his duties, while here the person required to pay the registration fee is a simple contractor, a resident of the State, the owner and operator of the motor vehicle in question, and engaged in a work which was to be performed entirely within the State. There the tax was, in effect, directly against the government, while here it is directly on the individual, and affects the government, if at all, only indirectly and incidentally. In fact, in the instant case it does not even affect the government indirectly or incidentally, since the owner of the motor vehicle, laboring under the belief that he was not required to pay a registration fee, did not include such fee as the necessary item of expense in submitting his bid to the government for the contract of carrying the mails in the city of Houston.

In the case of Choctaw, Oklahoma & Gulf R. R. Co. vs. Harrison, supra, the State of Oklahoma undertook to impose an occupation tax upon the railroad company for the receiving of coal that the railroad company, as lessee of the Federal government, had agreed to mine, the Federal government being under obligations by a treaty contract with an Indian tribe to develop the mines from which it had been taken.

The sum total of the decision in that case was that "a Federal instrumentality acting under congressional authority cannot be subjected to an occupation or privilege tax by a State."

There the Federal government was itself under contract obligations to develop the mines owned by the Indians, it procured its lessee, the railroad company, to fulfill its obligations by mining, in its place and stead, the coal from such mines. To have prevented the imposition of the occupation tax sought to be made in that case would have been to impose such a tax by a State upon the Federal government. That, of course, is impossible.

No such facts governing the decision in either of the cases cited by attorneys for the mail carrier, exist in the case in hand, and for these obvious reasons we are forced to conclude that such cases shed but little light on the question here presented where the existing facts are given application and consideration.

In the recent case of Fidelity Deposit Co. vs. Commonwealth of Pennsylvania, supra, it was held by the Federal Supreme Court that a surety company does not, by becoming, conformably to an act of Congress, surety on bonds required by the United States, become a Federal instrumentality, so as to be exempt from a State tax on the

premiums received. Mr. Justice McReynolds, speaking for the court in that case, said:

"That the challenged tax 'is an exaction for the privilege of doing business,' seems plain (*Equitable Life Ass. Soc. vs. Pennsylvania*, 238 U. S., 143); and undoubtedly a State may not directly and materially hinder exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a Federal instrumentality pay a tax for the privilege of performing its functions. *Farmers Bank vs. Minnesota*, 232 U. S., 516; *Choctaw & Gulf R. R. vs. Harrison*, 235 U. S., 292. But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from State control. *Baltimore Ship Building Co. vs. Baltimore*, 195 U. S., 375. Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations contracting under it with the Federal government shall not be exempt from State regulation and taxation, they must submit thereto. *National Bank vs. Commonwealth*, 9 Wall., 353, 362; *Van Allen vs. Assessors*, 3 Wall., 573, 585; *Cooley on Taxation*, 3d ed., pp. 130, 131."

If the bonding company in that case was subject to the laws of the State, the owner of the motor vehicles in this case ought to be subject to the laws of this State.

In the case of *Commonwealth vs. Classon*, supra, it was held that one in charge of a vehicle transporting United States mail is not exempt from the operation of State statutes and municipal ordinances regulating traffic on highways, although by Federal statutes the highways are post roads. In that case Classon was arrested for violating the statutes concerning the conduct and operation of motor vehicles on the public highways. He defended on the ground that: that being employed as a mail carrier, using a vehicle for the delivery of mail, he was immune from prosecution and punishment under the State statute. The court said:

"The designated streets or ways are not, however, instrumentalities created by the general government, where 'exemption from State control is essential to the independent sovereign authority of the United States within the sphere of their delegated powers.' If they were the defendant has committed no offense. *Commonwealth vs. Clary*, 8 Mass., 72; *Newcomb vs. Rockport*, 183 Mass., 74, 76, 78, 66 N. E., 587. While undoubtedly they are post roads under Act of Congress of March 1, 1884, c. O, enacting that 'all public roads and highways while kept up and maintained as such are hereby declared to be post routes' (U. S. Comp. St. 1916, Sec. 7457), and whoever knowingly and wilfully obstructs or retards 'the passage of the mail, or any carriage, \* \* \* driver, or carrier, \* \* \* is upon conviction subject to fine, or imprisonment, or both, by U. S. Rev. Sts. Sec. 3995, Act of March 4, 1909, c. 321, Sec. 201, 35 Stat., 1127 (Comp. St. 1916, Sec. 10371), *yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration, and of discontinuance, but to make and enforce reasonable regulations for their use.* Nor do the facilities thereby afforded for transportation of the mails confer *extraordinary rights upon mail carriers to use the ways as they please, or necessarily, or impliedly do away with the power of supervision and control inherent in the State.* *Commonwealth vs. Breakwater Co.*, 214 Mass., 10, 100 N. E., 1034; *Postal Telegraph Cable Co. vs. Chicopoe*, 207 Mass., 341, 350, 93 N. E., 927, 32 L. R. A. (N. S.), 997; *Dickey vs. Turnpike Co.*, 7 Dana (Ky.), 113; *Searight vs. Stokes*, 3 How., 151, 11 L. Ed., 537; *Price vs. Pennsylvania R. R.*, 113 U. S., 221, 5 Sup. Ct., 427, 28 L. Ed., 980; *St. Louis vs. Western Union Telegraph Co.*, 148 U. S., 92, 13 Sup. Ct., 485, 37 L. Ed., 380; *Martin vs. Pittsburg & Lake Erie R. R.*, 203 U. S., 284, 27 Sup. Ct., 100, 51 L. Ed., 184, 8 Ann. Cas., 87."

The case of *Ex Parte Marshall*, supra, is an instructive and interesting one. During the world war a military encampment of United States soldiers was located near Jacksonville, Florida. The officer in charge of the camp made a contract in writing with Marshall, authorizing him to transport by motor bus the soldiers from the camp to the city of Jacksonville upon certain terms and conditions particularly set out in such contract. He was arrested for not complying with a certain State law imposing a license tax somewhat similar to that involved in this case. He urged as a defense to the offense charged that he was engaged in the business of the United States government, and was its constituted agent for the purpose of transporting soldiers. On appeal he cited the cases relied upon here by the owner of the trucks in this case, and concerning them the court said:

"We are in accord with the holdings of all of these cases, except possibly some expressions used therein illustratum arguendo that may be classed as obiter dictum; but unfortunately for the petitioner none of them fit the facts of the case in hand. In all of them a license tax was sought to be imposed by a State, a county or municipality upon the right to do business either by a bank, a railroad company, or telegraph company that had been chartered, and had been granted its franchise and right to do business, by the Congress of the United States, and in all of them it was held in effect that such license tax was invalid because it was an unwarranted invasion of rights properly granted by the Federal government, and amounted virtually to an attempt to annul such grant."

We feel warranted in the presumption that it will be conceded by all that the State has the right to levy a property tax on the motor vehicles in question; then, if this lawful right be conceded, by what source of logic or reason are we to reach the conclusion that they are not subject to a registration fee legally imposed on all other vehicles of similar kind and character? If these motor vehicles are not subject to the payment of the registration fee required by our statutes, would not the same rule of law and reason apply to all rural carriers and other persons engaged in the transportation of the United States mails and using motor vehicles as a means of transportation. We are unable to make a distinction in the application of the law. The case of *State vs. Wiles*, 199 Pac., 749, is the most recent decision on this question and is more nearly in point, both in law and in fact, than any case we have been able to find. It is by the Supreme Court of the State of Washington and is the basis upon which we have stated our conclusions of the law. Wiles was charged and convicted for the offense of unlawfully using and operating a motor truck on the public highways of the County of King, State of Washington, without first obtaining a license therefor as required by the State laws. As in the instant case, prior to his arrest, he had entered into a written contract with the United States government, whereby for certain consideration he agreed to carry the United States mail in the city of Seattle, Washington, between the various depots, wharves, docks, post offices and substations therein. In carrying out his contract with the government he used various motor trucks, including the one which he is accused of operating, without first having obtained a license. These trucks were used by Wiles only in the business of carrying the mail under his contract. The statute of the State of Washington, defining this offense, made it unlawful to operate automobiles and motor trucks on the public

highways of the State without first having obtained a license therefor, and further provided that "all motor vehicles owned by the United States government and used exclusively in its service" were exempt from the act.

In the last case cited we indicate the holding of the court by quoting the syllabus:

"A contractor for carrying mail for the United States within the State is not exempt from laws 1915, page 385, as amended by laws 1919, page 90, making it unlawful to operate motor trucks on the highways without first obtaining a license therefor, the fee therefor for each truck varying according to its capacity, this not being a direct tax on the property of the Federal government or on instrumentalities used by it in the discharge of its constitutional functions, but at most an indirect and immaterial interference with the conduct of government business."

As we understand the facts in this case and the law applicable thereto when considered in connection with that rule of law placing the authority in the State under its police powers to regulate and control the use of its highways by motor vehicles and otherwise, we conclude, and you are so advised, that the owner of the motor vehicles in this case is not, because of the law and the facts, relieved from complying with the State statute requiring him to pay a registration fee upon such motor vehicles.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2572, Bk. 60, P. 249.

PUBLIC OFFICERS—TERM—VACANCIES—GAME, FISH AND OYSTER  
COMMISSIONERS.

Where a statute creates an office and prescribes the length of the term without fixing the date of the beginning or termination of the term, the term begins to run from the date of the first appointment and all subsequent terms will begin on that same date.

In case of a vacancy in such an office the appointment is for the unexpired term only and not for a full term.

The first appointment to the office of Game, Fish and Oyster Commissioner in 1895 fixed the beginning of the two-year term, and all subsequent terms begin on that date. An appointment, therefore, made on February 20, 1923, entitled the appointee to hold the office for the unexpired term only, which began July 30, 1921. The appointee under the appointment of February 20, 1923, is now a holdover.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 19, 1924.

*Hon. W. W. Boyd, Game, Fish and Oyster Commissioner, Capitol.*

DEAR SIR: Attorney General Keeling has received your letter of date November 13, 1924, reading as follows:

"I was appointed to the position as Game, Fish and Oyster Commissioner by Governor Neff the latter part of February, 1921, and took charge of the department on March 1, 1921. I was reappointed in 1923 for a second term.

"Article 3 of Chapter 73 of the Acts of the Thirty-sixth Legislature, at its Second Called Session, prescribes the term of office as being for two years.

"I will thank you to advise me at your early convenience when my second term expires."

The office which you hold was created by act of the Twenty-fourth Legislature in the year 1895, the title to the office then being "Fish and Oyster Commissioner." We have examined the various acts of the Legislature in reference to this office and find that while there was by the Act of 1907 a change in the name to "Game, Fish and Oyster Commissioner," it is substantially the same office and seems to have been so treated from the beginning. The acts examined as showing the history of this office are the following:

Chapter 112, page 170, General Laws, Regular Session, Twenty-fourth Legislature (1895).

Chapter 175, page 312, General Laws, Regular Session, Twenty-sixth Legislature (1899).

Chapter 137, page 254, General Laws, Regular Session, Thirtieth Legislature (1907).

Chapter 41, page 62, General Laws, Regular Session, Thirty-second Legislature (1911).

Chapter 73, page 191, General Laws, Second Called Session, Thirty-sixth Legislature (1919).

It will be noted that the statutes create the office of Game, Fish and Oyster Commissioner and provide that he shall be appointed by the Governor and that his term of office shall be two years. There is no provision fixing the date of the commencement or expiration of the term. The appointments by the various Governors since the creation of this office by the Act of 1895 are as follows:

*Appointee—Date of Appointment—Title of Office.*

I. F. Kibbee, July 30, 1895, Fish and Oyster Commissioner.  
 I. F. Kibbee, January 22, 1897, Fish and Oyster Commissioner.  
 I. F. Kibbee, May 9, 1899, Fish and Oyster Commissioner.  
 I. F. Kibbee, January 11, 1901, Fish and Oyster Commissioner.  
 I. F. Kibbee, January 23, 1903, Fish and Oyster Commissioner.  
 I. F. Kibbee, January 19, 1905, Fish and Oyster Commissioner.  
 R. H. Wood, January 31, 1907, Fish and Oyster Commissioner.  
 R. H. Wood, February 2, 1909, Game, Fish and Oyster Commissioner.  
 W. G. Sterrett, January 19, 1911, Game, Fish and Oyster Commissioner.  
 W. G. Sterrett, February 10, 1913, Game, Fish and Oyster Commissioner.  
 W. W. Wood, January 21, 1915, Game, Fish and Oyster Commissioner.  
 W. W. Wood, January 17, 1917, Game, Fish and Oyster Commissioner.  
 W. G. Sterrett, January 21, 1919, Game, Fish and Oyster Commissioner (Resigned).  
 J. R. Jefferson, April 1, 1920, Game, Fish and Oyster Commissioner.  
 W. W. Boyd, February 16, 1921, Game, Fish and Oyster Commissioner.  
 W. W. Boyd, February 20, 1923, Game, Fish and Oyster Commissioner.

From this tabulation it appears that there has been no uniform date for the appointment of a Game, Fish and Oyster Commissioner by the different Governors. While a new administration each time made an appointment, the date of the appointment varies all the way from January 11th to July 30th, although after the first appointment the variation in the dates is not so wide. It would seem also that when J. R. Jefferson was appointed on April 1, 1920, the appointment was to fill a vacancy in the office, in all probability under the assumption that he was entitled to only the unexpired term of his predecessor.

We note also that upon the taking effect of the Act of 1919 no new appointment was made, but the appointments thereafter were made in approximately regular order, indicating that there was no idea that the Act of 1919 created a new office, but was merely a continuation of the office created in 1895.

The situation is therefore controlled by the principle of law that where the Legislature creates an office fixing the length of the term, but not prescribing the date of the beginning or ending of the term, the beginning of the term dates from the first appointment. That the term of office of an appointee begins to run from the date of the appointment where the law does not prescribe otherwise, was held by this Department in an opinion to be found at page 736 of the Reports and Opinions of the Attorney General for 1914-16. We find no dissent in the authorities upon this point. 22 R. C. L., 550; Royston vs. Griffin, 42 Texas, 566.

We conclude that the two-year term of the first appointee to this office began on July 30, 1895, the date of the appointment, and under the authorities this first appointment fixes the beginning of subsequent terms. On this point we quote Section 251, page 550, of 22 R. C. L., as follows:

"The commencement of the term of office may be fixed by the Constitution, or the statutes of the State. Where no time is fixed by law for the commencement of an official term, it begins to run from the date of the appointment, or, in the case of an elective office, from the date of election. The reason for not concluding that the term begins on the qualification of the officer is found in the possibility that under such a rule the beginning of an official term would depend on the will of the appointee, instead of that of the appointing power, and thus enable him to enlarge the term of his predecessor without shortening his own, or if he should be his own successor, he would be the constant gainer by his continual neglect to qualify. Where the law prescribes the length of the term and designates the person in whom is vested the power to fill a public office by appointment, but no date is fixed for the beginning or ending of the term, it has been held that the appointive power has the right to fix the commencement of the term, and when the same is fixed by the appointment first made all subsequent terms of office necessarily have reference to such initial period, and each term commences at the end of the preceding term."

This would make the term of the office begin every two years on July 30th; hence a new term began July 30, 1923, the year during which you received your second appointment. Therefore your appointment by the Governor on February 20, 1923, was to fill a vacancy which then existed in the office.

The question, then, is whether the appointment to fill this vacancy was for a full two-year term beginning on the date of the appointment or whether, on the other hand, the appointment to fill the vacancy was merely for the unexpired term, which term began on July 30, 1921. Upon this point there is a conflict in the authorities. 22 R. C. L., 552; 30 L. R. A. (R. S.), p. 338.

There appears to be a long line of decisions in other jurisdictions holding that where the law fixes the length of the term, but prescribes neither its commencement nor its termination, an appointment when a vacancy occurs entitles the appointee to hold his office for a full term. Many authorities hold this to be true, at least where there is no ref-



erence in the law to a vacancy in the office as distinct from the office itself. In our case, while the statute creating the office of Game, Fish and Oyster Commissioner makes no mention of a vacancy, there is an applicable provision in the Constitution which does mention vacancies and makes it the duty of the Governor to fill vacancies in State offices. (Article 4, Section 12.) Therefore, in reference to this office, it cannot be said that the law does not recognize a vacancy in the office distinguishable from the regular two-year term.

At any rate, our Supreme Court in the case of *Royston vs. Griffin*, 42 Texas, 566, held that where there is a vacancy in an office the appointee could hold for the unexpired term only, even though there is no provision of law expressly prescribing that the term shall begin or end on any particular date. The statute construed in that case was the Act of July 23, 1890, organizing the Criminal District Court of Galveston and Harris Counties (Paschal's Digest, 6143), providing that "there shall be appointed by the Governor a clerk of said court for each of said counties, who shall be removable by the judge at any time for misconduct, misfeasance or malfeasance in office; and in case of death, resignation or otherwise by which said office shall become vacant the Governor shall appoint a clerk to fill the vacancy," etc. The court held that this act, in view of the constitutional limitation that "the duration of an office not fixed by the Constitution shall never exceed four years," must be construed to provide that said office should be filled by appointment by the Governor at intervals of four years from the date of the appointment of the first incumbent and an appointment to a vacancy would be limited to the unexpired term remaining. At the organization of the criminal court under the act, Douglas was appointed on August 17, 1870, and after several intermediate appointments Griffin was appointed January 1, 1872. It was held by the Supreme Court that Griffin's appointment was for the unexpired portion of the four-year term and that, therefore, at the time of the appointment of Royston on September 10, 1874, there was a vacancy and Royston was entitled to the office under such appointment.

Justice Gould writing the opinion of the court on motion for rehearing, discusses the prior cases under the Republic of Texas apparently holding to the contrary and differentiates them. The prior cases were *Shelby vs. Johnson*, Dallah, 537; *Roman vs. Moody*, Dallah, 512; *Bradley vs. McCrabb*, Dallah, 504; *Banton vs. Wilson*, 4 Texas, 400.

Whatever may be said of the holding of these prior cases, the decision of our Supreme Court in *Royston vs. Griffin* is the latest expression of the Supreme Court of Texas on this question, and we must treat it as controlling. This decision, it is true, was rendered in 1875, prior to the adoption of the Constitution of 1876, but there is nothing in the Constitution of 1876 that would render the situation different, unless it be Section 27 of Article 16, which provides as follows:

"In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only."

The office under consideration is not an elective office as distinguished from an appointive office, and it might be argued that since the Constitution provides that *elections* to fill vacancies shall be for the unexpired term only, there was no intention that *appointments* should be for the unexpired term only. We do not believe, however,

that this constitutional provision was intended to have such effect. In the first place, the word *election* as used in this constitutional provision might very well be held to include appointments, for it is well known that under certain circumstances the word "election" may be used, not in its strict technical sense, but as including appointments as well as elections by vote of the people. 3 Words and Phrases, pp. 2329 et seq.; 2 Words and Phrases, pp. 228 et seq.; State vs. Compson, 54 Pac., 349, 351; 34 Cr., 25; People vs. Landon, S. Cal., 1.

Even if this provision in the Constitution of 1876 were held to pertain to elections by the people and not to appointments by the Governor, we do not believe that it would preclude the idea that appointments to fill vacancies should be held to be for the unexpired term only. Such a provision in the Constitution would, of course, prevent the Legislature from enacting a law providing for elections of the people to fill vacancies for any other than the unexpired term, but, in our opinion, could not reasonably be held to have the effect of controlling the term of office where an appointment is made to fill a vacancy. In other words, it would not be true that because the Constitution provides that *elections* must be for the unexpired term only, that this is the only kind of selection that could be for the unexpired term only. Indeed, the Constitution in existence at the time of the decision of the Supreme Court in Royston vs. Griffin in the year 1875 contained provisions in reference to particular offices to the effect that elections should be for the unexpired term only. But this did not prevent the court from holding that an appointment to fill a vacancy in an office not specifically mentioned in the Constitution should be for the unexpired term only.

You are therefore advised that the first appointment in 1895 fixed the beginning of the term at July 30, 1895, and the beginning of the term of the office of Game, Fish and Oyster Commissioner in the year 1923 was July 30th. It necessarily follows from what has been said that your appointment on February 20, 1923, gave you the office only for the remainder of the two-year term which began July 30, 1921, and you are now exercising your office as a hold-over.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2565, Bk. 60, P. 268.

#### OIL AND GAS PERMITS—COMBINATION OF PERMITS.

1. Chapter 81, Thirty-sixth Legislature, First and Second Called Sessions, provides no method by which a combination of permits authorized by Section 12 thereof once effected can be dissolved.

2. Two or more permittees grouping their permits as authorized by Section 12 of Chapter 81, Acts Thirty-sixth Legislature, First and Second Called Sessions, thereby enter into a new contract with the State to develop any part of the whole area formed by such combination within eighteen months from the average date of the permits forming such combination, and cannot thereafter by an act of their own dissolve the combination so formed and revert to their former individual permits.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 23, 1924.

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

DEAR SIR: This Department is in receipt of your communications of August 29th and September 3rd. In the first mentioned communication you desire the opinion of this Department on the following questions:

"First. When a combination has been effected under the terms of Chapter 81, page 249, Acts Thirty-sixth Legislature, First and Second Called Sessions, approved July 31, 1919, can the owners of such combination dissolve the same by contract among themselves or otherwise than by relinquishing the permits placed in such combination, and if so, what would be the procedure to dissolve the combination?

"Second. If the combination could be dissolved and had been dissolved, could the owners of the former combinations which have been dissolved into separate parts as represented by the several permits, again combine those separate parts or some of them with other permits not theretofore in the same combination, or with permits of the same combination less than the whole sixteen sections theretofore in the combination?

"Third. Assuming that the two separate combinations of sixteen sections each had been formed by an assignment of the several permits into separate ownerships, that is, one combination is in one ownership and another combination is in another ownership, could the owners of those two combinations make a new combination by each of such owners transferring or assigning permits covering eight sections out of each of the combinations into one ownership of a third person, and thereby form a third combination distinct from the other two that we have assumed have existed? If that can be done, what is the legal status of the two former combinations?"

In your communication of September 3rd you ask that the opinion of this Department be limited to University land.

In the outset, we desire to say that we have been unable to find any adjudicated cases on the questions asked by you, or any subject of a similar nature which could be taken or considered as ruling authority or even as bearing on the subject herein to be discussed. Therefore, the discussion will necessarily be limited to the acts of the Legislature referred to by you and other laws necessary to be construed with such act.

The purpose, as stated in the caption of Senate Bill No. 51, being Chapter 81 of the General Laws of Texas, 1919, First and Second Called Sessions, Thirty-sixth Legislature, is "to promote the development of oil and gas resources of the State of Texas in \* \* \* University \* \* \* lands; \* \* \* providing for the forfeiture of oil and gas rights for failure to comply with the laws; \* \* \* providing for a combination of oil and gas permits and for the extension of time in which to begin and complete development; \* \* \* providing for the assignment of permits and leases; providing for the relinquishment of the whole or a part of the permit; providing that permits on University land shall come within certain provisions of this act. \* \* \*"

Under the terms of this act and the other laws governing the subject, the first step necessary in order to obtain a tract of University land for the purpose of developing it for oil and gas is to obtain a permit on it. The permittee, in completing the steps necessary to obtain the said permit, agrees with the State of Texas that he will,

within eighteen months from the date of the granting of the permit, begin the drilling of a well for oil or gas on some portion of the land included therein, and that he will, within three years after such date, complete the development of oil and gas thereon, and if oil and gas is not found in paying quantities, the permit shall terminate and again become subject to the provisions of the act. But if oil or gas is produced in paying quantities upon the said tract of land included in the permit, the owner thereof may apply to the Commissioner of the General Land Office for a lease, whereupon on compliance with the provisions of the law the lease shall be issued for a period of not more than ten years, subject to renewal or renewals.

Now, the above is substantially the original contract between the State of Texas and the permittee. There are no other nor further conditions or agreement, the provisions mentioned above being the whole contract. It is evident that under the former laws the Legislature was of the mind that quick development could not be had on small tracts of land. However, without disturbing the right of a permittee to drill for oil or gas on any permit obtained by him, however small, in order to lend encouragement to the drilling and developing of the University land the Legislature provided an option for holders of permits, giving them the right to make a new contract with the State of Texas whereby such holder or holders of permits might group or combine into one organization, not to exceed sixteen sections, for the purpose of developing for oil and gas, providing that said grouping might be made by assignment of the permits or by agreements between the owners "upon such terms as the owners may agree." These groupings, whether made by assignments or agreement, in order to be valid, shall be recorded in the county or counties in which the land or part thereof is situated and filed in the General Land Office within sixty days after the execution.

Upon the organization of one of these groups, whether by assignment or agreement, each of the permittees holding a permit from the State of Texas becoming a party to such organization or grouping, enters into a new contract with the State of Texas which, while it does not change the terms of the agreement, vitally affects the life of each permit a member of said group by changing the term for which the same is to run. Thus, A, B, C and D are the respective owners of permits on four sections each. A's permit is dated January 1, 1924, and expires June 1, 1925. B's permit is dated June 1, 1924, and expires January 1, 1926. C's permit is dated September 1, 1924, and expires March 1, 1926. D's permit is dated March 1, 1924, and expires September 1, 1926. Now, every individual member of this group has a valid subsisting permit on which they must begin active operations within eighteen months from the date of each respective permit and complete the same within three years from said date, but by grouping or combining their interest they cause each of their respective permits to expire, for want of operation, within eighteen months from the average date of all the permits, the average date being April 20, 1924, thus requiring operations for the development of oil and gas to be begun on each of the above named permits on October 20, 1925. The contract as originally entered into by and between each of the respective owners of the four above named respective leases is of record in

the office of the Commissioner of the General Land Office as of the dates above mentioned. These respective owners voluntarily, under authority of Section 12 of Chapter 81, supra, enter into a new contract with the State of Texas accepting the proposition made by the State of Texas in said Section 12 and changing the term for which each of their leases shall run. We are unable to find, either directly or by implication, any provision in the laws of the State of Texas which would permit such a combination when once entered into to be dissolved. The permittees are authorized by Section 12 of the act to combine or organize and thus enter into a new contract changing the term for which their lease is to run. After having accepted the proposition in Section 12, supra, they cannot again change the term of their permit by act of their own or authority of law.

We believe the following example will illustrate an analogous proposition. A is the owner of a building used for mercantile purposes, containing four stores occupied by B, C, D and E under the usual form of a lease, with each separate lease running for different terms. All of the leases contain a provision permitting them to be assigned into a common ownership with the provision that they shall run a certain length of time, when combined, from the average date thereof. All of the tenants taking advantage of the provisions of the said leases assign them to a common owner or combine them into one lease, thus to that extent making a new contract with the landlord and changing the term for which all of the leases are to run. Could it be said that the common owner under such assignments, in the absence of a specific agreement to that effect, would have the right at any time to dissolve the combination or common ownership and that each individual and separate lease would again be reinstated and operate as a contract under its original terms and provisions? No more, we think, can it be said that the permittees who have taken the option of combining their permits into one organization and changing the terms of their permit could, after trying that plan a while and finding it is not satisfactory, go back to the original lease which they have abandoned, in the absence of a specific provision of the act to that effect. We find no such provision, either direct or implied. We cannot accept the theory that because of the fact that under the Acts of 1913 and 1917 regulating the issuance of permits the Commissioner was required to pass upon the applicant's right to receive said permit and that under Section 12 the Commissioner has no duty whatever to perform with reference to the combination of permits therein authorized, is any evidence that the Legislature intended to leave the control of combinations exclusively or almost exclusively in the hands of the owners of the permits making up the combination, or if it were the intention of the Legislature to leave the making of the combination in the hands of the owners of the permits, we cannot accept that as any evidence that the Legislature intended to permit the owners of the combination to at will throw off the burden of the new contract made by the State by reason of such combination and assume the privileges of each individual permit, nor do we think that the term "upon such terms as the owners may agree" adds anything additional to the right of the owners to dissolve the combination once made, nor that the making of a conditional combination which would under any conditions automatically change the term

for which each permit is to run, authorize a stipulation that the terms of the permits once having been changed upon the formation of the combination could again obtain their original status on the dissolution of such combination.

It is not believed that the formation of a combination would in any manner abrogate or interfere with the right to sell and assign permits, nor would the fact that a combination once formed could not be dissolved abrogate or interfere with the right to assign and convey the said permits. The original permittee, before entering into a combination whose right to explore the said tract would expire within eighteen months from the time of the date of said permit, could, of course, freely traffic in his permit. After the same had been transferred to a combination, it is possible that the date within which the tract could be explored would be shortened to twelve months. The owner of the combination could just as freely sell, assign or convey the permit or any portion thereof, but upon a different basis, it being a twelve months permit instead of an eighteen months permit, and it being in the combination from which it could not be removed. We do not think that an assignment of a part of the combination would automatically take the permit or the part of the permit assigned out of "one ownership." The statutes provide that the permits when issued may be assigned as a whole into "one ownership" or may be grouped or combined into one organization. The assignment of the part of the combination would take it out of "one ownership," but would not take the part so assigned out of the group or combination.

We think the case of *Ketner vs. Rogan*, 68 S. W., 774, is applicable herein, for the reason that the court held in that case that a lease on public lands once existing for a term of ten years, that being the limit of time for which a lease could be made, could not be relinquished and a new lease entered into, for the reason that a lease might be permitted to run for almost the entire ten years and then by agreement between the Commissioner and the lessee cancelled and another lease entered into for a term of ten years, which would practically amount to a lease for twenty years.

In the case of ownerships of separate permits of four sections each in A, B, C and D heretofore referred to, if the combinations were permitted to be dissolved and new combinations entered into after they had once been formed, A's lease which would normally expire June 1, 1924, was by reason of the combination extended to April 20, 1926, thus adding ten and three-fourths months to the life of the lease. A might, if permitted to withdraw from this combination and enter another with leases of a much later date than those of B, C and D, still further prolong the time within which development might be had. It was the purpose of the law that these permits be developed within eighteen months from their date, or if combined, within eighteen months from the average date of all permits in the combination, and we think that to permit a dissolution of the combination once made and entering into new combinations would defeat the very purpose of the law which is to "promote the development of the oil and gas resources of the State of Texas in \* \* \* University land. \* \* \*"

You are therefore advised that, in the opinion of this Department, when a combination has been effected under Section 12 of Chapter 81,

Acts of the Thirty-sixth Legislature, First and Second Called Sessions, 1919, the owners of such combination cannot dissolve the same by contract among themselves or otherwise than by relinquishing the permits placed in such combination. We are not holding, however, that the said permits so placed in the combination could not be sold, assigned or conveyed, but that in case of such sale they would still remain a part of the combination and would necessarily be sold as of the average date of all of the permits making up the combination.

The answer to your first question in the affirmative makes it unnecessary to answer the other questions.

Yours very truly,

FRANK M. KEMP,  
Assistant Attorney General.

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Op. No. 2639, Bk. 61, P. 235.

CONFEDERATE PENSIONERS—MORTUARY WARRANTS, AUTHORITY OF  
COMPTROLLER TO ISSUE.

1. An inmate of the Confederate Home, who has been regularly placed on the pension rolls and is receiving a pension provided by law, is a pensioner within the meaning of Article 6227, R. S. 1925.

2. One confined in a State hospital for the insane at the State's expense is not a pensioner under the terms of Article 6227, R. S. 1925.

3. The funeral expenses of a pensioner inmate of the Confederate Home, which are paid in part by the State, but to an amount less than \$65.00, may be further defrayed by the issuance of a mortuary warrant for the difference between the amount so paid by the State and \$65.00, or so much thereof as has been actually expended for such purpose; the total expense to the State not to exceed \$65.00 in any case.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 4, 1926.

*Hon. S. H. Terrell, Comptroller, Austin, Texas.*

DEAR SIR: Your letter of February 17, 1926, addressed to the Attorney General, has been handed to me for attention. Your letter is as follows:

"A claim for mortuary warrant on account of the death of Confederate pensioner, Landrum Morgan, has been filed by Mrs. A. C. Pierce, niece of deceased. Mr. Morgan, an inmate of the Confederate Home, died in Panola county while on a furlough from the Home and the State was relieved of all expense incident to illness, death and funeral of pensioner.

"What funeral benefits, if any, is claimant entitled to on account of this death, under Articles 6220 and 6225, 1925 R. C. S.?"

"What funeral benefits, if any, is estate of pensioner entitled to where death of such pensioner occurs while he is an inmate of the Confederate Home or State Hospital for the Insane, and funeral expenses are borne in part only by the State, but in an amount less than \$65.00 allowed under Article 6225, 1925 R. C. S.?"

You are evidently in error in referring to Article 6225, R. S. 1925, as relating to the issuance of mortuary warrants by the Comptroller. Article 6227, R. S., is authority for the issuance of such warrants.

Article 6220, R. S. 1925, provides:

"No person shall, while confined in any asylum of this State, at the expense

of the State, or while confined in the State penitentiary, receive a pension, and any person having been granted a pension who shall afterwards be confined in an asylum of this State, at the expense of the State, or who shall be confined in the State penitentiary, shall, while an inmate of such asylum, or penitentiary, forfeit his pension, and no pensioner who leaves this State for a period of over six months shall draw a pension while so absent; provided, that any person who has been granted a pension under this law, and who is thereafter admitted as an inmate of the Confederate Home or is thereafter admitted as an inmate of the Confederate Woman's Home of this State, shall thereafter be entitled to receive pension payments of 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 to be noted that no person is entitled to receive a pension while confined in an asylum of the State at the expense of the State, or while confined in the State penitentiary. It follows that a person is not a pensioner during the period of such confinement in the institutions mentioned. An exception is made in the case of inmates of the Confederate Home or Confederate Woman's Home, and it is provided that any person who has been granted a pension under said article and thereafter becomes an inmate of such Home shall be entitled to receive a pension in the amount of one-half the pension that the person would be entitled to receive if not an inmate of such home.

Article 6227, R. S. 1925, provides:

"Whenever any pensioner who has been regularly placed upon the pension rolls under the provisions of law relating thereto, shall die and proof thereof shall be made to the Comptroller within forty days from the date of such death, by the affidavit of the doctor who attended the pensioner during the last illness, or the undertaker who conducted the funeral, or made arrangements therefor, the Comptroller shall issue a mortuary warrant for an amount not exceeding sixty-five dollars, payable out of the pension fund, in favor of the heirs or legal representatives of the deceased pensioner, or in favor of the person or persons owning the accounts (proof of the existence and justice of such accounts to be made to said Comptroller under oath and in such form as he may require) for the purpose of paying the funeral expenses of the deceased pensioner. In such cases where a warrant for the pension for the quarter during which the pensioner died has been issued, the same shall be returned to the Comptroller, who shall mark the same 'cancelled' and file it before the mortuary warrant herein provided for shall issue. Where such warrant for the pension has not been issued, the same shall not be issued, but the mortuary warrant herein provided for shall take the place thereof."

This article gives certain funeral benefits to the heirs or legal representatives of deceased pensioners or to those persons owning the accounts incident to meeting the funeral expenses of deceased pensioners. It is provided that, on proper proof being made within forty days of the date of the death of such pensioner, the Comptroller shall issue a mortuary warrant for an amount not exceeding \$65 out of the pension fund. Article 6227 refers to the death of any *pensioner* who has been regularly placed on the pension rolls and provides for the issuance of mortuary warrants under specified conditions. We believe that the term "pensioner" is broad enough to include an inmate of the Confederate Home or Confederate Woman's Home who has been regularly placed on the pension rolls, but who, by virtue of becoming an inmate of either of the institutions mentioned, is entitled to receive a pension in the amount of one-half of that received by pensioners not inmates of such institutions.



As stated before, Article 6220 provides that no pension shall be paid to any person confined in an asylum of the State at the expense of the State, or to any person confined in the State penitentiary. Provision is made in this article for forfeiting the pension of a person becoming such an inmate. We think this provision of the law excludes the idea that the term "pensioner," as used in Article 6227, was intended to include persons confined in an asylum of the State at the expense of the State, or confined in the State penitentiary. The Legislature saw fit to except inmates of the Confederate Home and Confederate Woman's Home from the general inhibition contained in Article 6220.

In answer to your first question you are respectfully advised that, in our opinion, if proper proof has been made, you are authorized to issue a mortuary warrant to the person entitled to receive same for the account of funeral expenses of Confederate Pensioner Landrum Morgan, provided that in no event the amount of the warrant issued by you shall exceed \$65.

Answering your second question you are respectfully advised that, in our opinion, Article 6227, R. S. 1925, does not authorize the issuance of mortuary warrants by the Comptroller to the persons named in said article for the payment of funeral expenses of a person who dies while confined in a State hospital for the insane at the State's expense. On the other hand, you are respectfully advised that, in our opinion, you are authorized to issue mortuary warrants in favor of proper persons for the account of expenses incurred in the funeral of a pensioner inmate of the Confederate Home, where such expenses are borne in part by the State, but to an amount less than \$65, such warrant to be for the difference between the amount so paid by the State and \$65, or so much thereof as has been actually expended, the total expense to the State not to exceed \$65.

Trusting that the foregoing sufficiently answers your inquiry, we are,  
Respectfully yours,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2622, Bk. 61, P. 233.

#### CONFEDERATE PENSIONS.

1. Construction of Article 6217, Revised Civil Statutes, 1925.
2. Held, that under the facts stated in his affidavit applicant did not voluntarily abandon the Confederate service during the war as contemplated by Article 6217, Revised Civil Statutes, 1925.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 1, 1925.

*Hon. S. H. Terrell, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: Your letter of October 23rd, addressed to the Attorney General, has been handed to me for attention.

You state that Mr. Joseph W. Dodd, an applicant for a Confederate pension, has an honorable military record in the Confederate Army, except that he took the oath of amnesty and entered the Union Army

in 1864. It appears from the copy of the affidavit of Mr. Dodd, accompanying your letter, that he served a brief time in the Union Army, but later re-entered the Confederate service. It is further stated in the affidavit that he entered the Union Army, at a time when he was a Federal prisoner, for the purpose of gaining temporary liberty, and that when the first opportunity presented itself he deserted the Union Army and re-entered the Confederate Army, where he served honorably until the end of the war. You state that all of the other requirements of the law authorizing the granting of Confederate pensions have been met by Mr. Dodd, and ask this Department to advise you whether Article 6217, R. S. 1925, would preclude the placing of his name on the pension roll.

Article 6217 provides as follows:

“No application shall be allowed, nor shall any aid be given or pension paid to any soldier or sailor, or widow of any soldier, under the provisions of this title, where any such soldier or sailor deserted his command, or voluntarily abandoned his post of duty, or the said service during the said war, nor shall any application be allowed, nor any aid given, nor any pension paid any Confederate soldier's or sailor's widow who has been divorced from such soldier or sailor, nor to any widow who voluntarily, without cause, abandoned such soldier or sailor being her husband, and continued to live separate from him up to the time of his death, nor to any soldier or sailor who served as a substitute for another, nor to the widow of any substitute.”

Under the facts stated, it is necessary to determine whether the applicant voluntarily abandoned the service during the war.

The facts stated in the affidavit of Mr. Dodd clearly do not show the desertion of his command, or that he voluntarily abandoned his post of duty. As to voluntarily abandoning the service during the war, the question is close. In support of the proposition that the applicant is not precluded from being placed on the pension roll by virtue of the provisions of Article 6217, inhibiting the granting of pensions to those who abandoned the service, it may be stated that the record discloses that he re-entered the Confederate service and served honorably until the expiration of the war. This, taken in connection with the applicant's statement to the effect that he had no intention of remaining in the Union Army, but took the oath of amnesty for the purpose of gaining temporary liberty, and shortly thereafter returned to the service of the Confederate Army, in our opinion, removes the case from the inhibition expressed in Article 6217, R. S. 1925.

We are of the opinion that the applicant should furnish an affidavit and satisfactory proof that he has never become an applicant for a Federal pension at any time since the close of the war between the States, by virtue of service in the Union Army during the said war.

Yours truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2589, Bk. 60, P. 257.

PUBLIC LANDS—CAPITAL SYNDICATE LANDS—SECTIONS.

1. Under Chapter 163, Acts of the Thirty-sixth Legislature, Regular Session, relating to the sale of public free school lands, and particularly Section

5 thereof, the words "shall be sold in whole tracts only \* \* \* and in quantities not to exceed eight sections to one purchaser," together with the language used in Section 6 thereof, to the effect that land heretofore purchased by one shall be counted against him, refers to surveys, that is, that the amount of land the person was entitled to purchase is to be determined by the number of surveys and not by the quantity in acres.

2. Under this act, and in determining the eligibility of an applicant to purchase, with the maximum fixed at eight sections, it is necessary in counting the sections theretofore purchased to count each particular whole survey as a section without reference to the number of acres contained therein.

3. An applicant who, under this rule of counting, has heretofore purchased five surveys, or sections, within the meaning of the act and has made eight additional applications to purchase eight particular surveys, is entitled to purchase only three to make up the eight sections to which one person is entitled.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 17, 1925.

*Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.*

DEAR SIR: Your letter of recent date, addressed to the Hon. Dan Moody, Attorney General, has been referred to me for attention.

Your inquiries relate to the following state of facts: In the sale of land recovered from the Capital Syndicate in Dallam and Hartley Counties, one person, towit, Herbert Hedick, has applied for the purchase of eight tracts, or surveys, seven of which are for 320 acres each and one for 333.2 acres. Prior to these eight applications Mr. Hedick had already purchased five tracts or surveys, one of 1280 acres, two of 320 acres each, one of 259.8 acres, and one of 706 acres. According to the manner of counting these tracts, or surveys, your office has counted the 706-acre tract as one section, the 1280-acre tract as two sections, the two 320-acre tracts together as one section, and the 259.8-acre tract as one-half section, thereby charging Mr. Hedick with having already purchased, prior to his applications now pending, four and one-half sections. Under the same manner of counting, this applicant has now filed his applications for the purchase of eight additional tracts, or surveys, each of which is counted as one-half section, and he has, therefore, filed his application for the purchase of one tract more than enough land to make eight sections, according to your manner of counting. The act of the Legislature governing the right of an applicant to purchase this character of land is found in Chapter 163, Acts of the Thirty-sixth Legislature, Regular Session, and prohibits the sale to one person of more than eight sections, and specifically provides that land theretofore purchased by such person shall be counted against him in computing the number of sections he is entitled to purchase.

In Chapter 106, General Laws of the Regular Session of the Thirty-eighth Legislature, is found an act of the Legislature appropriating to the permanent public school fund whatsoever land that may be recovered to the State finally in the case of State of Texas vs. George Findlay et al. in the Capital Syndicate land suit, and provides for the survey and sale of same in the manner and upon the terms and conditions now provided by law for the sale of surveyed school land, except as to certain specific provisions with reference to the reserving of oil and gas. The Supreme Court of this State finally passed on the case mentioned in the last named act, as shown by the report of said case in 250 S. W., page 651. The Acts of the Thirty-sixth Legislature, Chapter 163, therefore governed the sale of this land.

Acting under the authority of the Act of the Thirty-eighth Legislature in appropriating said Capital Syndicate's lands to the permanent school fund, you, as Land Commissioner of the State of Texas, have had surveyed such land recovered into various sized tracts, none of them being cut into tracts of 640 acres. These surveys made under your supervision are, therefore, original surveys. Our information is also from your office that the tracts, so-called, heretofore purchased by Mr. Hedick, consisting of the 1280-acre, the two 320-acre, the 259.8-acre, and the 706-acre tracts, are each original surveys.

Upon this state of facts you propound two questions to this Department: first, whether or not this Department agrees with your manner of counting the sections as described in your letter and as above set out; and, second, whether or not an applicant for the purchase of this land who files his application for the purchase of more than eight sections can receive an award on any of the new applications, or whether all of said applications will have to be rejected.

Section 5 of Chapter 163 provides in part as follows:

"The surveyed land and unsold portions of surveys included in this act shall be sold in whole tracts only and without condition of settlement and residence, and in quantities not to exceed eight sections to one purchaser. A separate application in writing shall be made for each tract applied for."

Section 6 of the said act, amending Article 5410, provides the regulations governing the purchase of such land with reference to the manner of making the application, requiring that a separate application shall be made for each tract as a whole, fully describing the tract applied for, and stating the amount offered. That all of such applications shall be delivered to the General Land Office in a sealed envelope, and shall remain unopened and the applications remain unfiled until the day following the day when the land comes on the market, and at 10 o'clock a. m. on that day the Commissioner and his chief clerk shall begin to open the envelopes and file all applications. All sales shall be made to the applicant who offers the most for the land, not less than the price fixed by the Commissioner. Said Section 6 further provides in this language:

"Land heretofore purchased by one shall be counted against him under this act."

The first question to be determined is this: did the Legislature mean by the language quoted from Section 5 above, with reference to the number of sections which one purchaser could buy, eight original surveys, or did they mean lands amounting in quantity to eight sections of 640 acres each, or 5120 acres?

The Act of 1901, being Chapter 124 of the General Laws of the Twenty-seventh Legislature, Gammel's Laws of Texas, Volume 11, undertakes in express language to repeal all laws in conflict therewith. It does not expressly confer upon the purchaser of a share of the school lands the right to purchase additional land. It is provided, however, in Section 3 thereof, in substance, that the Commissioner is prohibited from selling to the same party more than four sections of land, and that all applications to purchase land shall also disclose the land theretofore purchased by the applicant from the State, and if it appear therefrom or from the records in the Land Office that said applicant

has already purchased land aggregating four sections, his application shall be rejected. This inhibition was not contained in the previous laws, but the words, "is hereby prohibited from selling to the same party more than four sections of land," were probably placed therein to reaffirm the existing rule on the subject.

It has been decided by the Supreme Court of this State in the case of *Hazelwood vs. Rogan*, in an opinion by Chief Justice Gaines, found in 95 Texas Reports, beginning on page 295, that the Act of 1901, though expressly stating that it repealed all laws in conflict therewith, did not in fact affect the main provisions of Article 4218f of the Revised Statutes, as amended by the Act of 1897. That act of the Legislature expressly authorized the purchaser of any land as provided therein to purchase other lands in addition thereto, provided that the total of his purchases should not exceed four sections.

In the case cited Justice Gaines was passing on a case where the applicant had made four separate applications to purchase the four surveys in question. Under the particular law applicable the applicant was not entitled to purchase more than four sections. He had already purchased, at the time he made his applications for which he was seeking to have awards made upon, his home tract, or section, which consisted of 160 acres. The other four sections upon which his applications were made, together with the home tract, which he already owned, contained less than 2560 acres in quantity, or less than four sections of 640 acres each. The decision of the court awards a mandamus to the relator for the three sections first applied for, but not for the four, thus counting his home tract as one section, under the law, and the other three tracts, or surveys, as a section each, and limiting the relator to the purchase of four sections. In discussing the matter, Judge Gaines says:

"The right to purchase additional lands is expressly conferred by Article 4218f of the Revised Statutes as amended by the Act of 1897 (Laws 1897, page 184), and that article, as to its main provisions, is not affected by the Act of 1901. It contains the following provisions: 'When any portion of said land has been classified to the satisfaction of the Commissioner of the General Land Office, under the provisions of this chapter or former laws, such land shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing 640 acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than 80 acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto,' etc. The question is, did the Legislature mean by four sections four original surveys, or did they mean lands amounting in quantity to four sections of 640 acres each,—or to 2560 acres? In the primary and broad signification of the term, any division of a thing is a section. But probably by reason of the fact that the United States has surveyed its lands in sections of a square mile each, it has become customary to speak of such a survey as a section. But any survey may be appropriately designated as a section. When in the provision last quoted the Legislature uses the words 'four sections consisting of six hundred and forty acres, more or less,' they meant surveys, that is, to include surveys intended and purporting to contain the quantity named,—though they might contain more,—and surveys of less than that quantity. In other words, the amount of land the settler was entitled to purchase was to be determined by the number of surveys and not by the quantity in acres. This construction is also borne out by the following provision in the same section from which

we have last quoted: 'And if he (meaning the purchaser) or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time.' Since the law gives an original purchaser the right to purchase 80 acres or multiples thereof, or an original survey of 640 acres, it is evident that the words 'home section' in the foregoing provision include within their meaning a survey of less than 640 acres of land. In the enactments in question, the Legislature were not recognizing a fixed right, but were extending a privilege to purchase; and it might well have been deemed the more practicable and convenient rule to grant the right to purchase three original surveys rather than the quantity of 1920 acres, when such surveys contained less than that quantity. Besides all this, the survey for which the relator applied and which contained only 457 acres and a fraction was known in the Land Office as 'Section 65' and was so described in his application."

The Supreme Court of this State has recently reaffirmed the holding in the Hazelwood case in an opinion by Justice Hawkins, in case of Ford vs. Robison, 109 Texas Reports, 126. In the last cited case the court was considering the Act of April 5, 1915, Laws of the Thirty-fourth Legislature, Chapter 150, and held that that act did not repeal Article 5420 of the Revised Statutes, which limited the quantity of public land which might be sold to one applicant. The court held that though the Act of 1915 contained no restriction as was provided in Article 5420, that, nevertheless, it provided that the sale should be made "under the terms, conditions, limitations and restrictions now provided by law." It was said by the court that though the Act of 1897, above referred to, made no restriction based on former purchases by an applicant, that various subsequent acts preceding the Act of 1915 expressly required that in determining whether an applicant was qualified to purchase the land described in his application, prior purchases made by him should be charged against him. (Acts of 1901, Chapter 125, page 294, Section 3; Acts of 1905, Chapter 103, page 163, Section 6; Acts of 1907, First Called Session, Chapter 20, page 490, Section 6.) It has been previously seen by decision in the Hazelwood case, supra, that the Act of 1897 specifically provided the right to purchase additional land. It is therefore shown that the Legislature indicates a legislative purpose to restrict the sale of State lands to complements of four or eight sections, as the case may be. The sale in the Ford case was made under the Act of 1915. Under the present law (that of 1919) it has been seen that the Legislature has restricted the sale to any one person to quantities not to exceed eight sections, and provides that land "theretofore purchased by such an applicant shall be counted against him by this act." This language is plain and unmistakable, so far as the limitation is concerned, and there can be no doubt that an applicant is entitled to no more than eight sections.

The question, of course, relates to what is meant by the word "section." The present law does not have the limiting or restricting words "of 640 acres, more or less," following the word "section." Chief Justice Gaines, as is shown in the opinion quoted from, has held that the word "section" refers to original surveys, and that it was not the intention of the Legislature in using the word "section" to refer to a particular quantity of land, but to an original survey.

It was argued in the Ford case that the Hazelwood decision should be distinguished from the facts in the Ford case because, under the Act

of 1901, the words "four sections" were used rather than "four sections of 640 acres each, more or less." The law under consideration in the Ford case had the words "of 640 acres each, more or less," following the word "section." Judge Hawkins for the court on this matter says:

"Counsel for the Commissioner frankly concede that their contention on this point, in the case at bar, 'appears to be in conflict' with that decision, but suggest that the two cases may be distinguished in that, they say, the statute there actually before the court for construction was a portion of the Act of 1901, page 292 et seq., which expressly limited to just 'four sections' rather than to four sections 'of 640 acres each, *more or less*,' the quantity of land which might be sold to one applicant. Whatever force lies in the suggested distinction seems to us to operate in the opposite direction, strengthening the idea that the conclusion there announced should be applied to the facts of this case."

In the Ford case the facts were that the applicant had purchased eight sections in all as surveyed. One of these sections, however, contained only  $277\frac{1}{2}$  acres. His application was to purchase a tract of 320 acres. If he were allowed to purchase the 320-acre tract, the aggregate amount of acres which he would own would be less than 5120 acres—eight full sections of 640 acres each. It was held that he was not entitled to the award, and the 320-acre tract for which his application was made was thereby determined to be a section within the meaning of the law.

We further quote from the decision in the Ford case as follows:

"The expression used by the Legislature in defining that *quantum*, as applicable to Jeff Davis County—'not to exceed 8 sections of 640 acres each, more or less, to one person, and *in whole tracts only*'—indicates, clearly and unmistakably, a definite purpose to give controlling force and effect to the number of sections, rather than to the *acreage*, and plainly negatives the idea that the acreage shall control. The number of sections comes first, as of greater importance, and the words 'of 640 acres each' are used to carry recognition of the amount of the acreage ordinarily thrown into one section, under both State and Federal practices, and the words 'more or less' are added, in the nature of a *videlicet*, to prevent a rigorous construction which would require the survey, or section, to contain precisely 640 acres—no more and no less; and any other construction of the statute is precluded by the addition of the words 'and in whole tracts only.' The positive inhibition against making any sale except 'in whole tracts' unquestionably prevents the Commissioner from carving out of an entire section containing more than 640 acres an acreage which, when added to seven other sections aggregating more than 4480 acres, would make up  $8 \times 640 = 5120$  acres.

"Moreover, if *acreage* is to control, what reason was there for saying anything about *sections*? We can see none. Historically, also, the word 'section' as used in Section 3 of said Act of 1915, has the meaning which we here attribute to it. That is made manifest by reference to previous decisions of this court and of other courts of this State construing laws providing for sale or for lease of public lands. *Hazelwood vs. Rogan*, Commissioner, 95 Texas, 295, 67 S. W., 80; *Winans vs. McCabe*, 41 Texas Civ. App., 99, 92 S. W., 817."

As is shown by the comparison of the several land laws passed by the Legislature since 1897, the Act of 1919 is not as explicit with reference to the number of acres as the Act of 1915, which was under consideration in the Ford case. Under these two decisions of our court of last resort there can be but one answer made to the first question propounded to us. It must be assumed that these several land statutes enacted after the rendition of the judgment in the *Hazelwood* case, leaving off the restrictive words "of 640 acres, more or less," were

enacted into law with full knowledge of the effect of that decision. If it is held that the word "section" under the Act of 1915 does not relate to the quantity, but to original surveys, then it is much easier to say that the act under consideration here relates to original surveys rather than to quantity in acreage.

We therefore advise that, in our opinion, based on these decisions of the Supreme Court, the use of the word "section" in the Act of 1919 does not relate to the acreage and does not mean 640 acres approximately, but relates to an original survey. We therefore cannot agree with the manner of counting the surveys, or sections, heretofore purchased by Mr. Hedick. Rather, we must hold that before he made his present applications he had already purchased five sections within the meaning of the law.

The applications now on file are for eight different surveys, seven containing 320 acres each and one 333.2 acres. In consideration of the second inquiry, we are of the opinion that Mr. Hedick is entitled to purchase and to be awarded three of the surveys, or sections, for which he has applied. This seems to be the effect of the holding in the Hazelwood case. The relator had applied to purchase four sections in that case. Under the law then existing he was not entitled to purchase more than four. He had already purchased his home tract, or section, of 160 acres. The court awarded him the sections on which his applications were filed in the order in which they were filed with the county clerk, and held that he was entitled to purchase the first three, but not the last section. Since Mr. Hedick is entitled to purchase three sections, or surveys, within the meaning of the act, and since each of the eight tracts which he has applied to purchase constitute separate surveys, we are of the opinion that he is entitled to an award of three of such sections and no more.

Respectfully submitted,

WRIGHT MORROW,  
Assistant Attorney General.

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Op. No. 2650, Bk. 61, P. 235.

**STATUTORY CONSTRUCTION RELATING TO PERSONS ENGAGED IN THE  
BUSINESS OF WEIGHING FOR THE PUBLIC.**

1. The business of private weighing is a legitimate vocation and falls within those ordinary occupations which a citizen is privileged to follow as an inalienable right, subject only to the valid exercise of the police power of the State.

2. Since the right of a person to engage in the business of weighing for the public is not dependent upon legislative sanction and the authority for its abridgment must rest in some positive and valid legal inhibition, in the absence of such inhibition, a person is authorized to engage in the occupation of weighing for the public notwithstanding the fact that there is a duly appointed or elected and qualified public weigher in the same city, precinct or county.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 2, 1926.

*Hon. Geo. B. Terrell, Commissioner of Agriculture, Austin, Texas.*

DEAR SIR: Your letter of recent date, addressed to Hon. Dan Moody, has been referred to me for attention.



The question submitted in your letter of above date is whether or not persons other than the public weigher who had been elected or appointed as required by law might carry on the business of public weighing. Article 5680, Revised Civil Statutes, 1925, provides that:

"Any person engaged in the business of public weighing for hire, or any person who shall weigh or measure any commodity, produce or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce or article is based, shall be known as a public weigher, and shall comply with the provisions of this chapter. The provisions of this article shall not apply to the owners, managers, agents or employes of any compress or any public warehouse in their operation as a warehouseman. This exemption shall not apply in any manner to any Texas port."

Article 5681, Revised Civil Statutes, 1925, authorizes and requires the Governor to appoint five persons as public weighers in cities coming within the class named in such article.

Article 5683, Revised Civil Statutes, 1925, authorizes the election of a public weigher in all counties in which there are no city or cities in which the Governor is authorized to appoint public weighers, authorizing the election of the public weigher for each justice precinct in the county. Articles 5683a and 5683b, Revised Civil Statutes, 1925, create the office of public weigher, whose official headquarters shall be at the county seat of such county and who shall discharge and perform, at the county seat only, all the duties required by law of any public weigher, and who shall appoint a sufficient number of deputies to enable him to discharge his duties. The statutory requirements contained in the preceding paragraph are found in Article 5683a and applies to cities with not less than 25,600 population and not more than 25,700 population, to be determined by the United States census of 1920, while Article 5683b applies only to cities with not less than 55,700 population and not more than 55,800 people, as shown by the United States census of 1920, and creates the office of public weigher, to be filled by two officers of equal rank, whose official headquarters shall be in the county seat of such county and who shall discharge and perform, at the county seat only, the duties required by law of any public weigher. The public weighers appointed by the Governor shall execute and file a bond payable to the State of Texas in the sum of \$5000, but each public weigher elected for a precinct shall execute a bond payable to the county judge in the sum of \$5000, to be approved by the commissioners court. And the bond of a weigher for a precinct when not over 5000 bales of cotton are received for sale or shipment, shall be \$2500.

Article 5704, Revised Civil Statutes, 1925, provides that in places where there are no public weighers appointed or elected, any person who shall weigh cotton, wool, sugar, grain, hay or pecans for compensation, shall be required, before weighing such produce, to enter into a bond of \$2500, approved and payable as in case of public weighers, and conditioned that he will faithfully perform the duties of his office and turn over all property weighed by him on demand of the owner. No one shall be allowed to follow the business of weighing for the public, or grant a certificate or weight sheet upon which a purchase or sale is made, unless he comply with the provisions of the law regulating the office of a public weigher.

The statutes relating to public weighers have been discussed and con-

strued by the courts of this State in a number of cases. However, since the codification of the statutes of this State in 1925, there has been no case in the courts of this State involving the validity or construction of the law relating to public weighers. The Codifying Commission eliminated certain provisions applying to the business of public weighing, but we do not understand such elimination to be material to the question here involved.

In the case of *Paschel vs. Inman*, 157 S. W., 1158, Mr. Justice Phillips, speaking for the Supreme Court of this State, said:

"The business of public weighing is a legitimate vocation and falls within those ordinary occupations of life which the citizen is privileged to follow as an inalienable right, subject only to such restraints and limitations as may be imposed in a valid exercise of the police power of the State. Since the liberty of pursuit as to such a calling is not dependent upon legislative sanction, the authority for its abridgment must rest in some positive and valid legal inhibition.

"The history of the legislation and its own terms plainly reveal that it has no application to private weighing in a justice precinct having a regularly elected weigher.

"It is clearly recognized in the present statutes that the election of a public weigher in a justice precinct shall not operate as a denial to all persons of the right to therein pursue the business of private weighing."

As hereinbefore indicated, the question involved is the right to conduct the business of a private weigher in a city, precinct or county where is a duly elected or appointed and qualified official weigher. The several legislative acts by which the office of official weigher was established, have been often construed and the decision of our appellate courts have been uniform, with the exception of *Perry vs. Carlisle*, 151 S. W., 1155. The cases all hold that owners of produce may engage others than official weighers to weigh the same, which is held to include the right of private persons to perform such services for the owners. As construed, the statute forbids only factors, commission merchants and persons pursuing similar occupations from weighing the cotton or other commodity that others have consigned to them for sale; the inhibition against that class of persons being made to protect owners against false and fraudulent accounts, and decline to go further, on the ground that to do so would interfere with the owner's complete domain of his property.

*Watts vs. State*, 61 Texas, 184.

*Martin vs. Johnson*, 33 S. W., 306.

*Johnson vs. Martin*, 75 Texas, 33.

*Ex Parte Hunter*, 29 S. W., 482.

*Smith vs. Wilson*, 44 S. W., 556.

*Whitefield vs. Terrell Compress Company*, 62 S. W., 117.

*Gault vs. Holder*, 75 S. W., 569.

*Davis vs. McInnis*, 81 S. W., 75.

*Gray vs. Eleazer*, 94 S. W., 911.

*Hedgepeth vs. Hamilton (Sup.)*, 140 S. W., 1082.

As Judge Phillips said in *Paschal vs. Inman*, *supra*, the business of private weighing is a legitimate vocation and falls within those ordinary occupations of life which the citizen is privileged to follow as an inalienable right, subject only to such restraints and limitations as may be imposed in a valid exercise of the police power of the State and is not dependent upon legislative sanction, the authority for its abridgment must rest in some positive and valid inhibition.

And as was said in *Martin vs. Foy*, 231 S. W., 699:

"We not only do not find the 'positive inhibition' against the pursuit of the business by others than those appointed or elected, but, as stated, that language used in the act suggests a contrary purpose."

Again, in *Martin vs. Foy*, the court said:

"If it had been the intention of the Legislature to prohibit any persons except all official weighers, elected or appointed under the terms of the law, from engaging in the business of weighing, it would have been easy to have expressed such intent."

You are therefore advised that a person who complies with the law relating thereto, other than the duly elected or appointed public weigher, is entitled to engage in the business of weighing for the public.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2574, Bk. 60, P. 276.

RAILROADS—PASSENGER FARES—UNLAWFUL DISCRIMINATION—ANTI-PASS LAW.

It would be an unlawful discrimination and a violation of the anti-pass laws of Texas for a railway company to charge the public a different rate for passenger service than that charged a particular class of passengers under a special rate.

Article 10, Section 2, Constitution of Texas.

Articles 6654 and 6670, Revised Civil Statutes of Texas.

Article 6677c, Complete Texas Statutes of 1920.

Articles 1532 and 1533, Penal Code of Texas.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 24, 1924.

*Hon. C. V. Terrell, Railroad Commissioner, Austin, Texas.*

DEAR SIR: Your letter of the 7th instant to the Attorney General has been received. In order to clearly present the questions asked by you the following is quoted from your letter:

"Enclosed herewith the Commission is handing you an application that has been filed with it by the Houston & Brazos Valley Ry. Co. for authority to assess a charge of fifty (\$50.00) dollars for the round trip operation of a passenger train, consisting probably of a locomotive and three coaches, between Freeport, Texas, and Hoskins, Texas, for account of the Freeport Sulphur Company.

"Attached to said application you will note draft of a proposed contract to be entered into between the parties.

"It might be explained that Hoskins, Texas, is a location of the sulphur mine of the Freeport Sulphur Company and is located at the end of a spur track, some several miles in length, owned by the railway company and leading off from an intersection with that company's main line track some several miles north of Freeport. The distance from Freeport to Hoskins is, including the mileage of the spur, 18½ miles.

"From the brief consideration so far given this matter by the Commission its impression is that there are probably two questions to be considered by it in connection with this matter; first, the question as to the reasonableness to all parties of the charge of fifty dollars per day as asked; and, second, the question as to whether the Commission could legally authorize the charging

by the railway company of regular fare (3.6 cents per mile) for the transportation on this train of parties, other than employes of the Sulphur Company, who might present themselves and desire transportation thereon. As we understand it, this train is the only train operated by the railway company over this spur track, hence the duty devolves upon it to handle thereon, in addition to the Sulphur Company's employes, any passenger that might present himself, and the Commission's thought is that discrimination would be involved should the passenger, who is not an employe of the Sulphur Company, be charged fare in excess of that accruing under the fifty dollar charge for the transportation of individual employes of the Sulphur Company."

In order to answer your question in regard to discrimination, it will be necessary to notice certain provisions of the Constitution and laws of Texas.

Section 2 of Article 10 of the Constitution of Texas reads as follows:

"Sec. 2. Railroads heretofore constructed, or which may hereafter be constructed, in this State are hereby declared public highways, and railroad companies common carriers. The Legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Article 6654 reads as follows:

"Art. 6654. The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and 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."

Article 6670 of the Revised Statutes of 1911 reads in part as follows:

"Art. 6670. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited.

"1. It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatever."

Article 6677c of Complete Texas Statutes of 1920 reads as follows:

"Art. 6677c. If any person, association or corporation subject to the provisions of this act shall by any special rate, rebate, drawback or other device, or in any manner directly or indirectly charge, demand, collect or receive from any other person, association or corporation a greater or less compensation for any service rendered, or to be rendered by it than it charges, demands, collects or receives from any other person, association or corporation for doing a like and contemporaneous service, or if any such person, association or corporation shall make or give any undue or unreasonable preference or advantage to any other person, association or corporation, or to any locality, or shall subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage, then and in any such case the person, association or

corporation thus offending shall forfeit and pay to the State of Texas a sum not to exceed five hundred dollars (\$500.00) for each and every offense."

Article 1532 of the Penal Code of Texas reads in part as follows:

"Article 1532. If any steam railway company, \* \* \* shall knowingly haul or carry any person or property free of charge, or give or grant to any person, firm, association of persons, or corporation, a free pass, frank, a privilege or a substitute for pay, or a subterfuge which is used, or which is given to be used instead of the regular fare or rate for transportation, or any authority or permit whatsoever, to travel or to pass or convey or transport any person or property free, or sell any transportation for anything except money, or for any greater or less rate than is charged to all persons under the same conditions, over any railway or other transportation line, or part of line, in this State. \* \* \* except to such persons as are hereinafter exempted from the provisions of this chapter, shall be deemed guilty of a felony under the laws of this State, and, upon conviction for such act, shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, and may, in addition thereto, in the discretion of the jury, be imprisoned in the penitentiary for a term of not less than six months nor more than two years."

Article 1533 of the Penal Code contains the following proviso:

"\* \* \* provided, further, that nothing in this act shall be construed to prohibit any such companies, their receivers or lessees or officers, agents or servants from making special rates for special occasions or under special conditions, but no such rate shall ever be made without first obtaining authority from the Railroad Commission of Texas. \* \* \*"

The contract referred to by you, a copy of which is attached to your letter, provides in general terms that the sulphur company shall pay to the railway company for said service the full and actual cost and expenses of said service, including interest at the rate of 5½ per cent per annum on the value of a fair and reasonable proportion of the property used by the railway company in furnishing said service. It also provides in substance that the general public shall be charged the regular tariff rates. It therefore provides a different rate for the general public to that provided for the employes of the sulphur company.

Under the foregoing provisions of our laws, it is our opinion that it would be an unlawful discrimination and a violation of the anti-pass laws of Texas for the Houston & Brazos Valley Railway Company to charge the general public a different rate for passenger service between Freeport, Texas, and Hoskins, Texas, than that charged for the transportation of the employes of the Freeport Sulphur Company.

Yours very truly,

R. E. SEAGLER,  
Assistant Attorney General.

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Op. No. 2613, Bk. 61, P. 240.

TEXAS STATE RAILROAD—JURISDICTION OF INTERSTATE COMMERCE  
COMMISSION TO MAKE VALUATION.

1. The Texas State Railroad, now under lease to the Texas & New Orleans Railway Company for a period of five years, is property owned or used by a common carrier within the provisions of Section 19a and Section 15a of the

Interstate Commerce Act requiring its valuation by the Interstate Commerce Commission.

2. By its entrance into the Federal Union, Texas became a party to the compact represented by the Constitution of the United States, whereby there was delegated to Congress the supreme and exclusive power to regulate commerce between the several States. By engaging in the business of interstate transportation, the State of Texas made itself subject to the Acts of Congress validly enacted pursuant to the Commerce Clause of the Constitution.

3. Ownership by the State of property used in interstate transportation does not render such property immune from the jurisdiction of the Interstate Commerce Commission conferred upon it by valid acts of Congress.

4. The Attorney General cannot conscientiously join the Board of Managers in protesting the jurisdiction of the Interstate Commerce Commission to value the property of the Texas State Railroad, when he cannot find reason or authority to support opposition to such jurisdiction.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 29, 1925.

*Hon. Lynch Davidson, Chairman, Board of Managers, Texas State Railroad, Houston, Texas.*

DEAR MR. DAVIDSON: The Attorney General has received your letter of the 24th instant requesting him to join you in protesting the tentative valuation of the Texas State Railroad fixed by the Interstate Commerce Commission in Valuation Docket 567. This protest we understand to have been prepared in behalf of the Board of Managers and the Texas & New Orleans Railway Company, jointly, by the attorneys for the last named company, who is lessee of the Texas State Railroad. The Board of Managers have questioned the jurisdiction of the Interstate Commerce Commission to make any valuation of this line of railroad, as shown by the following quotation from the protest:

"Now comes the Texas State Railroad, by its duly and legally constituted Board of Managers, and protests to the valuation of its properties by the Interstate Commerce Commission, and says that said body is without legal authority or jurisdiction to make a valuation or otherwise exercise control over property belonging to the State of Texas, in this instance the said Texas State Railroad. The Texas State Railroad alleges that because the Interstate Commerce Commission was without authority to value its properties, as aforesaid, it is not legally required to make and file a protest to the tentative valuation served upon it with the Commission's notice bearing date of May 18, 1925."

Your letter of the 24th instant reads in part as follows:

"It is the Board of Managers' view that this protest ought to be filed:

"(a) To sustain the polity and policy of State Government;

"(b) To safeguard the integrity, principles and prerogatives of the State;

"(c) To resist the encroachment of Federal Government on the property of the State of Texas; and,

"(d) To resist the extension and intrusion of the power of Federal Government into the affairs of the sovereign State of Texas and control of the sovereign State's exclusive property—the Texas State Railroad.

"If the Interstate Commerce Commission can fix the jurisdiction, for the purpose of valuation, over the Texas State Railroad, the exclusively owned property of the sovereign State of Texas, it can likewise fix jurisdiction for all other purposes. If the right of the State to value its own property, control, operate and manage its own railroad, is to be abandoned as a principle, then the material side of the subject is to be considered.

"The Texas State Railroad, from Palestine to Rusk, thirty-two miles long, exclusively the property of the State of Texas, was reduced by the blight of Federal control and for various other reasons to a mere junk pile. The Legislature in 1921 created and named the present Board of Managers. Under their

management the road has been resurrected and rehabilitated. It now has a physical value of approximately one and a half million dollars. Its operations are being conducted under lease by the T. & N. O. Railroad and under their operation has been constantly bettered.

"If the jurisdiction of the Interstate Commerce Commission is established over the railroad—the property of the State of Texas—in the opinion of the Board of Managers, it would result in the destruction of the railroad. A short line railroad cannot exist on the divisions of freight rates prescribed by the Interstate Commerce Commission, nor can it exist under the jurisdiction and regulations of the Federal Government. It must be free. Considered from the material side, the jurisdiction of the Federal Government over the Texas State Railroad must be successfully resisted, or the road's existence will gradually terminate. More important is the principle involved in jurisdictional supervision by Federal agencies over the exclusive property of a sovereign State.

"It is my understanding that the protest in which I am asking you to join will first be reviewed by the Interstate Commerce Commission, and should they determine they have jurisdiction over the road, then the Board of Managers are forced to test their cause in the courts. In this cause the Board of Managers of the Texas State Railroad invite you, as the Attorney General of the State of Texas, to join."

At the time of your conference with the Attorney General on August 18th, he expressed the view that your opposition to the jurisdiction of the Interstate Commerce Commission in this proceeding is not sound, and that unless further reflection and an examination of the authorities convinced him to the contrary, he could not consistently urge this portion of the protest of the Board of Managers to the tentative valuation served in Valuation Docket No. 567. Since your conference, we have investigated the decisions construing the Commerce Clause and the Interstate Commerce Act with its various amendments, and have been confirmed in our original opinion that the jurisdiction of the Interstate Commerce Commission as to this valuation proceeding does not admit of such a reasonable doubt as will justify a lawyer in advancing a contest thereof.

Prior to 1907, the Texas State Railroad was not operated in transportation generally, but consisted only of a line of track about one and one-half miles in length, connecting the State penitentiary at Rusk with the line of the St. Louis Southwestern Railway Company. Apparently, its sole use was for the carriage of products of certain industries, constituting and operated as a part of the Penitentiary System, and for the delivery of supplies to the institution at Rusk. The Thirtieth Legislature, by Chapter 34, General Laws of the Regular Session, authorized the extension of this line of track to a connection with the Texas & New Orleans Railway and/or the International & Great Northern Railroad, as the Penitentiary Board or the Governor might deem to the best interest of the State, and the maintenance, operation and equipment of the railroad so to be constructed. Under the authority of this enactment, the present line of the Texas State Railroad was built, and it has been ever since operated as a common carrier.

On March 12, 1921, the Thirty-seventh Legislature created the present Board of Managers, with plenary power of control and management. Among the powers conferred upon the Board of Managers, was authority to sell or lease the road "for the highest amount and upon the best terms obtainable to any person, firm or corporation." Pursuant to this act, the Board of Managers entered into a contract with the Texas & New Orleans Railway Company, dated August 23, 1921,

whereby the latter company was granted the right to operate trains over the Texas State Railroad, and use of its facilities and appurtenances for a term of five years. This contract was ratified by the Legislature by act passed August 24, 1921.

The contract in question was made subject to the approval of the Governor and the Interstate Commerce Commission. The latter provision was inserted by reason of a requirement embodied in the Transportation Act of 1920, that no carrier in interstate commerce should acquire control of any other line without a prior certificate of public convenience and necessity by the Interstate Commerce Commission.

On September 17, 1921, this Department advised you that in the opinion of the Attorney General the contract was consonant with the Constitution and laws of this State. The Governor of Texas duly approved the lease contract, and on September 26, 1921, in Finance Docket No. 1576, the Interstate Commerce Commission authorized the Texas & New Orleans Railway Company to acquire control of the Texas State Railroad in accordance with the terms of said contract (70 I. C. C., 485), designating the Texas State Railroad as a *common carrier subject to the Interstate Commerce Act*. The lease contract became effective immediately, and, consequently, the State of Texas went out of business as a common carrier.

The valuation of this line of railroad was undertaken by the Interstate Commerce Commission pursuant to Section 19a of the Interstate Commerce Act, whereby Congress directed the Commission to "investigate, ascertain and report the value of all the property *owned or used* by every common carrier subject to the provisions" of the Act of Congress relating to interstate commerce. This section was originally enacted in 1913, and became effective on March first of that year. In 1920, Congress enacted Section 15a of the Interstate Commerce Act, directing the Commission to determine, for the purpose of fixing just and reasonable rates, the aggregate value of the property used by common carriers in interstate commerce with authority to utilize for that purpose the results of its investigations under Section 19a in so far as same should be deemed available. The provision is made as follows:

"Whenever, pursuant to Section 19a of the act, the value of the railway property of any railway *held for or used* in the service of transportation, has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value." (Italics ours.)

This valuation is required to be made "from time to time and as often as may be necessary." A further provision is made as follows:

"The Commission shall initiate, modify, establish, or adjust such rates \* \* \* to a fair rate upon the aggregate value of the railway property of such carrier *used for or used* in the service of transportation." (Italics ours.)

As we understand the position taken by the Board of Managers, it is that because the Texas State Railroad is property of the State of Texas, it is beyond the power of Congress to require its valuation for the purpose of fixing rates to be charged for the carriage of interstate traffic. We have given sympathetic consideration to this contention, and reluctantly advise you that in our opinion it cannot be sustained.

Among the powers conferred upon Congress in the Constitution of the United States as originally adopted, is the power "to regulate com-



merce with foreign nations and among the several States and with the Indian tribes." Thus the States, in their original compact creating the Union, voluntarily divested themselves of control to the agencies of the Federal government. This power to regulate commerce "among the several States" has been held to be exclusive, and there is no doctrine better established in our jurisprudence, or supported by a greater multitude of judicial decisions, than that it extends to the physical agencies used in such commerce, even though located wholly within one State.

The power of Congress to require the valuation of the property used by interstate carriers for rate making, in order to make more effective the authority of the Interstate Commerce Commission, may not be doubted. Indeed, this is a salutary power, designed to prevent excessive earnings on the part of railroad companies whose book accounts do not faithfully represent the value of their properties used in transportation. The existence of such a power in Congress, under the Commerce Clause of the Constitution of the United States, cannot become the subject of debate at this time among men who possess even the slightest information concerning the jurisprudence of this country touching questions of commerce and the prerogatives of Congress under this clause.

Is the property of the Texas State Railroad within the purview of Sections 19a and 15a of the Interstate Commerce Act? Both sections refer in terms to property *owned or used* by carriers engaged in the transportation of persons or property between the States. Under the lease contract of August 23, 1921, the use of the Texas State Railroad and all its properties is entrusted to the Texas & New Orleans Railway Company, and the line is now being operated by that company as lessee. The contention is not made that this railway is not used in interstate commerce while being operated at the present time by the Texas & New Orleans Railway Company as lessee. In truth, it is admitted, as it must be admitted, that under the most limited definition ever given the term "interstate commerce," this railway is now being operated by the Texas & New Orleans Railway Company in the carriage of passengers and freight in interstate commerce. Thus, by the unambiguous language of the act of Congress, the Interstate Commerce Commission is directed to include the Texas State Railroad and its appurtenances in the aggregate property of the Texas & New Orleans Railway Company, upon which it is to fix a value. If the Commission did not have jurisdiction to value this property prior to the date the lease to the Texas & New Orleans Railway Company became effective, nevertheless, it acquired such jurisdiction as soon as the lessee engaged this road in interstate commerce, and it would be futile for the State of Texas to contend otherwise. Congress, under admitted powers, has clothed the Interstate Commerce Commission with authority to fix the rates on freight and passengers carried in interstate commerce, and has in part fixed the rules by which the Commission is to fix the rates. One of the things to be taken into consideration in determining what is a fair and just rate for the transportation of freight and passengers, is the value of the property owned or used in interstate commerce. Congress has by law made it the duty of the Commission to value the property owned or used in interstate commerce, that this value may be taken into consideration in fixing a fair rate for the carriage of pas-

sengers and freight. While the Texas State Railroad is operated by the Texas & New Orleans Railway Company in interstate commerce, undoubtedly the Commission has the right to control the commerce transported over this road and to fix rates thereon. To fix a fair rate, the value of the property used must be taken into consideration. How is a rate, from Palestine to New Orleans, on freight passing over the Texas State Railroad while under lease to the Texas & New Orleans Railway Company, to be fixed, unless the value of this road is known? The State of Texas is not collecting the rate or engaging in the commerce. It is the Texas & New Orleans Railway Company, a conceded common carrier of freight and passengers engaged in interstate commerce, that is, at this time using the railway and carrying on and engaging in commerce.

We are of the further opinion, however, that the ownership of this line of railroad by the State of Texas does not withdraw it from the operation of the acts of Congress relating to interstate commerce. It seems that after the construction of its line of railroad the State of Texas engaged in the business of a common carrier. It did not restrict its activities to intrastate commerce, but engaged in transportation between the several States, in that it permitted the Texas State Railroad to serve as a connecting carrier for interstate passengers and freight. In becoming a member of the Federal Union, Texas made itself a party to the compact whereby the power to regulate such commerce was delegated exclusively to the United States. To this extent Texas, of its sovereign powers, paid homage to the government of the United States at the very portals through which the Republic of Texas entered the Union. Thus its sovereignty is not infringed except pursuant to its own voluntary act. The fact of public ownership does not withdraw the Texas State Railroad from the operation of laws applicable to persons or corporations engaged in transportation except to the extent indicated by the acts of the Texas Legislature. It was held by the Supreme Court of North Carolina in *Marshall vs. Western Railroad Company*, 92 N. C., 322, that ownership by the State of shares of stock in a railroad company did not make it a public corporation. In so far as the Texas State Railroad was used as appurtenant to the Penitentiary System, its business was, of course, that of the State in its sovereign capacity; but to the extent that it engaged in the carriage of private persons and freight, the State of Texas was not exercising a function of sovereign government, or a thing public in its nature, and to that extent it was engaged in commerce. If it engaged in interstate commerce, it subjected that portion of the business engaged in by the State to the regulations prescribed by Congress or its agencies which might lawfully affect any portion of the business conducted. The Interstate Commerce Act applies by its terms to common carriers engaged in the transportation of passengers or property by railroad from one State or Territory of the United States or the District of Columbia to any State or Territory of the United States or the District of Columbia, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, in so far as such transportation takes place within the United States. The term "common carrier" is made to include "all persons, natural or artificial,

engaged in such transportation as common carriers for hire," but this language is not restrictive. A large number of judicial decisions touch upon the question as to whether a State is "a person" as that term is used in legislative enactments. A discussion of these decisions would be profitless. In some instances, States are held to be within the purview of the statutes under discussion, and in other instances the holding is to the contrary. The phrase "common carrier" as used in the Interstate Commerce Act is not restrictive of State agencies, but all inclusive, as is apparent from paragraph 1, Section 1. If the interpretation of this paragraph were otherwise, we are convinced that "State railroads" would be held to be persons engaged in transportation. Doubtless they were not expressly designated, because, as we are advised, there are only two lines of railroad in the United States owned or operated by the States themselves, one being the Texas State Railroad, and the other the Atlantic & Western, in which the State of Georgia has an interest.

The Federal courts have held that instrumentalities of the State, even when used in the public business, are subject to the laws of the United States relating to interstate commerce. The power of the United States over its navigable waters exists under the Commerce Clause of the Constitution. In *Gillman vs. Philadelphia*, 3 Wallace, 724, the Supreme Court said:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

In the *Oyster Police Steamers of Maryland* and its companion cases, 31 Federal, 763, certain steamships were seized for navigating the Chesapeake Bay and transporting passengers without having received a certificate of inspection required by an act of Congress. The vessels in question belonged to the State of Maryland, and the State had refused to permit the boilers and hulls to be inspected, as required of ships engaged in navigation over the public waters of the United States. It was contended that the public ownership by the State of Maryland withdrew the vessels in question from the operation of congressional enactments. In disposing of this proposition the court said:

"The exemption of the public property of one sovereign power from arrest by the courts of another rests upon a general usage of nations founded upon considerations of such comity and convenience. It may be withdrawn or bargained away.

"By the Federal compact in matters relating to vessels navigating the public waters of the nation, the States have agreed that the Federal authorities shall have supreme and exclusive control, and this implies of necessity that no considerations of comity shall prevent the Federal courts from enforcing laws which the Congress has deemed it wise to enact in the exercise of this supreme and exclusive control, provided they are appropriate to the object to be obtained and not obviously beyond the reasonable scope of the powers granted. \* \* \* In the present cases, the State and the Federal Government are exercising authority within the same territorial limits, and their claims in these cases conflict in regard to a matter concerning which the State has transferred her sovereignty to the United States and with regard to which she has agreed that the Federal authority shall be supreme and exclusive."

This opinion of the district judge was approved by the Circuit Court upon appeal at 35 Federal, 926, it being there said:

"The reasons submitted by the district court in support of its judgment in its opinion filed in the cause are so well considered and ample to sustain its judgment that no further opinion is required in the case."

These authorities have been often cited, and their soundness has never been questioned. Their logic is inescapable. Any other holding would permit the States, by purchasing their transportation facilities, to nullify the provisions of the Constitution vesting control of interstate commerce in the United States. We could not conscientiously assert before the Interstate Commerce Commission or the courts that the Maryland Steamship cases erroneously declared the law. Since Congress did not exempt State-owned railroads from the operation of the Interstate Commerce Act, we think they are necessarily included among the "common carriers" affected by its provisions, if engaged in interstate transportation.

We do not believe that the correctness of this conclusion can be questioned. However, if there is a disposition to question the soundness of these authorities and the conclusion which must necessarily follow, certainly no one can in serious mind doubt the right of the Interstate Commerce Commission, under existing acts of Congress, to place a value on the Texas State Railroad while it is being operated in interstate commerce as a leased property by the Texas & New Orleans Railway Company. You suggest the probability of a suit by the Board of Managers to prevent the Commission from fixing the value of this property. The thought possibly suggests itself to your mind that, so long as the road continues under its present operation, your suit would be futile, unless the whole jurisprudence dealing with commerce is overturned, and that no suit could in any event avail until after the properties are returned to the State and by it placed in operation, and, in our opinion, under the authorities cited, the Board of Managers would, even then, be without prospect of success.

It has been the policy of this Department under the present and all preceding administrations to use every effort and the utmost diligence to protect from Federal encroachment the sovereignty of the State of Texas in matters of transportation. In more than one instance our efforts have met with success. In all cases, however, we have borne in mind the canons of ethics which should control every lawyer, among them his duty to the courts that he advocate no legal proposition not sustained by reason or authority. We view with alarm the tendency on the part of the Federal government to overshadow the sovereignty of the States in matters that should be left to local control, and we are opposed to any attempt on the part of the Federal government to exercise control or jurisdiction over any matters, unless the right to the exercise of such control comes clearly within either one of the powers or implied powers delegated to the Federal government by the sovereign States in the Constitution of the United States of America. But we have found no authority supporting the position of the Board of Managers upon the question of jurisdiction of the Interstate Commerce Commission as set forth in the protest recently submitted to us. We can offer no reason which we believe to be sound to justify this phase of the protest made by the Board of Managers. We must, there-

fore, respectfully decline to comply with your request that we join you in this jurisdictional contest.

To other features of the protest we are giving consideration. We are inclined to the view that the tentative valuation is erroneous in more than one respect, and that the State should co-operate with the lessee railway company to correct this tentative valuation upon the final hearing. As to the jurisdiction of the Commission to make a valuation, however, we have no reasonable doubt.

Very truly yours,

ERNEST MAY,  
Assistant Attorney General.

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Op. No. 2612, Bk. 61, P. 280.

SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE—CRIMINAL  
LAW.

1. Statutes construed: Chapters 49 and 149, Acts Thirty-ninth Legislature, in connection with Articles 288, 289, 355 et seq., and 376, Code of Criminal Procedure, and Article 479, Penal Code.

2. Under authority of Articles 288 and 289, Code of Criminal Procedure, a house may be entered to make an arrest in a felony case, either under a *capias* or a warrant of arrest, without the necessity of procuring a search warrant.

3. An officer has no right to raise the hood and get the engine number of a car, where he merely suspicions that the car has been stolen, but must obtain a search warrant. If an arrest is made under authority of Article 376, Code of Criminal Procedure, or under a *capias* or warrant of arrest, the person making the arrest may take into his custody the property in the possession of the person arrested, and may examine the same without a search warrant.

4. Section 2, Chapter 149, Acts Thirty-ninth Legislature, prohibits an officer from examining the contents of jugs in a vehicle, which are not known to contain intoxicating liquor, without a search warrant. If, however, an arrest is lawfully made, the property in the possession of the person arrested may be seized and examined without a search warrant.

5. Evidence of the commission of the crime of murder obtained without a search warrant is admissible on the trial of the accused, and the officer obtaining same is not subject to the penalties of Section 3, Chapter 149, Acts Thirty-ninth Legislature, since no search warrant is required to be issued in such case.

6. A person unlawfully riding a train and having a pistol in his possession, if arrested for the offense of unlawfully carrying the pistol, may be so arrested without a warrant of arrest; but if the arrest is for unlawfully boarding the train, the arrest must be made under a warrant of arrest, under which the officer would have the incidental right to take possession of the pistol and to testify on the trial to the finding of the pistol on the person of the accused.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 20, 1925.

*Hon. Joe W. Strode, County Attorney, Conroe, Texas.*

DEAR SIR: Receipt is acknowledged of your letter of August 6th, enclosing a letter you have received from the sheriff of Montgomery County. Your letter and that of the sheriff submit five questions upon which you request our advice.

The questions submitted in the sheriff's letter are as follows:

1. "If I hold a *capias* for arrest in a felony case, have I the right to enter the home of a defendant or a private residence if I have grounds to believe

and do believe that the defendant is secreted in said house, or must I wait and go and get a search warrant?"

2. "Have I the right to raise the hood and get the engine number of a car, where I have reason to believe that the car is stolen, or must I resort to a search warrant first?"

The questions submitted in your letter are as follows:

3. "One of our local officers a few days ago saw two quart bottles on the seat of a buggy and two or three jugs in the back. These bottles looked like they contained intoxicating liquor and were in plain view. This officer, believing he was without authority, passed the matter up, although he was satisfied in his mind that the law was being violated, and the owner of the property bears the reputation of a bootlegger. Had I the right to examine the contents, and make arrest without search warrant?"

4. "A homicide has been committed. The guilty party has fled. The officer in going over the scene of the homicide in search of clues, found a bloodstained hammer that can be identified as belonging to John Doe. The wounds on deceased were made and inflicted with some blunt instrument. Bloodstained ground and other marks usually left in the wake of such a crime are found. Is the evidence gathered up under these circumstances without a search warrant admissible upon a trial of the case, and has the officer violated the law if he seizes the same without search warrant?"

5. "Party is arrested for unlawfully riding a passenger train, and he is found with a pistol on his person, which the officer takes possession of without search warrant. Barring his defense of being a traveler, is he guilty of carrying a pistol and is the evidence thus secured admissible upon the trial of his case?"

The questions will be answered in the order in which they are stated herein.

In reply to the first question submitted in the letter of the sheriff, you are cited to Article 288, Code of Criminal Procedure. This article reads as follows:

"In making an arrest, all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused."

You are further cited to Article 289, Code of Criminal Procedure, which reads as follows:

"In case of felony, the officer may break down the door of any house for the purpose of effecting an arrest, if he be refused admittance, after giving notice of his authority and purpose."

An intent on the part of the Legislature to repeal the two articles of the Code of Criminal Procedure above cited is not evidenced by the enactment of Chapter 149, Acts of the Thirty-ninth Legislature, page 357; and you are advised that Articles 288 and 289 of the Code of Criminal Procedure have not been repealed by the act of the Thirty-ninth Legislature herein mentioned.

You are therefore advised, upon the authority of the statutes herein cited, that a sheriff holding a capias in a felony case, after giving notice of his authority and purpose to execute the same, may enter a private residence for the purpose of making the arrest; and if refused admittance, he may use force to effect an entrance. This answer is to be understood as limited by the provisions of Article 288 of the Code of Criminal Procedure, limiting the amount of force which may be used

in effecting the arrest to no more than is necessary to secure the arrest and detention of the accused.

An arrest may be made either with or without a warrant. The Code of Criminal Procedure provides when and under what circumstances an arrest may be made without a warrant. There are two forms of writs under which peace officers make arrests that are spoken of as arrests made under a warrant. These writs are the warrant of arrest and *capias*. The warrant of arrest is defined by Article 265, Code of Criminal Procedure, and *capias* is defined by Article 505 of the Code of Criminal Procedure. If the officer holds either a warrant of arrest or a *capias* it is not necessary that either of these writs be supplemented with a search warrant before he is authorized to take into his custody the person named in the warrant or *capias*. Under the circumstances stated in the question, the law does not require that the officer have a search warrant.

In reply to the second question submitted in the letter of the sheriff, you are cited to Article 376, Code of Criminal Procedure, which reads as follows:

"All persons have a right to prevent the consequence of theft by seizing any personal property which has been stolen, and bringing it, with the supposed offender, if he can be taken before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure they must, however, have reasonable ground to suppose the property to be stolen, and the seizure may be openly made and the proceeding had without delay."

The term "all persons" in the above statute embraces private persons as well as officers, and a private person acting under the authority of this article is, for the time being, an officer *de facto*, enjoying all of the privileges and subject to all of the penalties of an officer *de jure*.

It is to be observed that this article is a part of Title 6, Chapter 3, of the Code of Criminal Procedure. Title 6 of the Code of Criminal Procedure deals generally with search warrants; and Chapter 3 has to do with the subject of the execution of search warrants. In the Revised Statutes of 1879, and again in the Revised Statutes of 1895, and then in the Revised Statutes of 1911, Article 376, Code of Criminal Procedure, quoted above, appears under the general title dealing with search warrants and in the chapter of the title devoted to the subject of the execution of search warrants.

Section 1 of Chapter 149, Acts of the Thirty-ninth Legislature, page 357, appears to be an enactment by the Legislature of Section 9, Article 1 of the Constitution of Texas. This provision has been a part of the statutory law of this State for approximately fifty years. It appears in the Revised Statutes of 1879, 1895 and 1911 as Article 5 of the Code of Criminal Procedure, and in the same language as it appears in Section 1 of Chapter 149, Acts of the Thirty-ninth Legislature, page 357. Section 2 of this act provides that it shall be unlawful for any person or peace officer to search the private residence, place of habitation, place of business, person or personal possessions of any person, without having first obtained a search warrant as required by law. Section 3 fixes a penalty for the violation of the provisions of Section 2.

An examination of the act does not show an intent upon the part of the Legislature to repeal any of the existing laws dealing with the question of search warrants. The enactment of a statute declaring the pro-

visions of the Constitution guaranteeing the citizens against unreasonable searches and seizures, and the enactment of a provision prohibiting a search without having first obtained a search warrant as required by law, cannot be held to impliedly repeal any of the existing statutes relating to search warrants. The constitutional guarantee is that the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches or seizures, and that a warrant to search shall not be issued without giving a description of the property to be searched, nor without probable cause, supported by oath or affirmation. It is conceded that some question might be raised regarding the validity of Article 376, in view of the provisions contained in Section 9, Article 1 of the Constitution of Texas. After an examination of the authorities of this State, none has been discovered in which question has been raised touching the validity of this statute. However, a number of cases have been found in which the courts have made an application of Article 376 of the Code of Criminal Procedure, and the validity of the statute seems to have been recognized.

Under the authority of this article of the Code, you are advised that the sheriff of your county has a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the person of the offender, if he can be taken, before a magistrate for examination; but to justify such a seizure, there must be reasonable grounds to suppose that the property had been stolen, and the seizure must be openly made and the proceedings had without delay. If reasonable grounds exist to suppose that an automobile has been stolen, and the same is seized under the provisions of Article 376, as an incident of the seizure the sheriff would have the right to examine the number of the automobile.

Your third question, after stating the things which the officer observed asks: (1) under this state of facts, did the officer have the right to examine the contents of the jugs; and (2) did the officer have the right to make the arrest without a search warrant? These questions will be answered in the order stated.

The examination of the contents of the jugs described in your question would constitute a search of the property and possessions of the person who at the time had possession of the jugs. Section 2, Chapter 149, page 357, Acts of the Thirty-ninth Legislature, prohibits the search of persons or personal possessions of any person, unless the officer making the search shall have first obtained a search warrant. You are therefore advised that the officer had no right to make an examination of the contents of the jugs, subsequent to the enactment of the above cited statute, unless he had a search warrant in conformity with the law.

A search warrant may be so written as to include a warrant of arrest. (Article 365, Code of Criminal Procedure.) A search warrant, however, is not necessary to authorize the arrest and detention of a citizen. While the search warrant may direct the arrest of an offender, if the officer holds either a warrant of arrest or a *capias* it is not necessary that either of these writs be supplemented with a search warrant before such officer is lawfully authorized to make the arrest.

The authority given to make arrests without a warrant is founded upon the law of necessity, for prompt action in order to arrest and



detain the offender, so as to prevent his escape by the delay incident to procuring a warrant for his arrest. The instances in which an officer is authorized to make an arrest without a warrant will be found stated in Chapter 1, Title 5, Articles 259-264a, Code of Criminal Procedure.

These statutes, Articles 259-264a, Code of Criminal Procedure, do not permit an officer to make an arrest without a warrant, upon the mere suspicion that a felony or an offense against the public peace has been committed in his presence or within his view. The officer may, where it is shown by satisfactory proof, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, pursue and arrest the accused without a warrant. It has been held that our statutes authorizing arrests without a warrant must be construed in subordination to the constitutional guarantee against searches and seizures. There is no authority in the law to justify an officer in making an arrest without a warrant upon the mere suspicion in his mind that an offense has been committed. It is believed that the officer would be justified in making the arrest without a warrant if he had reasonable grounds to believe, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that a felony or an offense against the public peace had been committed in his presence or within his view. The officer would also be authorized to make the arrest without a warrant where it is shown by satisfactory proof, upon the representation of a credible person, that a felony has been committed and that the offender is about to escape so that there is no time to procure a warrant. If the officer may lawfully make the arrest, he has the lawful right to take such property as the person arrested may have in his possession at the time, for the purpose of examining same and for the purpose of protecting the property. Under the question submitted, it was not necessary for the officer to have a search warrant in order to make the arrest. In those cases where the officer can lawfully arrest without a warrant, you are advised that he has the right to make an examination of the property in the possession of the accused at the time the arrest was made. If, in order to determine that a felony has been committed in the presence or within the view of the officer, it becomes necessary for the officer to conduct a search, you are advised that such a case is not one where the officer would be authorized to arrest without a warrant.

The fourth inquiry presented above, after stating a hypothetical case, submits questions as follows: (1) is evidence secured under such circumstances, without a search warrant, admissible upon the trial; and (2) has the officer violated the law if he seizes the property discovered in a search without a search warrant?

Chapter 149, page 357, Acts of the Thirty-ninth Legislature, prohibits a search of a private residence, actual place of habitation, place of business, person or personal possessions of any person, unless the person making the search shall have first obtained a search warrant *as required by law*. Title 6, Code of Criminal Procedure, deals generally with the subject of search warrants. No provision is made in this title as to how a search warrant may be issued for the purpose of searching for weapons which have been used in the commission of the

crime of murder. The provision in our Constitution guaranteeing the citizen against unreasonable searches and seizures, and the fact that the Legislature has passed statutes providing how search warrants may be issued, how they may be executed, and how they may be returned, indicates that it is the intent of our law that search warrants shall be issued only where authorized and permitted by statute, and it is so provided. Under the hypothetical state of facts submitted by you, the officer could not have caused to be issued a search warrant directing that the premises be searched and that the implements or weapons, with which the crime was committed, be seized. Chapter 149, page 357, Acts of the Thirty-ninth Legislature, prohibits the search unless the person making same shall have first obtained a search warrant *as required by law*. There is no law authorizing the issuance of search warrants in a case of this character. It is therefore the advice of this Department that the officer violated no law by making an examination of the premises and taking into his possession the bloody instruments with which the crime was committed, as described in your question.

Replying to the other question embraced in your fourth inquiry, you are cited to page 186, Chapter 49, Acts of the Thirty-ninth Legislature, which reads as follows:

“No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on trial in any criminal case.”

Property seized and the evidence secured by means of an unlawful search is not admissible in evidence under the provisions of the act of the Legislature above quoted. The search described in your question, perhaps, involved a trespass for which an action for damages might lie, but the search was not in violation of any provision of the Constitution or statutes of this State. Article 1, Section 9, of the Constitution of Texas protects the people against the enactment of statutes by the Legislature providing for unreasonable searches and seizures, and from the passage of laws authorizing the issuance of warrants to search and seize, unless a description is given of the property to be searched or seized, and unless the application for the search warrant is supported by oath or affirmation and with probable cause. This provision of the Constitution is a limitation upon the legislative department of our government to prevent an invasion of the liberties of the citizens or their security in their persons and property. The Legislature has not enacted a statute authorizing the issuance of search warrants to search for the weapons with which a murder has been committed. It therefore follows that the evidence found by the officer in the search described in your question is admissible in evidence upon the trial of the person charged with the homicide.

Laws are passed for the security of the individual and his property, and if, under this act (Chapter 149, Acts of the Thirty-ninth Legislature), it is contended that an officer is not allowed to make a search of premises where a crime has been committed, it would amount to a serious deprivation of the security, not only of the particular individual whose premises are to be examined for clues, but of the welfare of the entire State, since it would aid the escape of the offender, which is one of the things that the Code of Criminal Procedure is expressly

designed to prevent. But, if this reason were not sufficient to prevent such an absurd interpretation from being given to this statute, the other is evident and sufficient. Under the statutes which permit the issuance of search warrants (Articles 355 et seq., Code of Criminal Procedure), it is provided that a search warrant may not be issued for any other than the purposes therein expressly provided, which do not include the one here involved, namely, the search, or, more properly, the examination of premises on which a murder has been committed. Chapter 149, Acts of the Thirty-ninth Legislature, provides that no officer shall search private premises without having first obtained a search warrant *as required by law*, thus necessarily limiting the application of this law to those cases where, by authority of law, a search warrant may be issued. In other words, the effect of Chapter 149 above is to require that, in those cases in which by authority of law a search warrant *may* be issued, a search warrant *must* be issued, before a search of the premises can lawfully be made. It has already been shown that, under the state of facts supposed in your inquiry, a search warrant may not be issued, and is, therefore, not required by Chapter 149 to be issued. You are therefore advised that the officer does not subject himself to the penalties of Chapter 149, and that the evidence so obtained is admissible in evidence.

Replying to the fifth inquiry submitted, you are cited to Article 479, Penal Code, which reads as follows:

"Any person violating any of the provisions of Articles 475 and 477 may be arrested without warrant by any peace officer and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person, on his own knowledge or upon information by some credible person, shall be punished by a fine of not exceeding \$500."

Articles 475 and 477 define the unlawful carrying of arms as a penal offense.

This statute authorizes the arrest without a warrant of a person unlawfully carrying arms. The peace officer has power to prevent or bring to an end the doing of that thing for which he is authorized to make arrests without warrant. In taking the offender into custody, he has the authority to disarm him, both for the purpose of bringing the offense to an end and for the further purpose of protecting himself. Chapter 49, page 186, Acts of the Thirty-ninth Legislature, provides that evidence obtained in violation of the Constitution and laws of this State shall not be admissible in evidence. Under the circumstances detailed in your last inquiry, the officer has the lawful right to make the arrest and take possession of the pistol, and since in so doing he violates no provision of the Constitution or laws of this State, he would be permitted, upon a trial of the person arrested for unlawfully carrying the pistol, to testify to the finding of the pistol on the person of the accused.

The officer would have the right to arrest without a warrant a person unlawfully carrying a pistol, but, under the authority of *Freeman vs. Costley*, 124 S. W., 458, an officer does not have the right to arrest a person who has boarded a train without intending to become a passenger thereon, and with no lawful business thereon, and with the intent to obtain a ride thereon free of charge and without the consent of the persons in charge of said train, unless such officer has a warrant

for the arrest of such person. Therefore, if the arrest described in the last question submitted by you was for unlawfully riding a passenger train, the arrest would be unlawful, unless made with a warrant; but if the arrest was made for unlawfully carrying a pistol, a warrant was not necessary.

Yours very truly,

DAN MOODY,  
Attorney General.

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Op. No. 2638, Bk. 61, P. 292.

SECRETARY OF STATE—DUTIES RELATIVE TO DEPOSITING CERTAIN FEES  
IN THE STATE TREASURY.

1. Article 3916, Revised Statutes of 1925, conflicts with Section 23 of Article 4 of the Constitution of Texas, and by virtue of said Section 23 of Article 4 of the Constitution, the Secretary of State may not deposit the fees enumerated in Articles 3914 and 3915, Revised Statutes of 1925, in the State Treasury monthly.

2. The Secretary of State is required to deposit fees received under the provisions of Articles 3914 and 3915, Revised Statutes of 1925, in the State Treasury, and may not carry an account with a bank for the purpose of depositing said fees therein.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 26, 1926.

*Mrs. Emma Grigsby Meharg, Secretary of State, Austin, Texas.*

DEAR MADAM SECRETARY: Your letter of the 11th instant, addressed to the Attorney General, has been handed to me for attention. The letter is as follows:

"More than forty years prior to 1918, it was the policy of the Secretary of State to carry an account with some Austin bank, which bank collected all items for which checks or drafts were given, and the Secretary of State deposited in the State Treasury on the tenth day of each month the net sum of all collections for the month, up to the first of the month. In other words, the Secretary of State by the tenth of the month had full return on all items collected during the previous month.

"In 1918, the policy was changed, and the Secretary of State began depositing daily in the State Treasury, the net amount of all collections. More than half of the \$1,500,000 collected last year was remitted in the form of personal checks and drafts, the remainder was remitted in the form of bank drafts, which drafts were on small banks throughout the State whose reliability was no greater than the firm that remitted these drafts. This has brought about a condition whereby the local Austin bank, with which the Secretary of State has carried her account, feels like the account is turned into an expense account item, so far as they are concerned. They are required to put up the actual cash each day on each deposit, and it takes on an average of ten days to clear these checks through the proper channels. Hence the bank is out this money for a full period of ten days. This is only one feature of the question.

"The Secretary of State in about twenty per cent of all cases has to make returns in the form of Department check for excessive remittances, wrongful remittances, etc. Many times a Department check is out, and at the same time the check that is given to the Department in full payment of the fee is turned down at the other end of the line, and it does not give us an opportunity of adjusting this matter.

"We use all possible diligence in the collection of all items, but some few items of small amounts are still carried by the Secretary of State for the past year, and are now in your hands for collection.

"To completely change the policy of the Department will work a hardship

on the public, and to change the system of handling all accounts would not only entail considerable expense, but would completely disorganize the present system and necessitate the inauguration of a new system entirely.

"Article 3916, Revised Civil Statutes, 1925, provides: 'That the Secretary of State shall deposit fees collected by him monthly,' while the Penal Statute seems to imply that all officers should be required to immediately deposit all funds coming into their hands in the State Treasury.

"The Secretary of State desires to change back to the system established and in use for more than forty years, but does not desire to do so, without your advice."

I understand that your letter contains the following questions:

1. Under the provisions of Article 3916, Revised Statutes, 1925, would the Secretary of State be authorized to pay the fees received under Articles 3914 and 3915, Revised Statutes, 1925, into the State Treasury monthly?

2. Is the Secretary of State authorized to carry an account with a bank for the purpose of depositing therein the fees received under Articles 3914 and 3915, Revised Statutes, 1925, pending the time that such fees are required to be paid into the State Treasury pursuant to the provisions of Article 3915, Revised Statutes, 1925?

Section 23 of Article 4 of the Constitution provides:

"The Comptroller of Public Accounts, the Treasurer, and Commissioner of the General Land Office, shall each hold office for the term of two years, and until his successor is qualified; receive an annual salary of twenty-five hundred dollars, and no more, reside at the capital of the State during his continuance in office, and perform such duties as are or may be required of him by law. They and the Secretary of State shall not receive to their own use any fees, costs or perquisites of office. All fees that may be payable by law for any service by any officer specified in this section, or in his office, shall be paid, when received, into the State Treasury."

Article 3916, Revised Statutes, 1925, provides:

"All fees mentioned in the two preceding articles shall be paid in advance into the office of the Secretary of State, and shall be by him paid into the State Treasury monthly."

The fees mentioned in Article 3916, above quoted, are enumerated in Articles 3914 and 3915, Revised Statutes, 1925.

Article 86 of the Penal Code defines misapplication of public money. Article 87 of said Code enumerates certain acts which are included in the term "misapplication of public money." These acts are enumerated as follows:

"1. The use of any public money in the hands of any officer of the government for any purpose whatsoever, save that of transmitting or transporting the same to the seat of government and its payment into the Treasury.

"2. The exchange of one character of public funds for those of another. The purchase of bank checks or postoffice orders for transmission to the Treasury is not included in this class.

"3. The deposit by any officer of the government of public money at any other place than the Treasury of the State when the Treasury is accessible and open for business or permitting the same to remain on deposit at such forbidden place after the Treasury is so open.

"4. The purchase of State warrants or other evidence of State indebtedness by any officer of the government by public money in his hands.

"5. The section above set forth cannot be understood to exclude any class, which by fair construction comes within the meaning of the preceding language; this article shall not be construed to prevent collectors of taxes from paying warrants drawn by the Comptroller in favor of officers living in their district or county, as may be provided by law."

Article 98 of the Penal Code defines the offense of wilfully or negligently failing to account for all moneys in the hands of public officers other than tax collectors.

The statutes above quoted were carried into the Revised Civil and Criminal Statutes by the Thirty-ninth Legislature. The acts are, therefore, concurrent acts of the Legislature and should be construed together in determining the duties of the Secretary of State with reference to fees coming into her hands. If it were not for Section 23 of Article 4 of the Constitution, above quoted, there would be no difficulty in construing these statutes together and holding that Article 3916, Revised Statutes, 1925, is not inconsistent with the statutes of the Penal Code defining misapplication of public funds. In the absence of the constitutional provision mentioned, Article 3916, Revised Statutes, 1925, would certainly constitute, we believe, a special declaration with reference to the office of Secretary of State, and there would be no impediment to a construction which would give effect to the misapplication statutes as well as to Article 3916. This holding would be in harmony with the rule of construction that "where there is any one act or several contemporary acts relative to a particular subject, they will govern in respect to that subject as against general provisions contained in the same acts." Sutherland Statutory Construction, Vol. 1, page 530.

In the case of *Ex Parte McKay*, 199 S. W., 637, the Court of Criminal Appeals of Texas construed together the statutes under consideration and gave effect to Article 3916 and the articles of the Penal Code relating to misapplication. However, the court did not have before it the question of the constitutionality of Article 3916 and did not refer to Section 23 of Article 4 in construing the statute.

We are of the opinion that the constitutional provision is clear and unambiguous. If the Legislature could authorize the Secretary of State to pay the fees collected by her into the Treasury monthly, then that body could go further and permit a State officer to make one settlement during his tenure of office. We take it that the terms "when received" as used in the constitutional provisions, above quoted, require the Secretary of State to immediately deposit fees received by her in the State Treasury, provided the Treasury is open for business.

In view of the foregoing, we must respectfully advise you that we are of the opinion that Article 3916 of the Revised Statutes of 1925 contravenes Section 23 of Article 4 of the Constitution and that question number 1 should be answered in the negative.

Answering your second question, we must respectfully advise you that, in our opinion, the Secretary of State would not be authorized to carry an account with a bank for the purpose of depositing therein the fees mentioned. We believe that Section 23, Article 4 of the Constitution, inhibits the deposit of fees by the Secretary of State in any other place than the Treasury of the State. Further, subdivision 3 of Article 87 of the Penal Code enumerates among the acts that are to be included within the term "misapplication of public money" the following:

"The deposit by any officer of the government of public money at any other place than the Treasury of the State, when the Treasury is accessible and open

for business, or permitting the same to remain on deposit at such forbidden place after the Treasury is so open."

Trusting that the foregoing answers your questions, I am,  
Yours very truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

Op. No. 2633, Bk. 61, P. 45.

BONDS—COMMON AND INDEPENDENT SCHOOL DISTRICTS.

1. A contract for the sale of bonds of a common or independent school district, which bonds are to be authorized at an election held at some future date, is prohibited by Revised Civil Statutes, 1925, Articles 2786 and 2788, and an attempted contract of such nature is not a binding obligation on the board of trustees of an independent or common school district.

2. An attempted contract for the sale of bonds of a common or independent school district, which bonds are to be authorized at an election held at some future date, is against public policy and is void.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 30, 1925.

*Mr. S. M. N. Marrs, State Superintendent of Public Instruction,  
Capitol.*

MY DEAR MR. MARRS: Your communication of recent date addressed to the Attorney General has been received and referred to me for attention. I quote from your letter as follows:

"I wish to ask your Department—

"(1) Whether or not a contract for the sale of bonds, made by a board of trustees, with an investment company, prior to the election authorizing the issuance of same, would be a legal and binding contract upon the board of trustees.

"(2) Would the making of such contract be an illegal act on the part of said board of trustees?"

An examination of Article 2786, R. C. S. 1925, which deals with the bonds of both common and independent districts, reads in part as follows:

"\* \* \* All *bonds* shall be sold to the highest bidder for not less than their par value." \* \* \* (Italics ours.)

Then, again, Article 2788, R. C. S. 1925, which refers to the bonds of independent districts only, reads in part as follows:

"\* \* \* When said *bonds* have been duly approved and registered, they shall continue in the custody of and under the control of said board and shall be sold by said board for cash, either in whole or in parcels." (Italics ours.)

It is apparent that the bonds themselves cannot be sold until after the election, as they are not in existence until that time. Therefore your inquiry resolves itself into the question of whether the board of trustees of a common or independent school district can make a contract for the sale of bonds which it is contemplated will be authorized at an election to be held at some future date.

It will be noted that both statutes quoted above refer to the sale of *bonds*. There can be no *bonds* until an election has been held at which there is given authority for their issuance. The above statutes do not

authorize nor mention a contract for the sale of bonds, which bonds are to be authorized by an election held at some future date. The only provision with reference to the sale of the securities is that the bonds themselves may be sold. The authorities are uniform in holding that the statutory method for the sale of bonds or other securities of municipal or quasi-municipal corporations must be followed to the exclusion of all others. Our statutes having provided that there shall be a sale of the bonds themselves, we are of the opinion that this precludes any sale of bonds which are not in esse. Consequently we construe the above statutes to mean that there can be no contract for the sale of bonds until such bonds have been authorized by an election.

We do not believe that it is incorrect to assume that all contracts made for the purchase of these bonds are made with the idea of financial gain on the part of the purchaser. Should a contract for the sale of bonds be made prior to the election at which such bonds are authorized, the purchaser of the prospective bonds would have a direct and specific financial interest in the outcome of the election. Such a condition is contrary to all principles of democratic government and in direct contravention of the public policy of this State.

If a contract can be made for the sale of bonds to be voted a few days subsequent to the time at which the contract was made, cannot a contract be made to purchase bonds to be voted months or even years subsequent to the time of the making of the contract of purchase? If a contract were made to purchase bonds to be voted some time subsequent to the date of the making of the contract of purchase, it is apparent that the school district would not be certain of receiving the full market value of the bonds at the time of their issuance. It is obvious that it was the intention of the Legislature that the school district should receive the full market value of the bonds, as they have incorporated in the statutes the specific provision that the bonds should be sold to the highest bidder. We again state that it is our opinion that such a contract of sale as you mention is unauthorized and unwarranted and is against public policy and void.

Being of the opinion that there is no authority in the board of trustees to make a contract for the sale of bonds of a school district prior to the date of the voting of such bonds, it naturally follows that we believe an attempted contract so to do would not be a legal and binding contract upon the board of trustees.

Respectfully,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2614, Bk. 61, P. 257.

INDEPENDENT SCHOOL DISTRICT—DEPOSITORY—BOARD OF EDUCATION—  
GENERAL FUNDS.

1. It is within the power of a board of trustees of the Independent School District of San Antonio to pass upon the propriety of the expenditure of money on hand; and when, acting in the apparent scope of its lawful power, the board orders the president and secretary to sign and deliver checks on a given fund, the depository paying such checks is fully protected.

2. An independent school district, as a municipal corporation, has the right



to recognize, settle or compromise disputed claims or demands against the district, when in the opinion and discretion of its board of trustees defense to litigation over such claims would be useless.

3. Under provisions of the special act of the Thirty-fifth Legislature creating San Antonio Independent School District, the Board of Education has the right to use money to credit of its general fund to pay any indebtedness due by it, incurred in operating and maintaining the schools.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 29, 1925.

*San Antonio National Bank, Depository, San Antonio Independent School District, San Antonio, Texas.*

GENTLEMEN: On Tuesday, the 25th of August, your attorney, Mr. Leroy G. Denman, called in person upon the Attorney General to present to him certain inquiries with reference to the final settlement of a controversy which has been going on for some time between the board of education of your school district and some four hundred or more teachers in your public school system, over a balance claimed to be due them upon their alleged contracts for the school year 1923-1924. Mr. Denman left at this office a letter written by you, through your president, to the Attorney General summarizing very briefly the facts which are involved and concluding with two specific questions to which you desire an answer.

Mr. Denman went over with this Department the history of this controversy and filed with us for our information the following papers: a certified copy of excerpts from the minutes of the San Antonio board of education which refer to this controversy beginning with the meeting of March 20, 1923, and extending down to August 7, 1925; original pleadings in the case of Eileen Pike et al. vs. San Antonio Independent School District in the County Court of Bexar County, and a transcript of the stenographer's notes of the testimony and evidence introduced in the trial of that case; and copies of some San Antonio newspapers in which some phases of this controversy were discussed. In addition thereto we have before us the written opinion of certain attorneys in San Antonio, among them the recent opinion of Mason Williams, Esq., under date of August 22, 1925, addressed to the board of education. In order that you may understand our attitude and may know what we have before us on this controversy, we summarize the following facts gleaned from the discussions and from the written and printed records before us.

The San Antonio Independent School District was created a body corporate under a special act of the Legislature of 1917 (Local and Special Laws, 35th Leg., p. 193), by which statute the affairs of the district were placed in the hands of a board of education. Beginning in March, 1923, this board, as shown by its minutes, began considering the election of the teaching force and the salaries to be paid the teachers for the scholastic year 1923-1924. There appears to have been a schedule of teachers' salaries spread upon the minutes of the meeting of the board on May 18, 1923. Subsequently it seems to be a fact that there was sent out over the signature of the president of the board a card notifying such elected teacher of his or her election and referring to the schedule of March 18th as the basis of the salary to be paid that year. The teachers who are now claiming compensation on the basis

of that schedule signed and returned an enclosed or attached card accepting the place so tendered; and they are now basing their claims upon the proposition that this card of notification and their card of acceptance constituted a contract with the board.

At subsequent meetings of the board further action was taken in the matter of teachers' salaries for the year 1923-1924, and it was determined in September of that year to make payment to the teachers upon a basis different from that set out in the schedule which was spread upon the minutes of May 18, 1923, and payment was actually made upon the basis of this last determination. The teachers who are parties to this controversy made claim for the difference between the salary actually paid and the amount to which they would have been entitled under the original schedule above mentioned. The board denies that any contract was in fact effected by these transactions. Subsequently, a suit was filed by one of the teachers, Mrs. Eileen Pike, against the school board to recover the amount claimed by her in this controversy, and we understand that upon the first trial of the case the jury was unable to agree upon a verdict and in the last trial a judgment was rendered for the plaintiff for the full amount of her claim. This judgment was not appealed from and became final.

We have stated above the basis of the teachers' claims. It is apparent from the facts which were outlined to us by Mr. Denman and others and from the printed and written documents which he filed that the issues which went to make up the controversy are very sharply contradicted. It seems that witnesses who testified in the lawsuit failed to agree upon most of the material matters which were inquired into and statements went even to the extent of questioning the verity of the records of the board. The pleadings in the case consisted of an amended petition and an amended answer and three supplemental pleadings by each party, in each of which general and special denials were made of the facts alleged by the opposite party and exceptions were raised numerously to the proposition of law set out.

Following the rendition of the judgment in this case the school board concluded officially to make no further resistance to the claims of the teachers and has agreed with them to make payment of the amount so claimed without further litigation and a resolution has been passed ordering payment to be made to each of the teachers for the amount of the claim alleged to be due. You inform us that checks have been or will be drawn in payment of these claims and that they will be presented to you for payment.

This statement, we believe, covers those portions of the transactions which are material to an answer to questions propounded in your letter, from which letter we quote the following paragraphs:

"The checks are drawn against the general balance to the account of the board made up of funds borrowed by the board during the year against its general revenue and out of collections of both current and back taxes, all of which are carried in a general fund.

"We respectfully ask your opinion upon the following questions:

"1. Can this payment be lawfully made?

"2. Can it be paid out of the general fund above referred to?"

The opinion of this Department is that both of these questions should be answered in the affirmative.

We quote from the act creating the board of education and the San Antonio Independent School District the following pertinent excerpts:

"Sec. 2. There is hereby created the San Antonio Independent School District \* \* \* which is hereby incorporated and made a body corporate.

"Sec. 3. The San Antonio Independent School District shall be under the management and control of nine trustees who shall be called a San Antonio Board of Education.

"Sec. 6. The said board shall establish, manage and control all public free schools within the district and shall provide for maintaining and operating the same for at least nine months in each year and shall have the management and control of all properties of said corporation and shall in all matters act for said corporation. The said board shall have power to prescribe the qualification to be required of teachers that may be employed and to fix a schedule of salaries for all persons employed by the board.

"All teachers shall be elected by the board upon recommendation of the superintendent \* \* \* shall be paid such salaries as are fixed by the board upon recommendation of the superintendent.

"For the purpose of carrying out the power and authority herein conferred upon the board the power is hereby conferred upon said board to levy and collect taxes upon the persons and property taxable within this district, but this power to levy taxes is subject to the limitations hereinafter set out.

"The board shall possess all other power necessary or proper to carry into effect the power and authority expressly given by this law, provided the current expenses for any fiscal year shall not exceed the current estimated income for such year.

"Said board may, in the name of the independent school district, contract, be contracted with, sue or be sued, plead or be impleaded \* \* \* and shall have power to borrow money and secure advances of money and to pledge as security therefor taxes and current finances of the board.

"Sec. 27. No execution shall be issued against the school district, but the board shall provide for the payment of judgments in levying the taxes next after the recovery of such judgment. Lands, debts due, and assets of every description shall be exempted from execution and sale, but the board shall make provision by taxation, or otherwise, for the payment of any and all indebtedness due by it."

The powers, duties and rights of the depository we find set out in Sections 9, 10, 11 and 13. They read in part as follows:

"Sec. 9. The board shall direct advertisement for sealed bids for the custody of the funds of the said board."

Sec. 10. Provides for the execution of a bond by the depository selected; conditioned "for the paying upon presentation of all checks and warrants drawn upon said depository by the president and secretary of said board whenever any funds shall be in said depository to the credit of the said board and applicable to the said check or warrant."

"Sec. 13. All checks, warrants and drafts drawn against any funds of said board for expenditures which have been authorized by the board shall be signed by the president and secretary of the board."

For the purpose of answering your first question we desire to say that this Department is of the opinion, in view of the wording of the statutes referred to, that the liability of the depository ends when it pays out the school money on checks drawn by the president and secretary of the board. The depository is only the custodian of the fund. It has no discretion in selecting the objects for which the funds are expended; it is charged with no duty in the making of contracts, incurring liability, nor discharging obligations. All matters of this sort are clearly within the province of the board of education. When the board shall have determined upon the expenditure of money and the president and secretary have signed and issued checks or warrants

against a specific fund in charge of the depository, it cannot refuse to pay such check on proper presentation and endorsement, assuming, of course, that it has money on hand to the credit of the fund against which the warrant is drawn.

Indeed, not only does this conclusion follow from the law prescribing the relative duties of the board and depository, but it also follows from the condition of your bond in which you are required, and the bondsmen guarantee, that you will make payment upon presentation of all checks drawn by the president and secretary of the board, when you shall have a balance to the credit of the fund on which the warrant is drawn. It certainly must follow, since the sureties bound with you as depository would be responsible for your refusal to pay checks under such condition, that you will have discharged your full duty under the law when you do make such payment.

The checks or warrants which the board is drawing and which have been or will be presented for payment, closing the controversy herein referred to, are no different from any other checks, drafts or warrants which have been presented heretofore and paid in the discharge of the duty of the depository. If you are under any obligation to pass upon the validity of the payment in this case, you are likewise required to pass upon the validity of every check or warrant presented to you for payment, and if you could be required to respond to a suit for the return of the money paid out on these checks, because they are unwarranted or improperly drawn, you could be required to respond for the payment of any other money on any other warrant drawn to pay an account or contract or other obligation improperly incurred or assumed by the board. This would, of course, necessitate your constant supervision over every act done or undertaken by the board of education in your city, would make you responsible for fraud perpetrated by the board or for mistakes made by it. The act imposes no such burden or duty on the depository.

When you pay the checks or warrants drawn by the president and secretary of the board of education, so long as there are moneys on hand to the credit of the fund on which the warrants are drawn, you are fully protected.

But aside from the consideration, we think that the school board, having in full charge the management of the affairs of this district, has ample authority to make payment of the claims of these teachers as it has lately agreed to do.

In saying this we desire to emphasize that we are not passing upon the merits of the original controversy and we are not expressing any conclusion or determination of the disputed facts which appear so pointedly in the record. The Attorney General's Department will not, by an opinion, undertake to try a lawsuit, neither will it express an opinion which must turn upon the determination of a disputed fact. We therefore have not gone into this record with the view of determining whether or not the teachers are right as a matter of law in their original controversy; nor do we mean to say whether the outcome of the Pike case in your county court was right or wrong.

We have gone into the facts only far enough to determine that this is a dispute over the alleged execution by the board of education of a teacher's contract, and that the board, if it did make such contract,

was well within its charter power. Being advised by the inquiry and investigation of the record submitted that board desires to compromise these claims; we undertake to pass upon its right and power to make a bona fide compromise of a disputed claim.

In this state of the record you are advised that it is the opinion of the Attorney General's Department that these controversies,—that these claims growing out of alleged contracts which have heretofore been so sharply disputed,—may in the discretion of the board be compromised, and settled, and this seems to be the intent and effect of the most recent action of the board on these disputed claims. There seems to be sufficient ground for apprehension that litigation brought by these teachers might ultimately be resolved against the school board and that is sufficient to make it lawful for the board to pay the claims rather than litigate, if it so desires.

We again emphasize the fact that we are not saying that the school board should have done this, neither are we saying that it should not have done this, but we are of the opinion that the board is not within its legal rights in taking this action in agreeing to desist from further litigation and pay these claims and to order and authorize the drawing of checks by the president and secretary to pay for the same.

The right of a municipal corporation such as the defendant to settle and compromise disputed claims either for or against it is well settled in the laws of this country. Your charter gives to the board the specific right to sue and be sued, to contract and be contracted with and generally to manage the affairs of the district. The rule of law which has been announced most generally and which is well settled is to be found in *McQuillin on Municipal Corporations*, Vol. 5, Sec. 2479, and is in these words:

"Unless forbidden by a charter or general law a municipal or other public corporation has the power to settle or compromise disputed claims in its favor or against it before or after suit has been begun thereon. The capacity to contract and be contracted with, sue or be sued, gives the implied power to settle disputed claims, controversies and matters in litigation."

The rule is likewise well expressed in 28 Cyc., 1756, in these words:

"The municipal council generally has the power to compromise and settle suits against the city and the consideration is adequate where in the opinion of the responsible officers the compromise discharges a moral obligation of the city and averts the apprehended recovery of a greater amount."

It might be added that the question of whether to bring a lawsuit or whether to defend a lawsuit brought against it as defendant, is necessarily a matter within the discretion of the board. It would have the right to decline to defend a lawsuit, or to confess judgment in a suit brought against it, and it must follow that it could avoid the expense incident to defending a threatened lawsuit by the payment of the claim in dispute if it felt that defense of the litigation would be useless. Of further interest in this connection are the following authorities of law bearing upon this proposition:

*First National Bank vs. Emmetsburg (Iowa)*, L. R. A., 1915A, p. 984.

19 R. C. L., 775.

3 R. C. L., 886.

*San Antonio vs. Street Railway*, 54 S. W., 281.

*Farnsworth vs. Wilbur (Wash.)*, 19 L. R. A. (N. S.), 320.

There are only two limitations upon this power to make compromises. The first is that disputes growing out of an alleged contract, the alleged act of the governing body must have been within the general power of the municipality; other limitations have reference to tax matters. All the authorities without exception hold that the right to settle or compromise disputed claim, either for or against the corporation, is necessarily incident to and implied in its power to sue or be sued. This has so long been the settled law of the land, that we are unable to find any authority to the contrary.

In answering your second question in the affirmative, we are not unaware that, as construed by the courts, there are in the general laws and most of the special acts creating independent school districts, restrictions upon the power of the board to use any money to pay an obligation that was incurred.

Throughout all this controversy the assertion that the payment of the salaries would exceed the estimated income for the year has been very seriously disputed. A court could, in a lawsuit over this matter, properly find that the facts supported the contention that the salaries were within the estimated income. A finding to that effect would not be improper and would be sustained as supported by the evidence. This being true, it would, we think, necessarily follow that the board in passing upon the probability of its liability in considering a settlement of these claims would certainly be invested with the authority to resolve the disputed question in favor of the validity of the contract under the provision above referred to, and for the purpose of settlement admit the validity of the contract. When a fact is disputed, the board could, in its discretion and as a part of its general authority as specifically conferred by statute and by the necessary implication from this specific authority, declare itself to have been bound originally by the contract as being within the provisions above quoted. But, assuming that the facts are otherwise, that the estimated revenues were not sufficient to cover the current expenses to include the claim now made by these teachers, we think that, as between the teachers and the board in this case, the provision would not invalidate the contract.

This provision of the law is merely directory and not mandatory. It provides merely direction to the board as to the manner in which it shall conduct its affairs, and is a limitation upon the action of the board; but the wording of the statute itself shows that the matters for determination cannot, in the nature of things, be mathematically precise, and, therefore, if the board itself could not be presumed to know exactly the limit of its authority, neither could a third person dealing with it be charged with notice of this limit of its authority. It will be noted that the language of the provision confines the current expenses for any fiscal year to an amount not exceeding the current "estimated" income. It is recognized by the Legislature that this item cannot be fixed definitely, and it must be evident that in a district the size of San Antonio, with so many variant sources of revenue, and so many possibilities and contingencies connected with the final collection of this revenue, it would be impossible to estimate in advance the exact amount.

Section 27 of this act provides that the board shall make provision for the payment of judgments and for all indebtedness due by it by

taxation or otherwise. This provision appears later in the act than that we have just been discussing, and is further evidence of the fact that the Legislature recognized that obligations of the board might arise probably for which no provision had been made in the budget, and it therefore gave the board the power and imposed upon it the absolute duty of making provision for the payment of such obligations. If it had been the intent of the Legislature that no obligation of the board should be paid except such as had been originally estimated to be within the current revenues of the district, then this latter provision would have been useless, as it certainly nullified the narrow construction of the earlier provision which is herein referred to. Construing these two portions of the act together, it must be clear that it was the intent of the Legislature to direct the board to budget as nearly as possible its expenditures and its revenues, but recognizing the utter impossibility of an exact estimate of either, it did not undertake to invalidate the contracts made by the board in the general course of its managerial and supervisory authority which might overrun the estimated income for the year. It will be noted that the old general law, which was in effect at the time of the passage of the special act creating San Antonio district, contained this provision:

"They (the board) shall approve all teachers' vouchers and all other claims against the school fund of their district, provided that the trustees of districts in making contracts with teachers shall not create a deficiency debt against the board."

In passing upon the connection of this statute with a teacher's contract in a suit wherein the payment of the last month's salary of the teacher would have come from the funds of a subsequent year, the Supreme Court, in the case of *Collier vs. Peacock*, 93 Texas, 255, uses this language:

"They (the board) could not contract debts in the employment of teachers to an amount greater than the school fund apportioned to that district for that scholastic year. This limitation upon the power of the trustees in making the contract with teachers necessarily limit the payment of debts that might be contracted to the amount of the fund which belonged to the district for that year, and any debt contracted greater than that would be a violation of the law and constitute no claim against the district. *The sum appropriated being known* and the number of schools determined, the length of the term to be taught would fix with certainty the price to be paid to the teachers, *and no one need be misled about it*. The trustees were authorized to expend the sum set aside for the district, but not empowered to contract a debt against the funds of future years."

It will be noted that the reasoning of the court in that case cannot apply to the present case, and the Legislature could not have meant it to apply, for the reason that the special act specifically sets out that the revenues of the board for any year will have to be *estimated* in advance, and the sum cannot be known, as was suggested in the *Collier* case. It will also be noted that this general law is applicable only to teachers' contracts, because the stipulation against the excess expenditure applies only to teachers' contracts. It might not have applied as against other contractual obligations.

We suggest this further consideration—at the time the teachers' alleged contracts were entered into an expenditure of approximately \$1,400,000 to cover them was involved. Other than these alleged contracts the board had made no contracts at that time, so far as the record

shows. The estimated revenues for the year were approximately \$1,900,000, which left, at the time the teachers' claimed contracts were made, about one-half million dollars for these other purposes. Therefore, at that time the board did not incur obligations exceeding the estimated income, and did not violate this inhibition, as the revenues were sufficient to take care of this item. We hardly think it can be said that these contracts, if valid when made, later became invalid, because the board took on additional obligations which exceeded the amount of its revenues. We think it must necessarily have been the later contracts, increasing the aggregate expenditures to an amount larger than the estimated income, which were invalid, if any of them were invalid. The board had a right to contract with teachers. Necessarily the teachers had a right to contract with the board. If this be given the dignity of a contract the making of same was clearly within the charter powers of the board. If once in effect, it continued in effect, and the board could not abrogate it by later appropriating to other purposes money which they would have used in paying these obligations.

The language of your special act is pointedly different from any corresponding language of the general law on this feature of your inquiry, and fairly applying the rules of construction just mentioned, it seems to us only reasonable to say that the Legislature intended that your large and important district should not be hampered with restrictions as inelastic as those imposed by law and decisions upon smaller districts whose affairs are naturally much less complex.

We assume from your letter that there are funds on hand sufficient to pay these drafts. There are intimations in the records before us that these moneys represent an operating surplus brought over from the year 1923-1924, and if this be true, the board, even if operating under the general law, would have the right to use them to pay these claims. And again, inasmuch as the validity of these claims has heretofore been denied by the board, and an agreement to pay them has only this year been made, it might reasonably be held that the debts are current obligations for the school year just closing, and that current revenues are applicable to the payment thereof.

But aside from these considerations, the special act creating the district invests the board with larger powers and wider latitudes of discretionary action than does any other act of which we have knowledge. We have quoted Section 27 before in this letter, and your attention is again called to its provisions. Of particular significance is this language:

"But the board shall make provisions by taxation *or otherwise* for the payment of any or all indebtedness due by it."

This provision is mandatory. The board has concluded that these claims are now debts due by the board. The board is compelled to provide for the payment of the debts of the schools. The board is not limited in the manner in which it makes such provision. It may do so "by taxation *or otherwise*." This is indeed broad language. It vests much power in the board, and trusts greatly in its discretion. But we know of no reason for saying that the Legislature did not mean what it said.

These funds are on hand, and if the board has determined to use



them for this purpose, we believe it to be a lawful exercise of its power.

We trust we have been sufficiently explicit in answering your inquiry.

Respectfully submitted,

R. B. COUSINS, JR.,  
Assistant Attorney General.

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Op. No. 2606, Bk. 61, P. 270.

INDEPENDENT AND COMMON SCHOOL DISTRICTS—CONSOLIDATION, ANNEXATION AND GROUPING OF SCHOOL DISTRICTS—COMPLETE TEXAS STATUTES, 1920, ARTICLES 2817 $\frac{1}{4}$  TO 2817 $\frac{1}{4}$ H—HOUSE BILL NO. 38—THIRTY-NINTH LEGISLATURE.

1. House Bill No. 38 of the Thirty-ninth Legislature does not modify or repeal the consolidation law of the Thirty-sixth Legislature (Articles 2817 $\frac{1}{4}$  to 2817 $\frac{1}{4}$ H, Complete Texas Statutes), which provides for consolidation of school districts by election.

2. School districts consolidated by election under the provisions of Articles 2817 $\frac{1}{4}$  to 2817 $\frac{1}{4}$ H, Complete Texas Statutes, 1920, may participate in another such consolidation by election.

3. School districts consolidated by election under the provisions of Articles 2817 $\frac{1}{4}$  to 2817 $\frac{1}{4}$ H, Complete Texas Statutes, 1920, may be annexed or grouped under the provisions of House Bill No. 38 of the Thirty-ninth Legislature.

4. A rural high school district organized or established under the provisions of House Bill No. 38, Thirty-ninth Legislature, is eligible to receive the \$1000 bonus under the provisions of Section 8 of House Bill No. 100, Thirty-ninth Legislature, provided such rural high school district meets the conditions precedent set forth therein.

5. A consolidated district which has already received a bonus from the State under the provisions of the Rural State Aid Law for consolidation may be eligible to receive another bonus for consolidation by election with another district.

6. The county boards of school trustees do not have the authority to change the boundaries of a consolidated district when the consolidation was effected under election by the provisions of the act of the Thirty-sixth Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, JUNE 29, 1925.

*Mr. S. M. N. Marrs, Superintendent of Public Instruction, Capitol.*

DEAR MR. MARRS: Your letter of recent date addressed to the Attorney General has been referred to me for attention. You write as follows:

"The Thirty-sixth Legislature, Second Called Session, provided for the consolidation of school districts by election,—that is, by a majority vote of the districts interested. The Supreme Court, in the Dover case from Navarro County, held that this act repealed a former act of the Thirty-fourth Legislature which authorized the county board of education to consolidate school districts.

"The Thirty-ninth Legislature at its recent session passed an act (House Bill No. 38, a mimeograph copy of which is attached hereto) authorizing the county board of education (a) to group certain school districts into a rural high school district and (b) to annex certain school districts to other contiguous school districts. Section 13 of this act repeals all laws and parts of law in conflict with its provisions.

"One of the sections of the Rural State Aid Law enacted by the Thirty-ninth Legislature authorizes a grant by the State Superintendent, with the approval of the State Board of Education, of one thousand (\$1000) dollars for each rural consolidation effected during the biennium.

"The following questions have arisen concerning the administration of these acts. I shall, therefore, appreciate your answering these questions:

"(1) Does the Rural High School District Act of the Thirty-ninth Legislature repeal the Consolidation Act of the Thirty-sixth Legislature? If the entire act was not repealed, what provisions of the act are now in force?

"(2) Do the provisions of the later act become cumulative of the provisions of the first act, and provide an additional means of consolidating school districts; or will the provisions of this act be construed as providing for the consolidation of districts for high school purposes and at the same time restricting the act of the Thirty-sixth Legislature to consolidations for elementary school purposes?

"(3) May the status of consolidated districts, created by election as provided for in the act of the Thirty-sixth Legislature, be changed (a) by participation in another consolidation election or (b) by being 'grouped' into a rural high school district or (c) by being 'annexed' to another school district, under the provisions of the act of the Thirty-ninth Legislature?

"(4) Will the consolidation effected under the provisions of the new Rural High School District Law qualify the consolidated districts for the bonus of one thousand dollars authorized in the Rural State Aid Law?"

You later supplemented the above letter by submitting the following additional questions:

"(5) May a consolidated district, which has already received a bonus from the State, under the provisions of the Rural State Aid Law, qualify for another such bonus by another consolidation; that is, by consolidating with another district or districts?

"(6) Does the county board of trustees have the authority to change the boundaries of a consolidated district, when the consolidation was effected by election under the provisions of the act of the Thirty-sixth Legislature?"

A copy of House Bill No. 38, Acts of the Thirty-ninth Legislature, is attached to this opinion and made a part hereof. Upon examination of questions one and two it would seem that it is best to answer them together.

The Consolidation Act of the Thirty-sixth Legislature referred to by you is contained in Articles 2817 $\frac{1}{4}$  to 2817 $\frac{1}{4}$ h, Complete Texas Statutes, 1920. The purpose of the act is shown in Article 2817 $\frac{1}{4}$ , which reads in part 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," etc.

The law then provides that contiguous independent districts may be consolidated with one another and with contiguous common school districts in the same manner as contiguous common school districts are consolidated with one another, as stated in the act. Article 2817 $\frac{1}{4}$ g, Complete Texas Statutes, 1920, provides that the trustees of the consolidated district may recognize or establish certain high schools within the limits of the district. The provision is not mandatory and it is obvious that the purpose of consolidation under the act of the Thirty-sixth Legislature is for general school purposes; that elementary schools must be maintained as provided by Article 2817 $\frac{1}{4}$ f, but that the establishment and maintenance of high schools is left to the discretion of the trustees of such consolidated district.

Section 1 of House Bill No. 38, Thirty-ninth Legislature, clearly shows the purpose of the act by the use of the following language:

“\* \* \* the county board of school trustees shall have the authority to form one or more rural high school districts, by grouping contiguous common school districts having less than four hundred scholastic population and independent school districts having less than one hundred and fifty scholastic population, for the purpose of establishing and operating rural high schools. Provided, also, that the county board may annex one or more common school districts to a common school district having four hundred or more scholastic population or to an independent district having one hundred and fifty or more scholastic population upon the approval of the board of trustees of the common school district having four hundred or more scholastic population, or of the independent district having one hundred and fifty or more scholastic population, as the case may be.”

It would seem that in view of the language of the statute above quoted the establishment and maintenance of high schools in districts created under the provisions of House Bill No. 38 is mandatory.

Your questions one and two are doubtless inspired by the decision of our Supreme Court in the case of Dover Common School District No. 66 vs. County Board of Trustees, Navarro County, 248 S. W., 1062, 112 Texas, 503. This case held that the Consolidation Act of the Thirty-sixth Legislature providing for consolidation by election repealed the former law which gave to the county boards of school trustees the power of consolidation for high school purposes. However, we are of the opinion that the same facts and conditions do not exist in this instance as existed at the time of the holding in the Dover case. In the instance of the Dover case the act of the Thirty-sixth Legislature, which repealed the act of 1915, provided for consolidation by election for general school purposes, and a district so consolidated had the right at its option to establish and maintain a high school. Under the provisions of the act of 1915, which was repealed by the act of the Thirty-sixth Legislature, the county board of school trustees could consolidate for *high school purposes*, and the establishment and maintenance of a high school was mandatory. The act of the Thirty-sixth Legislature, it must be borne in mind, was broader in its terms than the act of 1915, which is repealed. But here such is not true. House Bill No. 38 is not so broad a law as the act of the Thirty-sixth Legislature and gives to the county board the authority to group or annex school districts for *high school purposes*, and gives that power only under certain conditions set forth in the act. If we should hold that House Bill No. 38 repeals the Consolidation Act of the Thirty-eighth Legislature, we would hold that the Legislature intended to prevent any consolidation of two or more common school districts for the purpose of strengthening those districts without the establishment of a high school. We do not believe that this was the intent of our Legislature.

We are of the opinion that House Bill No. 38 does not repeal the Consolidation Act of the Thirty-sixth Legislature; that it does not limit the Consolidation Act of the Thirty-sixth Legislature to consolidation for elementary school purposes only; and that House Bill No. 38 provides a different and an additional method whereby under certain conditions school districts may be grouped, annexed or consolidated (as one may view it) for the purpose of establishing and maintaining high schools and elementary schools.

In subdivision (a) of question three of your letter you ask if a consolidated district, consolidated by election under the act of the Thirty-

sixth Legislature heretofore mentioned, may participate in another consolidation election—we assume, of course, under the provisions of the act of the Thirty-sixth Legislature. We see no reason why this is not permitted under the law. The act of the Thirty-sixth Legislature provides that an election shall be ordered “when any number of contiguous common school districts within this State” so petition. Certainly a consolidated common school district is a common school district. They are amenable to all laws, rules and regulations of common school districts unless otherwise specifically provided. To our mind, the only objection which could be offered would be that the act of the Thirty-sixth Legislature also provides that school districts consolidated by election may be dissolved by an election held for that purpose, which election shall be held in the same manner as the election for consolidation. The right, therefore, is reserved to the voters of the district to maintain the status of the consolidated district so that their right to dissolve such district will be preserved. But if another consolidation election were permitted whereby the consolidated district would be merged with another common school district, then the majority of the qualified property taxpaying voters of such consolidated district would have to vote to so consolidate. Thus, the people to whom was reserved the right to dissolve the consolidated district would have spoken negatively on dissolution by voting affirmatively on the proposition of another consolidation.

You are advised, therefore, that in our opinion a consolidated district consolidated under the provisions of the act of the Thirty-sixth Legislature may participate in another consolidation by election.

Subdivision (b) and (c) of question three of your letter can best be answered together. It might be urged that the people of the consolidated district have reserved the right to dissolve such district and, therefore, the status of the district should not be changed in such a manner as would prevent the exercise of that right. But we have other things to consider. This grouping or annexation is for a different purpose than the original consolidation by election, viz., for the purpose of establishing high schools. Then, too, House Bill No. 38 was passed subsequent to the act of the Thirty-sixth Legislature. But suppose the people of the district should vote to dissolve the consolidated district; as soon as the dissolution had taken place the board of trustees could group them into a rural high school district. We do not see any provision in House Bill No. 38 to exempt consolidated school districts from the provision of such bill.

Therefore you are advised that consolidated districts may be grouped or annexed under the provision of House Bill No. 38 of the Thirty-ninth Legislature.

In question No. 4 of your letter you ask if the consolidations, annexations or groupings perfected under the provisions of the Rural High School District Law of the Thirty-ninth Legislature (H. B. No. 38) will qualify such consolidated districts for the bonus of one thousand dollars authorized in the Rural State Aid Law of the Thirty-ninth Legislature for each “rural consolidation.” Section 8 of House Bill No. 100, Regular Session, Thirty-ninth Legislature, being the Rural State Aid Law, reads as follows:

"Section 8. It is hereby further provided that the sum of one thousand (\$1000) dollars may be granted by the State Superintendent, with the approval of the State Board of Education, for each rural consolidation effected during the biennium ending August 31, 1927, between two or more common school districts, or between an independent school district and one or more common school districts, provided the total scholastic population does not exceed five hundred in such consolidated district; provided such consolidation results in the erection of a rural high school building with not fewer than four teachers, or the addition of at least one room and one teacher, as a consequence of the consolidation, to the high school already provided, and resulting in a school of not fewer than four teachers. This sum shall become available when the building has been erected, or is nearing completion."

We do not believe that the words "rural consolidation" used in this section were used in a technical sense with intent to refer alone to the law of the Thirty-sixth Legislature authorizing consolidation by election. It is our opinion that this phrase was used in its broad, general sense with reference to the bringing together of districts in any lawful manner for the purpose of furthering and promoting the interests of education in rural communities. The provisos attached to Section 8 lend weight to our position, as one of the provisos is that such consolidation, result in the erection of a rural high school—the erection of rural high schools being the primary purpose of House Bill No. 38.

Therefore, you are advised that a rural high school district established and created under the provisions of House Bill No. 38 would be eligible to receive the one thousand dollar bonus provided in Section 8 of the Rural State Aid Law, provided such district met the conditions set out in Section 8 of such law.

We assume that by question five submitted above, you desire to know if a district consolidated by election may be eligible to receive a bonus for consolidation by virtue of having consolidated by election with another school district. We believe that this question should be answered in the affirmative. Having held that consolidated districts may consolidate with another district or districts, it is our opinion that if made in good faith and if not one of a series of consolidations made for the sole purpose of receiving several different bonuses, the second consolidation should be eligible to receive the one thousand dollar bonus under the provision of Section 8 quoted above. However, we think it is within your discretion, under the provisions of Section 8 of the rural aid bill, heretofore quoted, to refuse to grant such one thousand dollar bonus if you believe that the districts were consolidated into the final consolidated district by a series of consolidation elections rather than by consolidating all the component districts of the final consolidated district at elections held at the same time (for the purpose of obtaining several bonuses instead of one).

By question six, above, we take it that you ask the question if the county board of trustees can re-establish a consolidated school district within different metes and bounds without any attempt at changing the class of the district; that is, without attempting to group or annex it under the provisions of House Bill No. 38. We call your attention to a portion of Chapter 13, General Laws, Third Called Session of the Thirty-eighth Legislature, with reference to the dissolution of districts consolidated by election, which reads as follows:

"It is herein further provided that in the same manner as is described in Section 1, such consolidated school districts may be dissolved and the districts

included therein restored to their original status, except that it shall not be necessary to provide for polling places in each of the districts composing such consolidated district."

It is easily discernible that the Legislature intended to reserve and did reserve to the voters of such consolidated district the right to dissolve such consolidated district and to restore each of the component districts thereof to its original status. If it should be held that the county board of school trustees could change or alter the boundary lines of a consolidated school district consolidated by election, how would it be possible to hold an election to dissolve the consolidated district when the district as consolidated no longer existed? The Legislature having plainly spoken and having reserved to the qualified voters of the district the right to dissolve such consolidated district at an election held for that purpose, we believe that such right reserved to the people necessarily carries with it the preservation of the consolidated district in its status as originally consolidated in order that the right so reserved to the people may be exercised. To hold otherwise would be to destroy that right. Therefore, we answer question six in the negative.

Respectfully,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2604, Bk. 60, P. 281.

#### CONSOLIDATION OF SCHOOL DISTRICTS.

1. In the absence of a provision in an act creating an independent school district exempting said district from the operation of the general laws of this State, said district is authorized under Article 2817 $\frac{1}{4}$ , Texas Complete Statutes, 1920, to consolidate with contiguous common school districts.

2. The Love Independent School District is subject to the operation of the general laws of this State and is authorized under Article 2817 $\frac{1}{4}$ , Texas Complete Statutes, 1920, to consolidate with contiguous common school districts.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, May 19, 1925.

In Re: Consolidation Love Independent School District with Common School Districts.

*Hon. H. L. Jordan, County Attorney, Tulia, Texas.*

DEAR SIR: I have given careful consideration to your letter of the 8th instant relative to the consolidation of independent school districts with common school districts, which said letter reads as follows:

Referring to your letter of the 6th of May and the question there quoted, in connection with Rev. St. Art. 2817 $\frac{1}{4}$  of Texas 1920 Statutes, I will say that it is desired to consolidate one or probably two common school districts of Swisher County, lying adjacent to the Love Independent School District, with the said independent school district. That this Love Ind. Sch. District was created by a special act of the Legislature of Texas, to wit: Local and special law of 1921; Acts 37th Leg. 1st C. Sess. Ch. 45 H. Bill 67, page 152.

"Thanking you for an opinion herein, I am,

"Yours truly,

"(Signed)

H. L. JORDAN."

Article 2817 $\frac{1}{4}$ , Texas Complete Statutes, 1920, provides:

"It is herein provided that in the same manner as is described in Section 1, common school districts may be consolidated with contiguous independent school districts, and that when common school districts are so consolidated with an independent school district, the district so created shall be known by the name of the independent school district included therein, and the management of the new district shall be under the existing board of trustees of the independent school district, and that all rights and privileges granted to independent school districts by the laws of this State shall be given to the consolidated independent school districts created under the provisions of this act."

The Love Independent School District was created by special act of the Legislature in 1921. (Acts Thirty-seventh Legislature, First Called Session, Chapter 45, House Bill No. 67.) The control of the schools within the Love Independent School District is vested in a board of trustees composed of three members, it being provided that said board shall be elected as provided by the general laws for the election of trustees in independent school districts incorporated for school purposes only. Section 3 of the act vests said school district with all the rights, powers, privileges and duties of a town or village incorporated under the general laws of the State of Texas for free school purposes only.

The act creating the district contains no provision permitting said district to change its metes and bounds or to consolidate with any other school district. I beg to cite you the case of *Martin vs. Grandview Independent School District*, 265 S. W., 607, wherein the court passed upon the authority of the county board of school trustees, at the instance and request of the board of trustees of the Grandview Independent School District, to add adjacent territory to said district, said Grandview District having been created by special act of the Legislature. In passing upon the question, the court said:

"Appellant contends that the action of the county board of school trustees in enlarging the boundaries of the original district, as defined by the legislative act creating the same, was void, because no express authority therefor was given by the terms of said act. While the enlargement of the boundaries of said independent school district appears to have been suggested and requested by the board of trustees thereof, such enlargement was the act of the county board of school trustees and not the act of the trustees of said district. There is nothing in the act creating said independent school district in terms exempting it from the operation of the general laws of this State. Such action by the board of school trustees seems to have been in accord with the provisions of the statutes. Complete Texas Statutes, 1920, Art. 2866."

It appears that the Supreme Court refused to grant a writ of error in the case above quoted from. In view of this fact, such case must be taken as authority for the proposition that independent school districts created by special acts of the Legislature were subject to the provisions of Article 2866, Complete Texas Statutes, 1920, in the absence of a provision in the acts creating such districts exempting them from the operation of the general laws of the State.

The act creating the Love Independent School District contains no provision exempting said district from the operation of the general laws of this State.

Article 2817 $\frac{1}{4}$ , Texas Complete Statutes, 1920, is a general law applicable to the consolidation of independent school districts with contiguous common school districts and the consolidation of contiguous

common school districts. Its provisions are not restricted to districts created under the general law, but are sufficiently broad to include all independent and common school districts within the State. If the county board of school trustees had authority under Article 2866, Statutes 1920, to add territory to independent school districts created by special acts of the Legislature where the acts creating such districts did not exempt them from the operation of the general law, then it necessarily follows that the provisions of Article 2817½, Statutes 1920, permit the consolidation of common school districts with contiguous independent school districts created by special acts of the Legislature, provided such districts are not exempted by the act creating them from the operation of the general law.

There being no provision in Chapter 45, Acts of the Thirty-seventh Legislature, at its First Called Session, exempting the Love Independent School District from the operation of the general law, you are advised that, in our opinion, said Love Independent School District may be consolidated with contiguous common school districts under the provisions of said Article 2817½, Texas Complete Statutes, 1920.

Yours very truly,

GEO. E. CHRISTIAN,  
Assistant Attorney General.

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Op. No. 2571, Bk. 60. P. 365.

TAXES—DELINQUENT—INDEPENDENT SCHOOL DISTRICTS—LIMITATION.

Suits for the collection of delinquent taxes assessed upon or against real property by an independent school district, that have remained due and unpaid since December 31, 1908, and to foreclose the lien on such land to secure the payment of same, are not barred by any of our limitation statutes.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, October 25, 1924.

*Hon. W. K. Jones, County Attorney, Del Rio, Texas.*

DEAR SIR: The Attorney General is in receipt of yours of the 14th inst., requesting his opinion on the question of whether or not suits for the collection of delinquent taxes assessed upon or against real property by one of your independent school districts, that have remained due and unpaid since December 31, 1908, and to foreclose the lien on such land to secure the payment of same, are barred by any of our statutes of limitation.

The first and original statute of this State providing for the collection by suit of delinquent taxes due and unpaid on real property, and for the foreclosure by court proceedings of the lien on lands to secure the payment of such taxes, was Chapter 42, page 50, General Laws, Regular Session, Twenty-fourth Legislature, approved April 15, 1895. This act was amended by Chapter 103, page 132, General Laws, Regular Session, Twenty-fifth Legislature, passed in 1897. This amendment is a complete act covering the whole subject, repealing "all laws and parts of laws in conflict" with it, and was carried into and constitutes Chapter 15 of Title 126 (Articles 7683 to 7700, inclusive) of



our Revised Civil Statutes of 1911. These acts originated what is denominated in them and subsequent statutes, and what is now known as the Delinquent Tax Record.

Our next statute was the act of 1905, being Chapter 130, page 318, General Laws, Regular Session, Twenty-ninth Legislature. This act appears as Chapter 17 of Title 126 (Articles 7702 to 7715, inclusive) of the Revised Civil Statutes of 1911. Then came the act of 1915, being Chapter 147, page 250, General Laws, Regular Session, Thirty-fourth Legislature, approved April 3, 1915, commonly known as "House Bill 40." Sections 1 and 3 of that act were amended and Section 3a was added by Chapter 64, page 164, General Laws, First and Second Called Sessions, Thirty-sixth Legislature, approved July 28, 1919. Section 1 of that act was again amended, and Section 2 of the same was also amended by Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature, approved May 26, 1923. Said Chapter 13 also amended certain articles of our Revised Civil Statutes of 1911 and added others on this subject, and some of these were again amended by Chapter 21, page 180, General Laws, Third Called Session, Thirty-eighth Legislature, approved June 21, 1923.

These statutes quite plainly require the preparation or compilation of a record showing all delinquent State and county taxes against each separately assessed tract of land in each county in this State for each and every year, and all years, since December 31, 1885, and the supplementing of such record from year to year, thus affording at all times a complete record of all such delinquent taxes. They also plainly require that through the tax collector an official notice in writing be given each year to the record owner of each such tract of land of the amount of all delinquent taxes which at the time such notice is given remain unpaid against same as shown by such record and supplements, that is, all such taxes remaining unpaid since December 31, 1885, which notice is required to state that if such taxes are not paid within thirty days from the date of such notice, suit will be instituted to enforce payment of same and to foreclose the lien on such land securing payment thereof. Not only so, but these statutes just as plainly make it the duty of the county attorney, or district attorney of counties having no county attorney, to institute such suits, under penalty of fine and forfeiture of his office, "for the *total amount* of taxes, interest, penalty and costs that have remained unpaid for all years since the 31st day of December, 1908," and to "pray for judgment for the payment of *the several amounts* so specified" in such notices by the tax collector and "shown to be due and unpaid by the *Delinquent Tax Records* of said county." These duties are clearly enjoined upon these officers and are plain and unambiguous.

Said Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature, added to our Revised Civil Statutes of 1911 Article 7689a, which reads as follows:

"That there shall be no defense to a suit for collection of delinquent taxes, as provided for in this act, except the following, to-wit:

"First. That the defendant was not the owner of the land at the time the suit was filed;

"Second. That the taxes sued for have been paid; or

"Third. That the taxes sued for are in excess of the limit allowed by law; but this defense shall apply only to such excess."

Meantime, there had been enacted Chapter 3, page 6, General Laws, First Called Session, Twenty-fourth Legislature, approved October 9, 1895, entitled "An Act to prevent delinquent taxpayers from pleading the statute of limitation by way of defense against the payment of any taxes due from him or her, either to the State or any county, city or town." This act now appears as Article 7662 of our Revised Civil Statutes of 1911, and reads as follows:

"No delinquent taxpayer shall have the right to plead in any court or in any manner rely upon any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the State or any county, city or town."

These various statutes, of course, are "for the purpose of collecting delinquent State and county taxes" against real property; that is, whatever other delinquent taxes they may be applicable to, they are at least for that purpose, and in view of them, particularly Articles 7662 and 7689a, it is plain that none of our limitation statutes are available as a defense or bar to the recovery by suit of such taxes, and to foreclose the lien securing payment of same.

This being true, it must follow by reason of Article 7699 of our Revised Civil Statutes of 1911, as amended by said Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature, that none of our limitation statutes are available as a defense or bar to the recovery by suit of independent school district taxes, and to foreclose the lien securing payment of same. This article contains, among others, this provision:

"All laws of the State of Texas for the purpose of collecting delinquent State and county taxes are by this act made available for, and when invoked shall be applied to, the collection of delinquent taxes of cities and towns and independent school districts in so far as such laws are applicable."

The evident purpose and effect of this provision is to make applicable to delinquent independent school district taxes against real property, all laws of the State that are "for the purpose of collecting delinquent State and county taxes" against such property, and since our statutes for that purpose expressly provide that no statute of limitation shall be available as a defense or bar to suits brought to enforce the payment of delinquent State and county taxes against real property, and to foreclose the lien securing payment of same, it must follow that no statute of limitation can be available as a defense or bar to suits brought to enforce the payment of delinquent independent school district taxes against such property and to foreclose the lien securing payment of same.

It will also be noted that our delinquent tax statutes require such suits to be brought "for the *total amount* of taxes, interest, penalty and costs that have remained unpaid *for all years since the 31st day of December, 1908.*" At the time that act was passed, it thus expressly required such suits to cover or include a period of fifteen years antedating its passage, and this period of time is being extended from year to year as time goes on. It is not plausible to say that the Legislature would enjoin this expressly mandatory duty upon county and district attorneys and at the same time pass, or in the face of, a statute barring by limitation the recovery by such suits of all taxes that had remained

unpaid for two years, or four years, or for any period of time less than as far back as December 31, 1908. This might also be said as to other duties enjoined upon other officers under these statutes. This and other provisions of these statutes preclude, it seems to us, aside from Articles 7662 and 7689a, the applicability of any of our limitation statutes to such suits.

We have considered the case of *Texas & Pacific Ry. Co. vs. Ward County Irrigation District No. 1*, 257 S. W., 333, decided November 22, 1923, by our El Paso Court of Civil Appeals, holding that the collection by suit of delinquent taxes of an irrigation district is barred under our general limitation statutes, but it is our view that neither the holding in that case nor the reasoning upon which it is based is applicable to suits brought to enforce the payment of delinquent independent school district taxes assessed against lands, and to foreclose the lien on such lands to secure the payment of same.

You are advised, therefore, that in our opinion suits for the collection of delinquent taxes assessed upon or against real property by an independent school district, that have remained due and unpaid since December 31, 1908, and to foreclose the lien on such land to secure the payment of same, are not barred by any of our limitation statutes.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2600, Bk. 60, P. 288.

STATUTES—SENATE BILL 298—SENATE BILL 192.

1. Where two bills dealing with the same subject matter are in process of enactment at the same time and are to become effective at the same time, both bills must be regarded as expressing the intent of the Legislature and, if possible, must be so construed as not to conflict with one another.

2. Section 1 of Senate Bill 298 and Section 2 of Senate Bill 192 are not in conflict.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 25, 1925.

*Mr. S. M. N. Marrs, State Superintendent, Austin, Texas.*

DEAR MR. MARRS: Your letter of April 16th addressed to the Attorney General has been referred to me for attention. You write as follows:

"Senate Bill No. 192 enacted into law by the Thirty-ninth Legislature provides in Section 2 of the said bill that any person who has been engaged in teaching a special subject in the public schools for a period of four years, and who has been employed to teach the said subject during the last three years prior to September 1, 1925, shall be exempt from the requirement to hold a teacher's special certificate so long as he or she continues to be employed to teach the same subject; provided that any person who has been engaged in the teaching of music or writing and drawing in the public schools of Texas for ten years shall be exempt from the present law and be given a life certificate in that subject.

"Section 1, Senate Bill No. 298, which was passed by the Thirty-ninth Legislature, provides that when a teacher of a special subject has been for ten years engaged in teaching that subject in a city or town of 2000 inhabitants or more, the board of trustees of a public school situated in a town or city of

2000 inhabitants or more shall have the right to employ such teacher, though such teacher has no certificate.

"Both of these bills, as stated above, were enacted into law, and being ninety-day bills, became effective ninety days after the adjournment of the Legislature. Senate Bill No. 192 was finally passed on March 12th, approved April 2d. Senate Bill No. 298 was finally passed on March 18th, approved March 28th and filed in the office of the Secretary of State on March 28th.

"The provisions of the two sections recited above appear to be in conflict, and the question has arisen in this Department as to which of the two was the final expression of the legislative will. I am therefore submitting to you the question as to whether or not the two sections are in conflict, and if so, which is the present law on this subject."

Section 2 of Senate Bill 192 reads as follows:

"Any person who has been engaged in teaching a special subject in the public schools for a period of four years and who has been employed to teach the said special subject during the last three years prior to September 1, 1925, shall be exempt from the requirement to hold a teacher's special certificate so long as he or she continues to be employed to teach the same subject; provided that any person who has been engaged in the teaching of music or writing and drawing in the public schools of Texas for ten years shall be exempt from the present law and be given a life certificate in that subject."

Section 1 of Senate Bill 298 reads as follows:

"That when a teacher of a special subject has been for ten years engaged in teaching that subject in a city or town of two thousand inhabitants or more the board of trustees of a public school situated in a town or city of two thousand inhabitants or more shall have the right to employ such teacher though such teacher has no certificate."

These are the sections of the two bills which you believe may conflict. I have not quoted from the caption of either bill, as they do not seem to throw any light on the question at hand.

There is no more well grounded rule of construction than that every act, and every section of an act of the Legislature must be presumed to have some meaning. As you state in your letter, the bills in question, both become effective ninety days after the adjournment of the Thirty-ninth Legislature. It is also a sound rule, adhered to by the courts of every jurisdiction, that all laws should be so construed, if possible, in such manner that they will not conflict with one another; and especially do we think this rule should be applied in such an instance as this, where the bills or laws to be construed, and between which you state there seems to be an apparent conflict, were in the process of enactment at the same time, and will become effective and be in force at the same time, unless either or both of such bills or laws should be void in whole or in part. Applying the principles outlined above, specifically bearing in mind that these bills were enacted into laws almost simultaneously, and therefore together represent the aim and intention of the Legislature, we believe that the two sections in question—Section 1 of Senate Bill 298 and Section 2 of Senate Bill 192—can be reconciled.

It will be noted that Section 2 of Senate Bill 192 provides that any person who has been engaged in teaching a special subject in the public schools of the State of Texas for a period of four years and who has been employed to teach such special subject during the last

three years prior to September 1, 1925, shall be exempt from the requirement to hold a teacher's special certificate so long as he or she continues to be employed to teach the same subject.

Section 1 of Senate Bill 298 provides that the teacher of a special subject who has taught such special subject for ten years or more in the public schools of a city or town of two thousand or more inhabitants may be employed by the board of trustees of a public school situated in a city or town of two thousand or more inhabitants, though such teacher has no certificate.

Section 2 of Senate Bill 192 applies to all public free schools in the State, and by the provisions thereof any teacher who has taught a special subject in any public free school in the State for four years, including the three years prior to September 1, 1925, may continue to teach such special subject in any public free school in the State of Texas without the necessity of such teacher holding a special certificate. This section needs no further explanation, and, as before said, any teacher coming within its terms may continue to teach, without a special certificate, such special subject in any public school.

We now come to Section 1 of Senate Bill 298. This section does not repeal or modify any of the provisions of Section 2 of Senate Bill 192. It is merely an additional method by which teachers may secure permission to teach a special subject in the public free schools of cities and towns of two thousand or more inhabitants. Section 1 of Senate Bill 298 does not require such teacher to have taught for three years next preceding September 1, 1925, and in fact makes no requirement whatever with regard to continuous experience; but it does provide that if a teacher of a special subject has taught a special subject for ten years in a city or town of two thousand or more inhabitants, he or she will be permitted to teach without a certificate in a city or town of such population.

Thus we see that in cities or towns of two thousand or more inhabitants there are two methods by which a teacher of a special subject may teach without a certificate; first, by having taught such special subject in any public school for four years, including the three years next preceding September 1, 1925; second, by having taught a special subject in the schools of a city or town of two thousand or more inhabitants for ten years or more.

The last part of Section 2 of Senate Bill 192, which refers to persons engaged in teaching music or writing and drawing, could not conflict with Section 1 of Senate Bill 298, as the ten-year requirement is the same in both instances, and as Section 2 of Senate Bill 192 provides that such party shall be given a life certificate in the particular subject which he or she has taught, he or she would be eligible to teach in any school in the State.

Therefore, it is our view that these bills are not in conflict; that Section 2 of Senate Bill 192 applies to all the public free schools of the State; and that Section 1 of Senate Bill 298 simply provides a method, in addition to the method provided in Section 2 of Senate Bill 192, by which the schools of cities and towns of two thousand or more inhabitants may employ teachers to teach a special subject without such teacher holding a certificate to teach such special subject.

Obviously, it is unnecessary to make reply to your second inquiry.

Very truly yours,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2594, Bk. 60, P. 134.

STATE SUPERINTENDENT—POWERS AND DUTIES—ENFORCEMENT OF RULINGS.

When an independent school district refuses to recognize its liability to the county for its pro rata part of the expense of administering the school affairs of the county, the State Superintendent of Public Instruction, as a condition precedent to the district's receiving its share of the Available School Fund, cannot require that such district recognize and pay such liability to the county.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 25, 1925.

*Hon. S. M. N. Marrs, State Superintendent, Austin, Texas.*

DEAR SIR: Your letter of March 19th has been received by this Department and referred to me for attention. You write as follows:

"We have on file in this office an opinion from the Attorney General's Department to the effect that independent school districts having fewer than five hundred scholastics are under the supervision of the county superintendent of schools and should share in the payment of the expense of administration of school affairs in the county. Following that opinion, this Department has held that the League City Independent School District in Galveston County is under legal obligation to pay to the County of Galveston its pro rata share of the expense of administering the public free schools of the county as based upon the total number of children of scholastic age that are under the supervision of the county superintendent. The trustees of the League City Independent School District have failed and refused to recognize this obligation and at the request of the County Superintendent of Galveston County, the apportionment of the State Available School Fund due the League City Independent School District has been withheld by this Department pending the settlement of this claim.

"The Board of Trustees of the League City Independent School District deny the validity of this claim and raise the question that if the claim be valid the County of Galveston has a remedy at law by bringing suit against the Board of Trustees of the League City Independent School District. It is possible that this contention is technically correct, but this Department has always taken the position that if litigation can be avoided by administrative ruling the final result is better for the schools of the State. With this explanation, at the request of the Board of Trustees of the League City Independent School District, I am submitting the following question:

"In order to enforce the ruling of the State Department of Education and a compliance with the statute as interpreted by the Attorney General, can the State Superintendent lawfully withhold the State Available School Fund due the League City Independent School District until the claim of the County of Galveston is paid?"

In this connection it is well to note that the duty rests upon you to transmit to the treasurer of each school district or county of the State a warrant representing the proportionate share of the State Available School Fund, due each such district or county. This duty is imposed upon you by virtue of Article 4520, Revised Statutes of 1911, which reads as follows:

"Art. 4520. *Shall disburse warrants drawn by Comptroller.*—He shall receive from the State Treasurer all warrants drawn by the Comptroller in favor of the treasurer of the available school fund of each county, city or town, and each school district having control of its public school, and shall transmit such warrants to the respective treasurers in favor of whom they are drawn."

The chief powers of your office are reflected in Revised Statutes, 1911, Articles 4510 and 4511, which read as follows:

"Article 4510. *General duties.*—The superintendent of public instruction shall be charged with the administration of the school laws and a general superintendency of the business relating to the public schools of the State. He shall hear and determine all appeals from the rulings of the decisions of subordinate school officers, and all such officers and teachers shall conform to his decisions, unless they are reversed by the State Board of Education. He shall prescribe suitable forms for reports required of subordinate school officers and teachers, and blanks for their guidance in transacting their official business and conducting public schools, and shall, from time to time, prepare and transmit to them such instructions as he may deem necessary for the faithful and efficient execution of the school laws, and by whatsoever is so communicated to them, shall they be bound to govern themselves in the discharge of their official duties. He shall examine and approve all accounts of whatsoever kind against the school fund that are to be paid by the State Treasurer, and, upon such approval, the Comptroller shall be authorized to draw his warrant.

"Art. 4511. *Instructions binding.*—The State Superintendent shall advise and counsel with the school officers of the counties, cities and towns and school districts as to the best methods of conducting the public schools, and shall be empowered to issue instructions and regulations, binding for observance on all officers and teachers in all cases wherein the provisions of the school law may require interpretation in order to carry out the designs expressed therein, also in cases that may arise in which the law has made no provision, and where necessity requires some rule in order that there may be no hardships to individuals, and no delays or inconvenience in the management of school affairs."

Nowhere in the statutes do we find a provision relative to the exercise of discretion on your part in the payment to each district of its pro rata part of the available fund; and where all conditions precedent with reference to the payment of the funds themselves have been met, it then becomes your duty to pay over the funds irrespective of other contentions disconnected from the payment of such available funds. We understand that there is no controversy in this matter with reference to any conditions precedent, such as the giving of a depository bond and the like.

It is the duty of the district to pay its lawful debts. The statute provides that school districts may sue and be sued, and thereby provides a remedy for the enforcement of all lawful obligations of such district. It is also well to note that the payment of that part of the Available School Fund due to the League City Independent School District is an entirely separate and independent transaction from the payment by the League City Independent School District of an alleged obligation to the County of Galveston. There is no connection between the two, except that possibly a part of the available fund so paid would be used to discharge the alleged liability of the League City Independent School District to the County of Galveston.

The League City Independent School District is evidently seeking to have its day in court in order to determine by a judicial proceeding whether or not it is liable to the county as heretofore mentioned. If it so desires, this district is entitled to its day in court, and we do not believe that the law vests or contemplated vesting in any person

the authority or the power to defeat its right to a day in court. You would in fact be depriving this district of this right if you should force it, in order for it to obtain its portion of the Available School Fund, to discharge, without a judicial decision, its alleged liability to the County of Galveston.

While you are doubtless charged, as Superintendent of the Public Free School System of the State of Texas, with the general administration and conduct of the public free school system as a whole, and while appeals must be taken to and through you on certain matters, we find no expression in the law authorizing you to enforce your rulings in such matters by withholding funds or refusing to take other acts or discharge other duties imposed upon you by law, which further acts and duties and payment of funds are entirely separate and distinct transactions from the matter affected by the ruling which you are seeking to enforce. We do not deem it necessary to discuss the extent of the power and authority granted you by Articles 4510 and 4511, Revised Statutes, 1911, other than to say that we believe that in this instance and under these circumstances such statutes do not confer upon you the authority to withhold these funds. You understand that we do not say that under no circumstances would you be without authority to withhold a district's pro rata part of the available fund, but only that in this instance and for the purpose stated, you are not warranted in withholding the funds.

Summing up, you are advised that we do not believe that this withholding of the funds heretofore mentioned, under the conditions and for the purposes which you suggest, would come within the general powers of your office as defined by the statutes; neither do we find an express grant of such power to you as State Superintendent. Therefore, we answer your question in the negative.

Respectfully submitted,

WEAVER MOORE,  
Assistant Attorney General.

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Op. No. 2563, Bk. 60, P. 339.

TAXATION—SHARES OF BANK STOCK—DETERMINING VALUE OF.

In the assessment of shares of bank stock for State and county taxes there should be deducted from the actual cash value of same the assessed value for the current years of all lands in this State owned by the bank and subject to taxation for State and county taxes against it for the current year, irrespective of the county in which such lands may be situated, and such shares should be assessed for such taxes in the county in which the bank is situated, and in the names of the respective owners of same, only at the difference between such actual cash value and such assessed value of such lands, but not at a greater percentage of their value than the percentage of value at which such taxes are assessed in said county against other property.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 19, 1924.

*Hon. Rube S. Wells, County Attorney, Cooper, Texas.*

DEAR SIR: In yours of the 8th inst., you request the advice of the Attorney General on the following:



Where a bank located in Cooper, Delta County, Texas, owns land in another county, should the assessed value of such land be deducted from the actual cash value of the shares of capital stock of such bank in arriving at the value of such shares for taxation for State and county taxes?

All real property in this State owned by a bank on the first day of January of any year and subject to taxation for that year should be listed or rendered for State and county taxes for such year by the bank so owning same, and such taxes should be assessed upon such land in the name of and against the bank. No other property belonging to a bank, nor its shares of capital stock, should be listed or rendered by nor assessed for State and county taxes as against the bank. Shares of bank stock should be listed or rendered by and assessed for State and county taxes in the names of the respective owners of same. R. C. S., 1911, Arts. 7521 and 7522; *Engelke vs. Schlenker*, 75 Texas, 559, 12 S. W., 999; *Waco Nat. Bank vs. Rogers*, 51 Texas, 606; *First Nat. Bank vs. City of Lampasas* (Crt. of Civ. App.), 78 S. W., 42; *City of Marshall vs. State Bank of Marshall* (Crt. of Civ. App.), 127 S. W., 1083; Report and Opinions of Attorney General, 1916-1918, p. 173.

Under certain provisions of our Constitution and statutes land subject to taxation must be assessed for State and county taxes, and such taxes must be paid on same, in the county in which the land lies. Land owned by a bank, therefore, must be assessed and the taxes paid on same, including both State and county taxes, in the county in which the land lies, irrespective of the location of the bank owning same.

It is provided by statute, however, that shares of bank stock shall be assessed in the county in which the bank is situated, and that "each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its (the bank's) real estate is assessed." Your inquiry presents the sole question of whether or not lands lying in a county other than that in which the bank is situated, and subject to taxation for State and county taxes against the bank for the current year, are included in this statute. We think they are as to the assessment of State and county taxes.

This statute is evidently applicable to the assessment of shares of bank stock for State taxes. Otherwise there would be an assessment for State taxes against the shares of bank stock in the county in which the bank is situated at a valuation that would include the value of land against which State taxes were assessed in another county. In a strictly legal sense this might not constitute double taxation, but it is evidently what this statute was designed to avoid. This being true, and since under our system of taxation there cannot be one valuation placed upon property, including, of course, shares of bank stock, for the assessment of State taxes and another valuation placed upon the same property for the assessment of county taxes, it follows that this statute must be applied in the assessment of shares of bank stock for county taxes even though the land in question lies in some county other than that in which the bank is situated. Otherwise shares of bank stock in such cases would be assessed for county taxes at one valuation and for State taxes at another valuation, which is not permissible.

It is true that in such cases this will operate to deprive the county in which the bank is situated of taxes on the shares of capital stock

of such bank to the extent of the assessed value of lands owned by the bank and lying in some other county or counties, but bearing in mind the status of counties and their relation to the State, including their lack of inherent taxing power, we do not understand that this is sufficient within itself to exclude lands so situated from the operation of this statute.

It is also true that the statute provides no method for the officers of the county in which a bank is situated to obtain information concerning the assessed values placed upon lands situated in another county, but this is not material. The information is available and may be obtained in such matter as such officers may determine.

You are advised, therefore, that in the assessment of shares of bank stock for State and county taxes there should be deducted from the actual cash value of same the assessed value for the current year of all lands in this State owned by the bank and subject to taxation for State and county taxes against it for the current year, irrespective of the county in which such lands may be situated, and that such shares should be assessed for such taxes in the county in which the bank is situated, and in the names of the respective owners of same, only at the difference between such actual cash value and such assessed value of such lands, but not at a greater percentage of their value than the percentage of value at which such taxes are assessed in said county against other property.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2577, Bk. 60, P. 343.

TAXES—BANKRUPT ESTATES—PAYMENT OF.

All State, county, district and municipal taxes legally assessed against a bankrupt on his property prior to the institution of bankruptcy proceedings, or against the bankrupt estate pending bankruptcy proceedings, should be paid out of funds belonging to the bankrupt estate, and "in advance of the payment of dividends to creditors," to the extent of available funds for that purpose.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 25, 1924.

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

DEAR SIR: The Attorney General is in receipt of certain inquiries from you and certain county attorneys in this State concerning the payment of taxes assessed against property that is being administered by a bankruptcy court, and the following is in reply to same:

Payment of taxes properly assessed against property that is being administered by a bankruptcy court is provided for and required by Section 64(a) of the Bankruptcy Act, which reads:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

That such taxes are payable out of bankrupt estates "in advance of the payment of dividends to creditors" is not only thus plainly required by statute, but the bankruptcy statutes have been uniformly so construed and applied by the inferior Federal courts in a great number of cases, particular reference being made to *In re F. G. Borden Company* (No. 2820, C. C. A., 7th Dist., 1921), 275 Fed., 782, and in *New Jersey vs. Anderson*, 203 U. S., 483, it is said:

"An argument is made as to the alleged injustice of this requirement, in that it may take away from the local creditors in the State where the property of the corporation is situated practically all the assets of the corporation in favor of the State where the corporation is organized, but has no business or property. And it is urged that to permit a State under such circumstances to have a preference in the payment of taxes would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress."

This statute is applicable, it seems, even where such taxes have remained unpaid for such a length of time and have accumulated to such an extent that the payment of them may consume the bankrupt estate to the total exclusion of other claims. This not only seems evident from the statutes themselves, and is not only deducible from numerous Federal court cases, including *New Jersey vs. Anderson*, *supra*, but it was so held in the matter of *In re Weissman* (No. 2354, D. C. D. Conn., 1910), 178 Fed., 115. Also, since property in the custody of a bankruptcy court, and not exempt from taxation, is nevertheless subject to taxation as other property, and since it is not otherwise provided by statute, it follows that this statute requiring priority of payment of taxes applies as well to the payment of taxes assessed pending bankruptcy proceedings as to taxes assessed prior thereto, and it has been expressly so held in a number of Federal court cases. As illustrative of this holding we quote from *In re Prince*, (D. C. M. D. Penn., 1904), 131 Fed., 546, as follows:

"The taxes for 1902 stand somewhat differently. They were not due and owing by the bankrupts at the time of their bankruptcy, but have accrued since the proceedings were instituted, and do not, therefore, fall within the strict letter of the law. But the bankruptcy act does not withdraw the estate of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of trustees, the same as if they were not. *Swarts vs. Hammer*, 120 Fed., 256, 56 C. C. A., 92, affirmed, 194 U. S., 91, 24 Sup. Ct., 695, 48 L. Ed., 1060; *City of Waco vs. Bryan* (C. C. A.), 127 Fed., 79; *In re Sims* (D. C.), 118 Fed., 356; *In re Conhaim*, 4 Am. Bankr. Rep., 59, 100 Fed., 268; *In re Keller*, 6 Am. Bankr. Rep., 356, 109 Fed., 131. Even though accruing after bankruptcy, they must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. They are equally important to the municipalities to which they are due, whenever assessed, and the obligation of the property to respond is logically no different or greater at the one time than at the other. The same reasons existing in both cases, it must be assumed that no distinction was intended to be made between them."

This right of priority of payment applies also to taxes assessed prior to but not becoming actually due or payable until after the institution of the bankruptcy proceedings, as is held in *New Jersey vs. Anderson*, 203 U. S., 483, and *In re Flinn* (D. C. Mass., 1905), 134 Fed., 145.

It has also been held that taxes assessed prior to the bankruptcy proceedings against the homestead of other property exempt from forced sale for ordinary debts under State laws, and, therefore, likewise exempt under the Bankruptcy Act, are likewise payable out of the general bankrupt estate. In *re Tilden* (D. C. S. D. Ia., 1899), 91 Fed., 500. We also note that in *Dayton vs. Stanard*, 241 U. S., 588, the contention there made that the taxes against particular tracts of land were payable only from the proceeds of the sale of those tracts was held against, the court saying:

"The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well."

In *re Keller* (D. C. N. D. Ia., 1901), 109 Fed., 131, involved the payment of taxes on a stock of goods or merchandise that had been sold by a bankruptcy trustee "free and clear from all liens" at a time when the payment of the taxes in question was secured under State laws by a lien on such goods, and the court ruled that the taxes should be paid by the bankruptcy trustee out of the bankrupt property remaining on hand. In *re Gerry* (D. C. E. D. Penn., 1902), 112 Fed., 958, holds that one purchasing property from a bankrupt estate "under and subject to the several encumbrances on said property," specifying among such encumbrances "unpaid taxes," and who thereupon paid such taxes, is not entitled to be reimbursed therefor out of the bankrupt estate, and In *re Holfels* (D. C. M. D. Ia., 1899), 94 Fed., 629, is to this same effect; and the former intimates that if such taxes had not been so paid, the trustee would, nevertheless, be relieved of paying same, but this question was not involved and it is doubtful if such a holding would be sound. In *re Stacker* (D. C. W. D. N. Y., 1903), 123 Fed., 961, had to do with the claim by a city for taxes against certain land secured by a lien thereon, the land having been acquired by a third party under foreclosure directing payment of taxes and assessments out of the purchase price. In reference to this claim the court said:

"If they are unpaid, the city, by its lien, which still remains, if the property was sold subject thereto, is secured; and the city is not equitably entitled to a priority of payment from the bankrupt estate where the premises subject to taxes are owned by third parties, who purchased the same subject to taxes."

That exact question, however, was not involved, and the case further rested on peculiar facts and involved certain State statutes of New York and the construction of them by the courts of that State, and we doubt if this is a correct statement of the law applicable to a similar claim in this State; that is, we doubt if the purchase from the trustee of a bankrupt property in this State subject to taxes against same, or upon the assumption by such purchaser of the payment of such taxes, even though payment of same be secured by a statutory lien on the property, would, if such taxes were not in fact paid, affect the right of the State or other taxing area or unit to have such taxes paid out of the bankrupt estate "in advance of the payment of dividends to creditors," since the State or such taxing area or unit would in no sense be a party to such transaction.

*City of Waco vs. Bryan* (C. C. A., 5th Cir., 1904), 127 Fed., 79, holds that this right of priority payment must be accorded taxes against

the bankrupt even on property that may never have come into the hands of the trustee. That was a claim by the city for taxes against real property that under a lien foreclosure had passed into the hands of the lienholder prior to the institution of the bankruptcy proceedings, such taxes, however, having been properly assessed against said property prior to the lien foreclosure.

In *City of Chattanooga vs. Hill* (C. C. A., 6th Cir., 1905), 139 Fed., 600, it is held that it is the duty of the trustee to pay from the balance of the estate remaining in his hands taxes against other mortgaged real and personal property of the bankrupt that with the consent of the court had been relinquished by the trustee to the mortgagees.

There are other cases decided by the Federal courts construing and applying this statute in respect to other facts and circumstances, but we have noted here a sufficient number of cases to indicate the general trend of decisions on this subject.

You are advised, therefore, that all State, county, district and municipal taxes legally assessed against a bankrupt or his property prior to the institution of bankruptcy proceedings, or against the bankrupt estate pending bankruptcy proceedings, should be paid out of funds belonging to the bankrupt estate, and "in advance of the payment of dividends to creditors," to the extent of available funds for that purpose.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2578, Bk. 60, P. 349.

TAXES—BANKRUPT ESTATES—DELINQUENT—INTEREST—PAYMENT OF.

All State, county, district and municipal taxes legally assessed against a bankrupt or his property prior to the institution of bankruptcy proceedings, or against the bankrupt estate pending bankruptcy proceedings, upon becoming delinquent, bear interest therefrom at the rate of six per cent per annum until paid, and such interest, like the taxes themselves, and as under Section 64(a) of the Bankruptcy Act, should be paid from the bankrupt estate "in advance of the payment of dividends to creditors," to the extent of funds available for that purpose.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 1, 1924.

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

DEAR SIR: The Attorney General is in receipt of certain inquiries from you and certain county attorneys in this State concerning the payment of interest on taxes assessed against a bankrupt or his property prior to the institution of bankruptcy proceedings, or against the property of a bankrupt estate pending bankruptcy proceedings, upon such taxes becoming delinquent, and the following is in reply to same.

In *re Ajax Dress Company* (C. C. A., 2nd Cir., 1923), 290 Fed., 950, involved a claim in bankruptcy by the State of New York for a tax and additional charges in respect thereto under a statute of that State which provided that, "For the privilege of exercising its franchise in this State, in a corporate or organized capacity every domestic corporation \* \* \* shall annually pay in advance for the year beginning November first \* \* \* an annual franchise tax, to be computed by the tax commis-

sion upon the basis of its entire net income for its fiscal or calendar year next preceding," and which further provided that if such tax should not be paid by the first day of the following January there should thereupon accrue and be paid, "in addition to the amount of such tax, \* \* \* ten per centum of such amount, plus one per centum for each month the tax \* \* \* remains unpaid." The Circuit Court of Appeals ordered payment of the tax with interest thereon at the rate of six per cent per annum, but refused to allow either the additional sum of ten per cent or interest at the statutory rate. The State took the question to the Supreme Court, where it contended for the ten per cent as well as for interest at the statutory rate, insisting that it was entitled at least to interest at that rate or no interest at all. The action of the Circuit Court of Appeals was affirmed, however, by the Supreme Court (*People of the State of New York vs. Jersawit, Trustee in Bankruptcy of Ajax Dress Company, Incorporated*, 263 U. S., 493), the court saying:

"There can be no doubt that the additional ten per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, Sec. 57j, but it is urged that the one per centum for each month of default is statutory interest and that the State is entitled to that and otherwise would be entitled to none. As the one per centum is more than the value of the use of the money and is added by the statute to the ten to make a single sum it must be treated as part of one corpus and must fall with that. We presume that in this event the State does not object to receiving the simple interest allowed. That part of the order will stand."

In *re Ashland Emery & Corundum Company* (D. C. D. Mass., 1916), 229 Fed., 827, refused to allow in a bankruptcy proceeding the charge of one per cent a month which had accrued under a State statute which provided, as to a corporate franchise tax, that "If the tax of any company remains unpaid on the first day of July, after the same becomes due, the same shall thenceforth bear interest at the rate of one per centum for each month until paid," the refusal being upon the ground that this charge, although denominated "interest" by the statute, being "double the statutory interest rate and almost double the highest rate of interest which national banks are allowed to charge under United States statutes," was a "penalty" and not "interest," but "interest" was nevertheless allowed at the rate of six per cent per annum.

To this same effect is *In re J. Menist & Co.* (C. C. A., 2nd Cir., 1923), 920 Fed., 947, also a bankruptcy proceeding, wherein, upon the theory that it was a "penalty" within the provisions of Section 57(j) of the Bankrupt Act, a statute of the United States requiring the payment of "interest at the rate of one per centum per month" on an income tax remaining unpaid after a prescribed date was disregarded and interest thereon at the rate of six per cent per annum, a rate prescribed by no statute, was substituted and allowed by the court. The statute also prescribed a penalty, apparently applicable under the facts of that case, of five per cent of the amount of the tax, but the claim for this penalty was withdrawn and not insisted upon by the government and hence was not passed upon by the court.

*United States vs. Proctor* (D. C. S. D. Texas, 1922), 286 Fed., 272, on the authority of *Billings vs. United States*, 232 U. S., 261, which had so held, allowed interest in a bankruptcy proceeding at the rate of six per cent per annum on a past due income tax, although there was

no statute in that instance requiring the payment of interest nor fixing the rate.

There are *In re Kallak* (D. C. N. D. D., 1906), 147 Fed., 276, which allowed payment of a penalty of five per cent and also interest at the rate of one per cent a month in a bankruptcy proceeding under a State statute so providing, and *In re Scheidt Brothers* (D. C. S. D. O. E. D., 1908), 177 Fed., 599, which, ordered payment of a penalty of ten per cent of the tax and a further sum of five per cent of the tax for the use of the officer charged with the duty of an enforced collection of the tax, and certain other inferior Federal court decisions which appear to have followed State statutes in respect to the payment of interest on delinquent taxes, but they seem to be out of harmony in this respect with the Circuit Courts of Appeals and the Supreme Court as hereinbefore indicated.

*People of the State of New York vs. Jersawit, Trustee in Bankruptcy of Ajax Dress Company*, supra, as we understand it, holds that the additional charges under the wording of the statute there before the court constituted a single item that both "must be treated as a part of one corpus," a single sum resulting from an application to the tax of the two methods of calculation prescribed by the statute, that this sum so arrived at constituted a penalty within the provisions of Section 57(j) of the Bankruptcy Act, and that for this reason it was not allowed, and that interest was allowed at the six per cent rate on the basis of a reasonable compensation for the detention of the tax money rather than as a statutory rate. In other words, the whole statute in respect to these additional charges was disregarded and interest was allowed under the general rule followed by the Federal courts that in the absence of a statutory rate interest will be allowed at the rate of six per cent per annum, as had been held in *Billings vs. United States*. There seems to be a clear inference from *Billings vs. United States* that where there is an interest rate for delinquent taxes prescribed by statute, either State or Federal, that rate should be applied by the Federal courts in bankruptcy proceedings, and that the general rule of the Federal courts allowing interest at the rate of six per cent per annum should only be applied in the absence of such a statute, but *People of the State of New York vs. Jersawit, Trustee in Bankruptcy of Ajax Dress Company*, *In re Ashland Emery & Corundum Co.*, and *In re J. Menist & Co.*, make it doubtful if this inference is warranted or that such a rule would be followed. Except for the principle involved, however, this question is unimportant to us just now for the reason that the interest rate of six per cent per annum prescribed by our State statutes, both as to delinquent taxes and as applicable in the absence of a contract rate, is the same as the interest rate that is now being allowed on delinquent taxes, both State and Federal, in bankruptcy proceedings.

You are advised, therefore, that all State, county, district and municipal taxes legally assessed against a bankrupt or his property prior to the institution of bankruptcy proceedings, or against the bankrupt estate pending bankruptcy proceedings, upon becoming delinquent, bear interest therefrom at the rate of six per cent per annum until paid, and that such interest, like the taxes themselves, and as under Section 64(a) of the Bankruptcy Act, should be paid from the bankrupt estate

“in advance of the payment of dividends to creditors,” to the extent of funds available for that purpose.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2579, Bk. 60, P. 355.

TAXES—BANKRUPTCY ESTATE—PROPERTY OF—SUBJECT TO TAXATION—  
RENDITION—ASSESSMENT.

1. Although property, otherwise subject to taxation in this State, may be in the custody of or in process of administration by a bankruptcy court, it is nevertheless subject to taxation under the laws of this State in like manner as other like property.

2. Property subject to taxation in this State that is in the custody of and is being administered by a bankruptcy court at the time when under the laws of this State it is proper to list or render same for taxation, should be so listed or rendered by or in the name of the bankruptcy trustee or other custodian having possession and custody of same under the bankruptcy court, and the assessment of same and all proceedings pertaining thereto should be with and in the name of such trustee or custodian, and not with or in the name of the bankrupt, but an assessment of same otherwise valid would not be void because not so made.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 24, 1924.

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

DEAR SIR: The Attorney General is in receipt of certain inquiries from you and certain county attorneys in this State concerning the taxation under the laws of this State of property while in the custody of or in process of administration by a bankruptcy court, and the method of listing or rendering same for taxation and the assessment of taxes against same.

The question whether or not the Congress of the United States has the power to exempt from taxation property otherwise subject to taxation under State laws pending its administration by a bankruptcy court has been discussed at some length by parties litigant in certain cases, but since the Congress has never assumed nor attempted to exercise such power, neither in the Bankruptcy Act nor otherwise, it has never become necessary for the courts to pass upon that question. That such property is so subject to taxation, however, has been expressly held.

In *Swarts vs. Hammer* (C. C. A., 8th Cir., 1903), 120 Fed., 256, the question was squarely raised as to whether or not property otherwise subject to taxation under State statutes remained so subject to taxation after it had passed into the hands of and was being administered by a bankruptcy court, and on that question the Circuit Court of Appeals said:

“It has never been questioned but that property in the custody and control of receivers and trustees of Federal courts was subject to taxation under the law, the same as other like property. *Judson on Taxation*, Sec. 407, and cases cited. And this applies to trustees in bankruptcy as well as receivers and trustees in other cases and proceedings in the Federal courts. It is a grave mistake to suppose that property in the possession and custody of an officer of the Federal court by that single fact enjoys immunity from taxation. So far from exempting property in the custody and possession of its officers from tax-



ation, a Federal court, upon proper application, will always order and direct the payment of the taxes duly assessed on such property, and treat the same as a preferred claim against the estate or fund. Judson on Taxation, Sec. 541."

On appeal to the Supreme Court of the United States (Swarts vs. Hammer, 194 U. S., 441), this holding was affirmed, the court saying:

"By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the Circuit Court of Appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *In re Conhaim*, 100 Fed. Rep., 268; *In re Keller*, 109 Fed. Rep., 131; *In re Sims*, 118 Fed. Rep., 356."

Certain provisions of our Revised Civil Statutes, particularly Articles 7509, 7527, 7551 and 7563, undertake to designate by whom or in whose name property shall be listed or rendered for taxation, and against whom or in whose name the assessments against same shall be made, and, while they contain no specific provision to that effect, it may reasonably be concluded from them, and from certain provisions of the Bankruptcy Act and the holdings of the courts thereunder concerning the status of the title to property pending bankruptcy proceedings, that property belonging to a bankrupt estate becoming subject to assessment for taxes under the laws of this State pending bankruptcy proceedings should be listed or rendered for taxation by, and that the taxes against same should be assessed in the name of or as against, the bankruptcy trustee or such other custodian as may then have the possession and custody of same under the bankruptcy court, as such trustee or custodian, and not in the name of the bankrupt. This is indicated in the matter of *In re Conhaim* (D. C. D. Wash., N. D., 1900), 100 Fed., 268, and it is expressly so stated in *In re Keller* (D. C. N. D. Ia., 1901), 109 Fed., 131. At the same time, in view of Articles 7527, 7551, 7548, 7563 and 7578 and certain other provisions of our Revised Civil Statutes and certain of our court decisions in respect thereto, and the holding in *In re Keller*, supra, it would seem that a rendition and assessment of such property otherwise valid would not be void because not so made.

In answer to these inquiries, therefore, you are advised as follows:

1. That even though property, otherwise subject to taxation in this State, may be in the custody of or in process of administration by a bankruptcy court, it is nevertheless subject to taxation under the laws of this State in like manner as other like property.

2. That property subject to taxation in this State that is in the custody of and is being administered by a bankruptcy court at the time when under the laws of this State it is proper to list or render same for taxation, should be so listed or rendered by or in the name of the bankruptcy trustee or other custodian having possession and custody of same under the bankruptcy court, and that the assessment of same and all proceedings pertaining thereto should be with and in the name of such trustee or custodian, and not with or in the name of the bank-

rupt, but that an assessment of same otherwise valid would not be void because not so made.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

Op. No. 2580, Bk. 60, P. 360.

TAXES—BANKRUPT ESTATES—DELINQUENT—PENALTIES—PAYMENT OF.

Under the Bankruptcy Act as construed by the Federal courts the ten per cent penalty accruing under our State statutes on taxes against a bankrupt or his estate not paid within the time required by our State laws does not constitute a legal charge against the bankrupt estate and payment of same by such estate will not be authorized nor required by the bankruptcy or other Federal court.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 31, 1924.

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

DEAR SIR: The Attorney General is in receipt of certain inquiries from you and certain county attorneys concerning the payment by a bankrupt estate of the ten per cent penalty accruing under our State statutes on taxes against a bankrupt or his estate not paid within the time required by our State laws, and the following is in reply to same.

In re Ajax Dress Company (C. C. A., 2nd Cir., 1923), 290 Fed., 950, involved a claim in bankruptcy by the State of New York for a tax and additional charges in respect thereto under a statute of that State which provided that, "For the privilege of exercising its franchise in this State in a corporate or organized capacity every domestic corporation \* \* \* shall annually pay in advance for the year beginning November first \* \* \* an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income for its fiscal or calendar year next preceding," and which further provided that if such tax should not be paid by the first day of the following January there should thereupon accrue and be paid, "in addition to the amount of such tax, \* \* \* ten per centum of such amount, plus one per centum for each month the tax \* \* \* remains unpaid." The Circuit Court of Appeals ordered payment of the tax with interest thereon at the rate of six per cent per annum, but refused to allow either the additional sum of ten per cent or interest at the statutory rate. The State took the question to the Supreme Court, where it contended for the ten per cent as well as for interest at the statutory rate, insisting that it was entitled at least to interest at that rate or no interest at all. The action of the Circuit Court of Appeals was affirmed, however, by the Supreme Court (*People of the State of New York vs. Jersawit, Trustee in Bankruptcy of Ajax Dress Company, Incorporated*, 263 U. S., 493), the court saying:

"There can be no doubt that the additional ten per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, Sec. 57j, but it is urged that the one per centum for each month of default is statutory interest and that the State is entitled to that and otherwise would be entitled to none. As the one per centum is more than the value of the use of the money and is added by the statute to the ten to make a single sum it

must be treated as part of one corpus and must fall with that. We presume that in this event the State does not object to receiving the simple interest allowed. That part of the order will stand."

In *re Ashland Emery & Corundum Company* (D. C. D. Mass., 1916), 229 Fed., 827, refused to allow in a bankruptcy proceeding the charge of one per cent a month which had accrued under a State statute which provided, as to a corporate franchise tax, that "If the tax of any company remains unpaid on the first day of July, after the same becomes due, the same shall thenceforth bear interest at the rate of one per centum for each month until paid," the refusal being upon the ground that this charge, although denominated "interest" by the statute, being "double the statutory interest rate and almost double the highest rate of interest which national banks are allowed to charge under United States statutes," was a "penalty" and not "interest," but "interest" was, nevertheless, allowed at the rate of six per cent per annum.

To this same effect is *In re J. Menist & Company* (C. C. A., 2nd Cir., 1923), 920 Fed., 947, also a bankruptcy proceeding, wherein, upon the theory that it was a "penalty" within the provisions of Section 57(j) of the Bankruptcy Act, a statute of the United States requiring the payment of "interest at the rate of one per centum per month" on an income tax remaining unpaid after a prescribed date was disregarded, but interest at the rate of six per cent per annum was substituted and allowed by the court. The statute also prescribed a penalty, apparently applicable under the facts of that case, of five per cent of the amount of the tax, but the claim for this penalty was withdrawn and not insisted upon by the government and hence was not passed upon by the court.

There are *In re Kallak* (D. C. N. D. D., 1906), 147 Fed., 276, which allowed payment of a penalty of five per cent under a State statute so providing, and *In re Scheidt Brothers* (D. C. S. D. O. E. D., 1908), 177 Fed., 599, which ordered payment of a penalty of ten per cent of the tax upon the theory that "the penalty takes the place of interest" under the then laws of Ohio, and certain other inferior Federal court decisions, but they seem to be out of harmony in this respect with the Circuit Courts of Appeals and the Supreme Court as hereinbefore indicated.

It is thus indicated that the Federal courts will not authorize nor require the payment by a bankrupt estate of the ten per cent penalty accruing under our State statutes on taxes against a bankrupt or his estate not paid within the time required by our State laws.

It will be borne in mind, however, that where the penalty involved has accrued on taxes against real property the State has a lien upon the land as to which the tax was assessed to secure the payment of such penalty (*City of San Antonio vs. Toepperwein*, 104 Texas, 43, 133 S. W., 416), and it is our view that if not otherwise paid payment of same may be enforced by the foreclosure of such lien and the sale of the land thereunder in like manner as for delinquent taxes, either in the bankruptcy court or the proper State court, if permitted or not precluded by the bankruptcy or other proper Federal court. It would also seem that such penalty, as far as our State Constitution and statutes and the construction placed upon them by our State courts is concerned (*City of San Antonio vs. Toepperwein*, supra), is a tax, and

that if this is true, since under Section 17 of the Bankruptcy Act a discharge in bankruptcy does not release the bankrupt from liability for taxes, payment of such penalty may be enforced against the bankrupt after his discharge as against any property he may thereafter own, or even before his discharge as to any property that may at any time be released to him by the bankruptcy court, in like manner as if no bankruptcy proceedings had been instituted. These matters are not squarely raised by these inquiries and we are not directly passing upon them, but deem it prudent that they be mentioned here that they may not be lost sight of or overlooked because of our specific answer to your direct question. Other features of this matter may also be presented from time to time under the facts of particular cases as they arise.

Specifically answering your question, therefore, you are advised that under the Bankruptcy Act as construed by the Federal courts the ten per cent penalty accruing under our State statutes on taxes against a bankrupt or his estate not paid within the time required by our State laws does not constitute a legal charge against the bankrupt estate and that payment of same by such estate will not be authorized nor required by the bankruptcy or other Federal court.

Very truly yours,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2597, Bk. 60, P. 324.

**BANKRUPT ESTATES—TAXES—PENALTIES AND COSTS—TAXES REMAINING UNPAID UPON DISCHARGE OF BANKRUPT.**

1. Penalties and costs accruing prior to bankruptcy proceedings are taxes against the bankrupt estate within the meaning of Section 64(a) of the Bankruptcy Act should be allowed as such and ordered paid as a part of said taxes in advance of the payment of dividends to creditors.

2. Where funds of the bankrupt estate are not sufficient to pay all Federal, State, county and municipal taxes in cases where the State does not have any specific lien against the property of the bankrupt to secure the taxes, each would be entitled to its pro rata part of said funds.

3. In cases wherein the funds of the bankrupt estate are insufficient to pay all the taxes assessed against the bankrupt and his property prior to the institution of bankruptcy proceedings, the bankrupt upon being discharged would still be obligated for such unpaid taxes, including interest, penalty and costs which may have accrued prior to the bankruptcy proceedings, and all property which he may acquire subsequent to his discharge would be liable therefor.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 13, 1925.

*Hon. S. H. Terrell, State Comptroller, Austin, Texas.*

DEAR SIR: We acknowledge receipt of the following letter from you, dated February 19th, requesting an opinion of Attorney General Moody on certain questions therein submitted:

"I am herewith enclosing you a copy of a letter received by this department from Mr. H. M. Aubrey, Referee in Bankruptcy for this Federal District, in which he requests my department to instruct the tax collectors in this Federal district to accept the payment of the State and county taxes with interest at the rate of 6 per cent on all bankrupt estates in this district, eliminating all costs and penalties. Second: That where the amount that may be applied

under the law to the payment of taxes is not sufficient to pay all taxes due, that the collectors be instructed to accept the amount prorated by the referee to the State and county as their part in full satisfaction of their claims.

"I believe that the referee is probably correct in reference to costs and penalties that may accrue after bankruptcy proceedings had begun, but I feel that where the penalties had accrued prior to the beginning of bankruptcy proceedings that such penalty then becomes a part of the tax and should be included in the prior claims as a part of the tax indebtedness against said bankruptcy.

"The points upon which I desire an opinion from your department is whether or not costs and penalties that had accrued prior to bankruptcy proceedings should be eliminated or whether same would be a legal preference claim against the bankrupt estate. Second: Would my department be authorized, under the law, to instruct tax collectors to accept pro rata payments of taxes where funds of the bankrupt were not sufficient to pay all Federal, State, county and municipal taxes, and, if in accepting the pro rata part, would the collector be authorized to accept such pro rata payments in full satisfaction for the claim of State and county taxes against said bankrupt?"

From the above letter the following questions seem to be presented for determination:

1. Should penalties and costs accrued prior to bankruptcy proceedings be eliminated or would they be legal preference claims against the bankrupt estate?

2. Would the Comptroller's Department be authorized, under the law, to instruct tax collectors to accept pro rata payments of taxes where the funds of the bankrupt were not sufficient to pay all Federal, State, county and municipal taxes?

3. If by accepting their pro rata part, would the tax collectors be authorized to accept such pro rata payments in full satisfaction of the claim of State and county taxes against said bankrupt?

Taking them up in their order and considering the first question as to whether penalties and costs accruing prior to the bankruptcy proceedings should be eliminated, and if not, whether they would be legal preference claims against the bankrupt estate, your attention is called to Section 64(a) of the Bankruptcy Act, which provides:

"The court shall order a trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officials for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

Under this provision of the Bankruptcy Act it is manifest that all taxes legally due and owing by the bankrupt shall be given a preference and the payment thereof shall be prior to the payment of any claims in behalf of the creditors, and in deciding the question it becomes necessary to determine whether the penalty accruing prior to the institution of bankruptcy proceedings, together with all costs, is included as a part of the taxes within the meaning of the above section.

In the case of *In re Kallak*, reported in 147 Federal, page 276, which involved the payment by a trustee in bankruptcy of a penalty under the laws of North Dakota, on taxes assessed against the property of the bankrupt, the said taxes becoming delinquent on March 1, 1906, and on said date a penalty of five per cent was added together with the further sum of one per cent of the original tax payable on the first of each month, as provided for under the revenue laws of said State, the court held that the interest and penalty accrued to the date of pay-

ment should be allowed and paid by the trustee in bankruptcy, and after a very full discussion, and upon consideration of the question involved in said case, the court gives expression to its views in the following language:

"What ought the trustee to pay under Section 64(a)? The answer is found in its own language, 'all taxes owing by the bankrupt.' Whatever would be owing by the bankrupt at the time the payment is made, if no bankruptcy had intervened, that the court should require the trustee to pay. It includes the original tax and all other sums accrued and owing under the revenue laws of the State up to the time the payment is actually made or tendered."

In *re Ashland Emery & Corundum Company*, reported in 229 Fed., 829, was a case arising under the revenue laws of the State of Massachusetts and involved the question as to whether a penalty within the meaning of said Section 64(a) of the Bankruptcy Act was a part of the taxes and should be given priority of payment the same as taxes and interest, the penalty in this case having accrued subsequent to the institution of bankruptcy proceedings. The court in deciding the question held that the penalty should not be allowed and in giving expression to its views used the following language:

"If the charge here in controversy is to be regarded as interest, the trustee ought to pay it. Penalties, however, stand upon a different footing. It cannot be said that a penalty imposed for failure to pay a tax is a part of the original tax, in the sense that interest is. By 'interest' is ordinarily understood a charge for the use of money or damages for the detention of it. A penalty, as applied to cases of this character, means a punishment imposed for failure to make the payment on time. Section 64(a) contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them, especially when, as here, the estate was in course of administration during the entire period when they accrued. It does not seem just, nor to have been the intention of Congress, that out of a delay in paying the tax caused by the bankruptcy proceedings the State should make a profit or exact a penalty at the expense, for instance, of workmen employed by the bankrupt."

Under the authority last above cited it seems to be well settled that the penalty accruing after the institution of bankruptcy proceedings, together with all costs, would not be a proper charge against the bankrupt estate and that in such cases the penalty and costs would not be allowed as a part of the taxes and given priority of payment and that tax collectors would be authorized to eliminate such penalties and costs and accept the taxes and interest thereon from the trustee in bankruptcy in full settlement of said taxes, but from the expressions used by the court and found in that opinion there is a question as to whether the penalty accruing prior to bankruptcy proceedings, together with the costs, should be eliminated from the taxes. We have been unable to find any cases decisive of this question. It seems that in this case, *In re Ashland Emery & Corundum Company*, the reason the court held the penalties and costs to be no part of the taxes within the meaning of the Bankruptcy Act and relieved the bankrupt estate of such penalty and costs was that the accrual of such penalty and costs was caused by the bankruptcy proceedings and not by any act of the bankrupt himself, and to allow such penalty and costs, especially after the accrual thereof had been caused by the institution of the bankruptcy proceedings, would be permitting the State to make a profit at the expense of the creditors. It will be observed that in cases where the penalties

and costs accrue after the institution of bankruptcy proceedings there does not exist any personal obligation against the bankrupt to pay the same and for that reason penalties and costs upon and after accrual do not lose their identity as such and are disallowed for the reason there is not any person obligated to pay the same and hence have never become a part of the taxes. Such reasons advanced by the court in the Ashland case for disallowing penalties and costs accruing subsequent to the institution of bankruptcy proceedings do not have any application in cases where the penalties and costs accrue prior to such bankruptcy proceedings. In such cases the accrual of penalties and costs is caused by the acts of the bankrupt himself in failing to pay the taxes within the time required by law.

While Section 64(a) of the Bankruptcy Act, above referred to, does not expressly include penalties and costs, still there is nothing therein expressly forbidding the allowance of such penalties and costs as a part of said taxes and as incidents thereto, especially where they accrue under the revenue laws of the State in connection with the taxes and where, by virtue of the delinquency of the taxes, the same have become personal obligations of the bankrupt prior to the institution of the bankruptcy proceedings when the bankrupt fails to pay his taxes within the time required by law and penalties and costs accrue thereunder, and by virtue of said delinquency a personal obligation against the bankrupt immediately arises and the penalties and costs become liquidated demands against him, lose their identity as penalties and costs, become attached to and a part of the original tax and interest thereon in such a way as to be inseparable therefrom and should not be looked upon as penalties and costs independent of the taxes and disallowed by the bankruptcy court.

The Kallak case, first above cited, seems to furnish ample and sufficient authority for holding that it was intended by Congress, through Section 64(a), that not only the taxes owing by the bankrupt should be given priority of payment, but also the interest on said taxes and also the ten per cent penalty accruing prior to the institution of bankruptcy proceedings, together with all costs fixed at the time of the delinquency or the accrual of said penalty. Penalties and costs accruing prior to bankruptcy proceedings are obligations imposed upon the taxpayer and arise under the revenue laws of the State and grow out of and result from the failure on the part of said taxpayer to pay his taxes within the time prescribed by law, and being connected with the original taxes in such an inseparable manner as hereinabove indicated, such penalties and costs should be held to be a part of the taxes within the meaning of said Section 64(a) of the Bankruptcy Act.

On December 31, 1924, Assistant Attorney General W. W. Caves wrote an opinion for Lon A. Smith, Comptroller, holding that penalties and costs should be eliminated, but it now seems that such an opinion is applicable only to cases where the penalty accrued after the institution of bankruptcy proceedings. Until the courts have passed upon the question and held that penalties accruing prior to said bankruptcy proceedings, together with all costs, should not be allowed, you are advised that penalties accruing prior to bankruptcy proceedings, together with all costs, should not be eliminated, but should be included with the taxes and interest.

We think the question is of sufficient importance to the State as to justify the taking of such steps by your department through such instructions to tax collectors of the various counties in the State as will result in a case testing the application of the Bankrupt Act, particularly Section 64(a), as affecting penalties accruing prior to bankruptcy proceedings, together with all costs, and we advise that tax collectors be instructed to insist upon the payment by trustees in bankruptcy of all penalties and costs as well as the taxes and interest in cases where the penalty has accrued prior to bankruptcy proceedings in order that proper steps may be taken to bring the question up for decision by the Federal courts. In such cases applications should be made to the referee for an order directing the trustee to make payment of said penalties and all costs as well as the taxes and interest.

Considering now the second question above as to whether your department would be authorized under the law to instruct tax collectors to accept pro rata payments of taxes where funds of the bankrupt estate were not sufficient to pay all Federal, State, county and municipal taxes, we have concluded that said funds should be prorated and that tax collectors should accept their part of State, county and municipal taxes. In the case of *In re A. E. Fountain*, reported in *Federal Reporter*, Vol. 295, p. 873, it was held that the taxes due the United States and the State of New York should be paid after the expenses of the administration of the bankrupt estate had been satisfied, and that the same took priority over any and all other claims, and that where the funds in the hands of the trustee as assets of the estate were not sufficient after the payment of such administration expenses to cover all the taxes due the United States and the State of New York, that the balance remaining after expenses of administration had been fully covered should be prorated between the taxes due the United States and those due the State of New York. This decision seems to settle the question, but you are advised that it applies only in cases where the taxes are against personal property and only in such cases where the State does not have any specific lien against the property of the bankrupt to secure the taxes. In cases where the State has a lien by virtue of the assessment itself the United States would not be entitled to any portion of the funds until after the whole amount due the State had been satisfied, unless the United States had fixed a lien of equal rank also on said property for the taxes due the Federal government, in which event it would be proper to prorate the taxes.

Having disposed of your second question, we will answer your third question by simply calling your attention to Section 17 of the Bankruptcy Act, which relates to debts not affected by a discharge, and you will observe that by subdivision (1) under Section (a) the bankrupt shall not be released from taxes levied by the United States, the State, the county, district or municipality in which he resides. Said section with the subdivision mentioned is quoted herein as follows:

“(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides.”

In the opinion of the Attorney General, this alone is sufficient to create an obligation or keep alive and continue in force one which



has theretofore existed with respect to the taxes mentioned, and where the funds of the bankrupt estate are not sufficient to pay all the taxes assessed against the property prior to the institution of bankruptcy proceedings, the bankrupt upon being discharged would still be under obligations for the unpaid taxes, and all property acquired subsequent to his discharge would be liable for said unpaid taxes. It would be useless to provide for an obligation against the bankrupt for unpaid taxes assessed against him prior to bankruptcy proceedings if property which he acquired subsequent to bankruptcy should not be liable for said taxes. There would be no obligation, however, for taxes assessed after bankruptcy proceedings were begun. Such an obligation, if any, in such an instance would be one of the bankrupt estate, and if the funds were not sufficient to pay the taxes assessed against said estate, whatever amount remained unpaid would have to be charged off as a loss upon the winding up of the bankruptcy proceedings.

In answer to your third question, you are advised that tax collectors would not be authorized to accept such pro rata payment in full satisfaction of the claim for State and county taxes, including interest, penalty and costs, against said bankrupt, but only against the estate of said bankrupt, and that said bankrupt upon being discharged would still be obligated and bound for the payment of the remainder of said taxes, including interest, penalty and costs, and his property liable therefor, which said taxes had been assessed against him and his property prior to the institution of bankruptcy proceedings.

Yours very truly,

R. J. RANDOLPH,  
Assistant Attorney General.

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Op. No. 2564, Bk. 60, P. 371.

**TAXES—DELINQUENT LANDS—REDEMPTIONS FROM PURCHASE OTHER THAN STATE—DUTY OF COMPTROLLER AND TAX COLLECTORS.**

1. In the redemption of lands sold to some person other than the State to enforce the payment of State and county taxes assessed against same, whether at summary sales by county tax collectors or under tax lien foreclosure judgments, no duties whatsoever are enjoined upon the Comptroller of Public Accounts.

2. When a person having the right to redeem a tract of land sold to some person other than the State to enforce the payment of State and county taxes assessed against same, whether sold by the tax collector at summary sale or under a tax lien foreclosure judgment, tenders to the tax collector of the county in which the land is situated, within two years from the date of such sale, and for the purpose of redeeming same, a sum of money equal to double the amount of money paid by the purchaser at such sale for the land, and makes and delivers to such tax collector his affidavit that he has made diligent search in the county where such land is situated for the purchaser of same at the tax sale and has failed to find him, or that the purchaser at such tax sale is not a resident of the county in which the land is situated, or that he and the purchaser cannot agree on the amount of redemption money, it thereupon becomes the duty of such tax collector to accept the money so tendered and to give such person his receipt therefor, signed by him in the presence of two witnesses, and to hold such money and to pay same over upon demand to the purchaser of such land at such sale.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, September 26, 1924.

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

DEAR SIR: This is also in reply to your inquiry of some time ago requesting to be advised, among other things, whether or not any duties devolve upon county tax collectors and yourself in the matter of the redemption of lands sold to some person other than the State for State and county taxes and, if so, the amount of money required to be paid in such cases.

The only provision we have in our State Constitution relating to the redemption of lands sold for taxes is that part of Section 13 of Article 8 which provides 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," and it seems to have been held by our courts that this provision relates only to summary sales and that it has no application to land sold for taxes under tax lien foreclosure judgments. *City of San Antonio vs. Berry*, 92 Texas, 319 (48 S. W., 496); *Collins vs. Ferguson* (Crt. Civ. App.), 56 S. W., 225; *Guergin vs. City of San Antonio* (Crt. Civ. App.), 50 S. W., 140; *City of Marlin vs. Green* (Crt. Civ. App.), 78 S. W., 704, and 79 S. W., 40; *League vs. State* (Crt. Civ. App.), 56 S. W., 262, 93 Texas, 553 (57 S. W., 34), and 184 U. S., 156.

The right to redeem lands sold to some person other than the State by tax collectors at summary sales for State and county taxes is further provided for by Article 7641 of our Revised Civil Statutes of 1911.

That lands, however, sold to some person other than the State under tax lien foreclosure judgments for State and county taxes may also be redeemed is plainly provided by Article 7696 of our Revised Civil Statutes of 1911.

Said Articles 7641 and 7696 read as follows:

"Art. 7641. The owner of real estate sold for the payment of taxes, or his heirs or assigns or legal representatives, may, within two years from the date of sale, redeem the estate sold by paying or tendering to the purchaser, his heirs or legal representatives, double the amount of money paid for the land."

"Art. 7696. Where lands are sold under the provisions of this chapter, the owner, or any one having an interest therein, shall have the right to redeem said land, or his interest therein, within two years from the date of said sale upon the payment of double the amount paid for the land."

Article 7641 comes from Section 19, Chapter 152, General Laws, Regular Session, Fifteenth Legislature, approved August 31, 1876 (Gammel's Laws of Texas, Vol. 8, p. 1085), and is found in the Revised Statutes of 1879 (Article 4758) and the Revised Civil Statutes of 1911 (Article 7641), and in each revision or codification appears with and as a part of our statutes relating to summary sales by tax collectors of real property for delinquent State and county taxes, and was enacted long prior to our present statutes providing for the foreclosure by suit in the district court of the lien on lands for such taxes. For these reasons, and because of the holding of our courts hereinbefore cited in respect to Section 13 of Article 8 of our State Constitution, it might be plausibly argued that this article applies only to the redemption of lands sold at summary sales by tax collectors for State and county taxes. This is immaterial just here, however, since

this article and Article 7696 are substantially the same as far as the questions now before us are concerned.

Taking these statutes together, it is plain that lands sold to some person other than the State, either at summary sales by tax collectors or under tax lien foreclosure judgments, in the enforced collection of State and county taxes, may be redeemed, and that the requirements for redemption under both are substantially the same.

Such redemptions do not involve the payment of any taxes, State, county or otherwise, and no law of this State enjoins upon the Comptroller of Public Accounts any duty whatsoever concerning same.

We find, however, that Articles 7643 and 7644 do lay certain duties upon county tax collectors in the matter of the redemption of lands "sold at tax sale." They read as follows:

"Art. 7643. Any person having the right to redeem any land sold at tax sale may do so by payment, within the time prescribed by law, to the collector of taxes of the county in which the said land was sold, of the amount which the law requires to be paid; provided, that the owner of said land, or his agent, shall first have made affidavit before some officer authorized by law to administer oaths, that he has made diligent search in the county where said land is situated for the purchaser thereof at the tax sale, and has failed to find him, or that the purchaser at such tax sale is not a resident of the county in which the land is situated or that he and the purchaser cannot agree on the amount of redemption money. In such cases only shall the owner or agent be authorized to redeem the same by the payment to the collector of taxes."

"Art. 7644. It shall be the duty of any collector of taxes, to whom payment is made under the provisions of this chapter, to give a receipt therefor, signed by him officially, in the presence of two witnesses; which said receipt, when duly recorded, shall be notice to all persons that the land therein described has been redeemed; and the collector of taxes shall, on demand, pay over to the purchaser at said tax sale the money thus received by him."

These statutes clearly apply to lands sold at summary tax sales by county tax collectors, but there may be some question as to whether or not they are applicable to the redemption of lands sold under tax lien foreclosure judgments for State and county taxes. They are taken from and constitute the whole of Chapter 21, page 29, General Laws, Special Session, Sixteenth Legislature, approved July 8, 1879, passed long prior to our statutes providing for the foreclosure in the district courts of the lien on lands for the taxes on same and the sale of such lands under judgments foreclosing such liens, and at a time when they must have applied only to summary sales; and in our Revised Statutes of 1895 and 1911, the only revisions or codifications since the act was passed, they have been placed in a chapter separate from the chapter dealing with tax lien foreclosure judgment sales, and redemptions from such sales, and so placed in relation to our statutes clearly dealing only with such summary sales as to indicate the purpose and intent that they constitute a part of such statutes. From this, as well as from the apparent holding of our courts hereinbefore cited in connection with Section 13 of Article 8 of our State Constitution, it might be plausibly argued that these statutes are applicable only to redemptions from summary sales and not to redemptions from sales under tax lien foreclosure judgments. Also the wording of these statutes is such as to lend force to this argument. The wording is, "sold at *tax sale*," "the purchaser thereof at the *tax sale*," "purchaser at such *tax sale*," "purchaser at said tax sale." Since a sale under a tax lien foreclosure

judgment may not be in a technical sense a *tax sale*, while a summary sale by the tax collector is clearly such a sale, it might be said that this wording also indicates that this article is applicable only to summary sales and not to sales under tax lien foreclosure judgments.

We are not inclined to this view. To so hold would preclude redemptions from sales under tax lien foreclosure judgments otherwise than upon payment to the purchaser at such a sale, and as to many conceivable instances this would render such redemptions impossible and in others quite expensive and otherwise onerous, as where such purchaser could not be found, or could be found only at great expense and delay, and then only at such a time and under such circumstances as to render payment impossible within the two years allowed for redemption. These statutes were evidently designed to meet just such situations, and to afford a readily available method for redemption as to summary sales where they existed, and this they clearly do. We know of no sufficient reason for so limiting them that lands sold under tax lien foreclosure judgments may not also be redeemed in such instances, and prefer to regard and construe them as a part of the general body of our law on this subject and as also applicable to sales for State and county taxes under tax lien foreclosure judgments. In this connection we have also in mind the universal rule that statutes providing for the redemption by the owner of lands sold to another at forced sale on account of taxes against same should be liberally construed in favor of such redemptions. *Jackson vs. Maddox* (Crt. Civ. App.), 117 S. W., 185.

It is our opinion, therefore, that said Articles 7643 and 7644 are applicable not only to the redemption of lands sold for State and county taxes by tax collectors at summary sales to some person other than the State, but that they are also applicable to lands sold to some person other than the State under tax lien foreclosure judgments for such taxes. These statutes are only applicable, however, and the duties imposed by them upon tax collectors only attach, when tender of payment is made by a "person who has the right to redeem" the particular lands involved, and when the tender is made "within the time prescribed by law" and in "the amount which the law requires." These matters must be determined from Articles 7641 and 7696 hereinbefore set out, and upon the facts in each particular case.

Section 13 of Article 8 of our State Constitution and said Articles 7641 and 7696 each require, as necessary to a redemption, payment of only double the amount paid by the purchaser for the land at such sale. The Constitution and Article 7641 both say "double the amount of money paid for the land." Article 7696 says "double the amount paid for the land." Neither the Constitution nor statutes specifically provide for the payment of interest on the amount paid by the purchaser at such sale, nor the payment of taxes or other charges against the land that may have been paid by the purchaser. This being true, can the payment of either such interest or other sums or charges be required as a prerequisite to redemption by payment to the tax collector? We do not think so. We have examined a number of cases, including *Blair vs. Guaranty Loan and Savings Company* (Crt. of Civ. App.), 118 S. W., 608, and certain texts holding in some instances and indicating in others that payment of interest and certain charges are

necessary to a redemption, but all of them seem to rest upon statutes or city charters so requiring. The Constitution and statutes of this State as to lands sold at summary sales for State and county taxes, and at least our statutes as to lands sold under tax lien foreclosure judgments for such taxes, plainly declare the right of redemption upon payment of double the amount paid by the purchaser at such sale, and we know of no reason nor authority that would justify requiring the payment of a greater sum as a prerequisite to the existence or exercise of the right of redemption. We have considered our general statutes on the subject of interest and have concluded that they are not applicable to redemptions, and since the purchaser at such sales, within two years from the date of the sale, must be paid double the amount he paid for the land or else there can be no redemption, there could be no equity in requiring the payment of interest either on the purchase price from the date of the purchase or otherwise. We do not pass upon whether or not a court of equity might require the person seeking to redeem lands in such cases to reimburse the person from whom redemption is sought for such expenditures by the latter as were proper and necessary to the protection of the land and the title to same, and the like. We do say, though, that these matters are not within the province of the tax collector. Furthermore, the very nature and substance of the redemption by payment to the tax collector are such that neither he nor the person seeking to redeem by payment to the tax collector could know either the amount or nature of such expenditures or charges.

We have considered Articles 7642, 7642a (Vernon's 1918 Supplement), 7649, 7651, 7695, 7697, 7697 (Vernon's 1922 Supplement) and Section 1, Chapter 13, page 31, General Laws, Second Called Session, Thirty-eighth Legislature, being our only statutes on this subject other than those hereinbefore mentioned, but none of these are applicable to sales of land made to some person other than the State to enforce the payment of State and county taxes assessed against same.

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

1. That in the redemption of lands sold to some person other than the State to enforce the payment of State and county taxes assessed against same, whether at summary sales by county tax collectors or under tax lien foreclosure judgments, no duties whatsoever are enjoined upon the Comptroller of Public Accounts.

2. When a person having the right to redeem a tract of land sold to some person other than the State to enforce the payment of State and county taxes assessed against same, whether sold by the tax collector at summary sale or under a tax lien foreclosure judgment, tenders to the tax collector of the county in which the land is situated, within two years from the date of such sale, and for the purpose of redeeming same, a sum of money equal to double the amount of money paid by the purchaser at such sale for the land, and makes and delivers to such tax collector his affidavit that he has made diligent search in the county where such land is situated for the purchaser of same at the tax sale and has failed to find him, or that the purchaser at such tax sale is not a resident of the county in which the land is situated, or that he and the purchaser cannot agree on the amount of redemption money, it thereupon becomes the duty of such tax collector to accept

the money so tendered and to give such person his receipt therefor, signed by him in the presence of two witnesses, and to hold such money and to pay same over upon demand to the purchaser of such land at such sale.

It will be understood, of course, that we have considered these questions only as they relate to the duties of the Comptroller of Public Accounts and county tax collectors and nothing we have said is intended as an expression of our opinion in respect to the relative rights and obligations as to each other of the individual parties to a redemption.

Yours very truly,

W. W. CAVES,  
Assistant Attorney General.

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Op. No. 2646, Bk. 61, P. 317.

TAXES—METHOD OF COLLECTION.

Suits as at common law for debt may be instituted in any court having jurisdiction of the amount in controversy for the collection of all taxes due by the taxpayer and any of his property, except the homestead, sold as under execution in satisfaction of the judgment rendered, notwithstanding the two statutory methods providing for the collection of such taxes.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, April 14, 1926.

*Hon. A. R. Pool, County Attorney, Brady, Texas.*

DEAR SIR: This will acknowledge receipt of your letter of the 2nd instant, asking to be advised on the following question concerning the collection of delinquent taxes due the Melvin County Line Independent School District:

"In view of the fact that taxes are due on both personal and real property, have I the authority to disregard the tax lien provided by law and sue in either the justice or county court, according to the amount in controversy, for the recovery of not only the personal property taxes, but also the real estate taxes due by the delinquent, and have a personal judgment entered against the taxpayer and enforce the collection thereof by levying execution on the property of the judgment debtor?"

We have considered your question fully and upon investigation of the authorities have concluded that there exists a right of action for debt on all taxes due by delinquent, including both personal property and real estate taxes, and that a suit for the recovery of the amount due as taxes on the personal property, as well as such as may be due on the real estate, may be instituted as at common law and a personal judgment entered against the taxpayer and such judgment satisfied by the issuance of execution and levy thereof on any property of the judgment debtor, except the homestead, and a sale of such property made in satisfaction of said judgment, notwithstanding the two statutory methods prescribed for the collection of such taxes. Neither of the two methods provided in the statute, one of seizure and sale by the tax collector, and the other a suit for the foreclosure of the constitutional lien upon the real estate and a sale made thereunder, is exclu-

sive, and the law imposing an obligation upon the taxpayer to pay his taxes when due creates a debt against him and both he and his property are liable therefor under Article 7272 of the Revised Statutes, which reads in part 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."

In the case of *Cave vs. City of Houston*, 65 Texas, 621, Chief Justice Willie, speaking for the Supreme Court upon the question, gives an expression to his views as follows:

"Besides, the great weight of authority seems to be that when a statute does not provide a remedy for the collection of taxes which is made exclusive they may be enforced by suit."

The same question came up for decision in the case of the *City of Henrietta vs. Eustis*, 87 Texas, 17, and Judge Brown of the Supreme Court in writing the opinion announces the doctrine that the Legislature may provide for the collection of taxes by suit, and when there is no actual prohibition either in the Constitution or in the statutes, the action of debt lies for the collection of such taxes, and holds that where the law makes the tax a personal obligation of the taxpayer, it is fairly within all the authorities that a right to sue would exist in favor of the State, unless another remedy is given which is exclusive in its character, and after setting out the constitutional provision, Article 8, Section 15, with respect to liability of the taxpayer and his property for all taxes due and also the articles of the Revised Statutes concerning the seizure and sale authorized to be made by the tax collector for the collection of such taxes, takes up and considers the question as to whether the remedy by seizure and sale is exclusive and in deciding it says:

"There is nothing in the Constitution or the statute to indicate that this remedy is intended to be the only one to which resort may be had."

At the time of the handing down of the above decision, the only statutory method providing for the collection of delinquent taxes was the one authorizing the tax collector to seize and sell the taxpayer's property to satisfy all taxes due, and the law authorizing suits for the collection of taxes due on real estate through the foreclosure of the constitutional lien had not been passed. This decision was made in 1894, and it was the following year that the Legislature provided such method for the collection of delinquent taxes on real estate. Since then our delinquent tax law has been amended from time to time, but the present statutory method prescribing for the collection of delinquent taxes on real estate, so far as foreclosure is concerned, is substantially the same as it was under the original enactment, and while the remedy provided under such method is exclusive when the constitutional lien on the real estate is sought to be foreclosed, we do not think it is exclusive where suit is instituted for the collection of taxes due on real estate without foreclosure of the lien. There is nothing in this law that seems to indicate that it was the intention of the Legislature that in the collection of taxes due on real estate such statutory method should

be employed to the exclusion of all others. As held in the case of the City of Henrietta vs. Eustis, that the method of seizure and sale by the tax collector was not exclusive, we think the same holding should be made as to the statutory method prescribed as to the collection of taxes due on real estate.

In the case of *Richie vs. Moor*, 112 Texas, 500, the Supreme Court seems to have recognized the existence not only of the two statutory methods for the collection of delinquent taxes, but also a third method, which is a suit in the nature of an action for debt as at common law. Chief Justice Cureton wrote the opinion of the court in this case and holds that generally there are three methods provided for securing and collecting taxes, which are set out therein as follows:

1. The foreclosure and sale under the constitutional lien imposed upon each tract of land for the taxes assessed against it.
2. Summary process of seizure and sale by the collector.
3. Suit for taxes and the levy on and sale of all land, except the homestead, in satisfaction of the judgment.

Under this case it is plain that the third method may be employed and a suit as at common law for debt instituted against the taxpayer for the recovery of all taxes due, including taxes due on personal property, as well as such as may be due on real estate.

At common law there is no distinction between a debt for taxes due on personal property and taxes due on real estate, and where the statutory methods for the collection of delinquent taxes are not employed, suit may be instituted against the taxpayer for the recovery of the full amount of taxes due on personal property, as well as on real estate, in any court having jurisdiction of the amount in controversy, and a personal judgment may be rendered in the cause against the taxpayer for an amount covering all such taxes due, and the judgment may be satisfied through a sale of any of his property, except the homestead, as under execution. In the matter of collecting the taxes due on personal property alone, the method of seizure and sale by the tax collector may be disregarded and a suit instituted by the county attorney in the nature of an action at common law for debt and a personal judgment obtained against the taxpayer for the amount of the taxes due and any of his property, except the homestead, sold as under execution in satisfaction of said judgment. As to collection of taxes due on real estate, the county attorney may bring a suit under the statute for the foreclosure of the constitutional lien on such real estate, or he may disregard such statutory method and bring an independent suit for such taxes in the nature of an action at common law for debt and proceed to satisfy any judgment rendered through sale of any of his property, except the homestead, as under execution.

Very truly yours,

R. J. RANDOLPH,  
Assistant Attorney General.

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Op. No. 2648, Bk. 61, P. 298.

#### INHERITANCE TAXATION—MUNICIPAL BONDS.

Bonds of a Texas municipality owned by a non-resident decedent at the time of his death, and physically without the State, are not property within the



jurisdiction of the State subject to the operation of the Texas Inheritance Tax Law.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, August 8, 1926.

*Hon. S. H. Terrell, Comptroller of Public Accounts, Capitol.*

DEAR SIR: The question has arisen in a number of matters pending before your department as to whether bonds issued by municipal corporations in the State of Texas and held by a non-resident at the time of his death are subject to inheritance taxation by this State. We have before us at this time particularly the matter of the estate of Martha M. Wysong, deceased, and of James B. Duke, deceased. In each instance the decedent transferred by will bonds of Texas municipalities which were not physically within the State of Texas, but were at the domicile of the deceased. The executor in these cases has protested payment of inheritance tax upon the ground that the bonds had no situs within the State of Texas and were not property within the jurisdiction of this State for inheritance tax purposes. In the matter of the Wysong estate leave was asked to file a petition for mandamus in the Supreme Court to compel the Comptroller to issue a certificate that the testator owned no property subject to inheritance tax within this State except certain stock of the Texas Company as to which payment was tendered. Leave to file the petition was denied without prejudice to any rights the relator might seek to enforce in the Federal courts. However, this decision of the Supreme Court did not settle the question and the tax could be recovered only through litigation, if at all.

The Inheritance Tax Act provides a procedure for collections in case of the death of a non-resident owning no property in this State except stocks or bonds in a domestic corporation or association. It is apparent that the Legislature assumed that bonds of domestic corporations were property within the jurisdiction of this State, and, without giving consideration to the question as to whether such assumption was correct, we have previously advised interested parties that an incorporated town or city was such a domestic corporation as was contemplated within the meaning of the legislative enactment.

It is the general holding that there is no objection to a tax upon the transfer of bonds simply because these represent obligations of the government. In view of this general rule and of the decision of the Supreme Court of Massachusetts in *Bliss vs. Bliss*, 109 N. E., 148, and of the language of the Legislature above quoted, we construed the act of the Legislature as including municipal bonds transferred by a non-resident decedent.

On account of the insistence of attorneys for the executors of the Wysong and Duke estates we have given further consideration to this question, and a more mature investigation of the authorities has caused us to conclude that bonds of a Texas municipal corporation held by a non-resident at his domicile at the time of his death cannot be property within the jurisdiction of this State so as to be affected by our inheritance tax laws. The owner of such bonds has no interest in any property situated within the State of Texas. To this extent corporate bonds are distinguishable from stock of a domestic corporation which, it is uniformly held, represents an actual interest in the ownership of

domestic property. Bonds of a Texas municipality are secured only by the faith and credit of the governmental subdivision. The owner of the bonds does not own any interest in physical property located within the city. The bonds are transferable without the consent of the State or of the municipality or of any officer of the State or municipality. If a non-resident decedent owns no other property in Texas upon the transfer of which an inheritance tax may be levied, the State has no means of enforcing any claim except by suit in the foreign jurisdiction.

The Supreme Court of the United States has held that corporate bonds have no constructive situs apart from the domicile of the creditor. *In re Foreign Held Bonds*, 15 Wallace, 300. This is the doctrine of a majority of the courts. *Walker vs. The People, Colorado*, 171 Pac., 747; *Fuller vs. South Carolina Tax Commission*, 121 S. E., 478; *In re Ward's Estate (Minn.)*, 157 N. W., 1076; *Matter of Bronson*, 150 N. Y., 1, 44 N. E., 707; *Orcutt's Appeal*, 97 Penn. State, 179; *Gilbertson vs. Oliver*, 105 N. W., 1002; *Estate of Faire (Calif.)*, 61 Pac., 184.

The rule established in these cases is based upon the fundamental principle that while the State has the authority to impose conditions upon the right to transfer property by devise or descent, which is a creature of the law and not a natural right, yet, in the case of bonds of a domestic corporation actually owned outside the State by a non-resident, the right of transfer is not in any sense dependent upon the consent of the State creating the corporation which issued the bonds. This appears to be sound. While living the decedent, in each of the particular cases before this Department, could have transferred the bonds at any time without the consent of the State of Texas. We think that this power did not expire with his death, but that when he died the transfer directed by his will or by the laws of descent and distribution was just as effective as any transfer *inter vivos*. In other words, the property had no situs in Texas while the decedent was living, and his death did not bring the property within the jurisdiction of this State for inheritance tax purposes. That this kind of personal property can have no constructive situs apart from the owner's domicile is indicated by our Texas courts. *State vs. Fidelity & Deposit Co.*, 80 S. W., 544; *Hall vs. Miller*, 102 Texas, 289; *Guaranty Life Ins. Co. vs. City of Austin*, 108 Texas, 209, and *Great Southern Ins. Co. vs. City of Austin*, 112 Texas, 1.

The cases above cited relate generally to bonds of private corporations. There is a minority holding to the effect that where the bonds of such corporations are secured by a lien upon real estate the transfer of the bonds is taxable in the jurisdiction where the mortgaged realty is situated. This is the rule in Massachusetts, and has been adopted by the courts of Michigan and Maryland.

*Bliss vs. Bliss*, above cited, involved State bonds, but in that case there was the additional fact that a transfer of the bonds had to be registered with the Treasurer of the State before becoming effective. Upon the theory, therefore, that no transfer could be enforced except through the courts of Massachusetts such bonds were held to be property within the jurisdiction of that State for inheritance tax purposes. The transfer of our own municipal bonds is not subject to any such

requirement. They can be negotiated at will. So far as our investigation discloses, when the property is in possession of a non-resident owner, no authority supports the right of the State to impose a tax upon the transfer of such bonds by will or under the laws of descent and distribution of another State.

The Massachusetts rule with reference to the transfer of mortgaged bonds secured by a lien upon corporate realty situated within the State seeking to levy the inheritance tax is not before us at this time, and we therefore expressly refrain from passing upon this question, as to which there is a diversity of judicial opinion.

Very truly yours,

ERNEST MAY,  
Assistant Attorney General.

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Op. No. 2593, Bk. 60, P. 293.

INHERITANCE TAXES—WILLS—CONTRACTS—SERVICES.

1. The transfer of property by will is subject to the inheritance tax imposed by Article 7487 and the superseding act of the Thirty-eighth Legislature, notwithstanding that such transfer was made pursuant to a prior agreement which was based upon a valuable consideration.

2. Where a testator has promised another, upon a valuable consideration, to make a bequest to him, and the will contains no such bequest, but suit is brought against the estate for specific performance of the contract, and the claim is thereafter settled by the executor, the amount paid in settlement is not deductible under the inheritance tax law; for, in the contemplation of that law, the amount so paid passed by will.

3. Where a testator devised certain properties to another, and at the time of his death these properties had been disposed of, whereupon the executor paid to the devisee a sum of money in lieu of the properties devised, the payment so made is subject to the inheritance tax.

4. If, in the case stated in 3 above, the devise was made in consideration of professional services performed for the testator by the devisee, and the devisee disregards the will, but makes a claim against the estate for his services as a debt due by the decedent, and the claim for services is settled in compromise, the amount paid in settlement is not subject to the inheritance tax law, but is deductible as a debt of the estate.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, March 11, 1925.

*Hon. S. H. Terrell, Comptroller of Public Accounts, Capitol.*

DEAR SIR: On behalf of the Attorney General I have to acknowledge your letter of recent date relating to the inheritance tax due the State by the independent executor of the will of Dr. E. G. Patton, deceased.

It appears from your letter that Dr. E. G. Patton died in Dallas County in November, 1915. Letters testamentary were thereupon issued to A. C. Patton, independent executor, who is still acting in such capacity. The determination of the inheritance tax has been necessarily delayed for several years by the pendency of litigation arising out of the claims against the estate. This litigation has been terminated, however, and the executor has presented for approval a report on which the amount of inheritance taxes will be determined.

The executor claims as deductions three items which are set forth in your letter, as follows:

"1. Dr. Patton on moving to Dallas several years before his death, persuaded Ben W. Smith to come to Dallas and join him in a business venture, in consideration of which, Dr. Patton promised to bequeath him \$10,000, at his death. Smith in consideration of the promise, removed to Dallas and associated with Dr. Patton in business. Dr. Patton at his death did not bequeath the promised \$10,000, but by codicil stated that since Mrs. Patton on her death had bequeathed \$5000 to Smith as her half of the indebtedness, he, therefore, bequeathed Smith \$3000 and certain stock of the face value of \$2100. Smith made claim upon the estate, disavowing the benefit of the provisions of the codicil. The claim being denied, suit was instituted for \$10,000 and interest. After judgment for Smith as he prayed, the case was remanded on appeal; after a second trial, judgment was again rendered for the full amount and the case was pending in an appellate court at the time the executor settled and compromised with Smith on October 28th, 1924. Is the amount paid by the executor in settlement and compromise deductible or taxable?"

"2. By the will of Mrs. Patton, a bequest was made to Florence R. Cade of \$40,000. Mrs. Patton being without children and having been raised and educated in the family of the father of Mrs. Cade practically as a sister of hers. At the time of the death of Mrs. Patton, a subsequent will was offered for probate, by the terms of which all of her property was devised and bequeathed to her surviving husband, Dr. Patton. Mrs. Cade, upon the death of Dr. Patton, made claim against his estate for \$40,000, asserting that immediately after the death of Mrs. Patton, she presented to Dr. Patton her claim under the previous will of his deceased wife and threatened to contest the probate of the subsequent will on the ground of mental disability, and that in order to avoid such contest and to settle and compromise her claim and to honor his moral obligation, as she claimed, to distribute his wife's property as she desired, Dr. Patton, then in consideration of Mrs. Cade's foregoing the contest to the probate of the will, signed a written contract, agreeing to provide in his will that Mrs. Cade have \$40,000. The claim against the estate of Dr. Patton was based on this written instrument and the consideration claimed to have been given at the time of its alleged execution. The claim being denied, suit was filed, the defendants denying the execution of the written instrument and the alleged consideration therefor. Two mistrials having been had in the trial court, the suit was settled and compromised on October 28th, 1924. Is the amount paid by the executor in settlement and compromise, deductible or taxable?"

"3. J. C. Patton, for many years a practicing attorney in Dallas, a nephew of Dr. Patton acted as his personal attorney for many years and performed many professional services for him, the charge therefor not then being determined upon in amount and payments therefor not being made. It was then understood that payment would be made therefor, but the manner and amount was undetermined. In his last will which was probated, Dr. Patton provided that J. C. Patton should receive certain properties, which were thought to be oil properties of considerable value. Dr. Patton during his lifetime indicated that such provisions in his will was intended by him for the professional services rendered. Upon Dr. Patton's death it was found that the properties in question had been disposed of by him after the execution of the will, and thereupon, claim was made by J. C. Patton against the estate, on account of the professional services which he had rendered. This claim was settled and compromised by the independent executor. It is contended that this settlement was in satisfaction of the alleged debt for professional services rendered prior to the death of Dr. Patton, but it may develop that this payment was made in lieu of the properties which the will provided J. C. Patton should receive. In either event, was the payment thus made by the executor deductible or taxable?"

Both the assistant criminal district attorney of Dallas County in charge of the civil department of that office and the attorneys for the independent executor have submitted briefs pertinent to your inquiry, and of these we make due acknowledgment, and have to say that in our consideration of the questions presented we have been materially aided thereby.

The brief for the executor relates to what his counsel conceive as a

conflict in authority upon the question of whether the inheritance tax law affects a transfer under a will executed pursuant to a prior agreement, which was based upon a valid consideration. It is conceded by both the assistant criminal district attorney and counsel for the executor that Article 7487 of our Revised Statutes, which was in effect prior to the time of the death of Dr. Patton, has not been construed, in the particular involved, by our Texas courts.

The decisions cited in both briefs, however, have reference to statutes essentially similar to ours. After an examination of all the authorities referred to we conclude that the respective decisions cited are not irreconcilable, as believed by the attorneys for the executor. The pertinent provisions of Article 7487 were as follows:

"All property within the jurisdiction of this State, real or personal, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of this State or not, which shall pass absolutely or in trust by will, or by the laws of descent 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 except the father, mother, husband, wife or direct lineal descendants of the testator, intestate, grantor or donor, or any public corporation or charitable, educational or religious organization within this State then such bequest, gift or devise is to be used for charitable, educational or religious purposes within this State, be subject to a tax for the benefit of the State, as follows:"

The attorneys for the executor have cited, in support of their position that the above statute did not affect the items claimed as deductions, the decision of the Supreme Court in *Knowlton vs. Moore*, 178 U. S., 401, and the Federal case of *Blair vs. Herold*, 150 Fed., 199, 158 Fed., 804. The Supreme Court's opinion has reference merely to the validity of the act of Congress imposing an inheritance tax, and does not in any respect support the contention that deductions should be allowed in the three instances involved in your inquiry. The holding of the circuit judge and of the Circuit Court of Appeals in *Blair vs. Herold* were merely to the effect that the transaction involved was not a gift or other transfer in contemplation of death or to take effect in possession and enjoyment after the testator's demise. We do not think this to be the controlling question in the controversy concerning which you have requested the opinion of this Department.

The same comment may be made upon the decision of the New York Court of Appeals in *In re Orbis*, 119 N. E., 88, and in the affirmance by that court of *In re Baker's Estate*, 82 N. Y. S., 390, and *In re Vanderbilt*, 169 N. Y. S., 201. In each instance the New York court was construing that portion of the inheritance law relating to gifts and transfers in contemplation of death, and held that antenuptial and partnership agreements upon good consideration were present transfers, not in contemplation of death or to take effect in possession and enjoyment after death, as included within the intendment of the statutes construed. We do not think that in any case the New York Court of Appeals has overruled its decision in *In re Gould's Estate*, 156 N. Y., 423, 51 N. E., 287, wherein it was held that even though a will were made pursuant to a contract contemplating services to be rendered, and thereafter performed, the beneficiary under the will was subject to the inheritance tax.

Upon this question we content ourselves with saying that in the

opinion of this Department it is immaterial whether a will be made pursuant to such contract, or that such contract be supported by a valuable consideration. Property passing thereunder passes *by will*, and, therefore, the transfer is subject to a tax for the benefit of the State under Article 7487 as under our present law.

We cannot agree with counsel for the executor that an incorrect holding was made by the Supreme Court of New Hampshire in *Carter vs. Craig*, 77 N. H., 200, 90 Atl., 598, 52 L. R. A., 211, Ann. Cas., 1914D, 1179. On the contrary, we believe that decision to be in accord with sound reason and with the great weight of authority. In that case the New Hampshire court said, in construing a statute not materially different from Article 7487:

"The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property' so passing. If the Legislature had intended to limit the imposition of the tax to property passing gratuitously it could easily have said so; but by providing that all property passing by will should be subject to the tax, it manifested an intention not to so limit it."

In *In re Grogan's Estate*, 219 Pas., 88, the Supreme Court of California construed a section of the California Inheritance Tax Act, which read in part as follows:

"A tax shall be and is hereby imposed upon the transfer of any property."  
 "1. When the transfer is by will."

After a thorough review of the authorities, and after quoting the above excerpt from the New Hampshire opinion, it was said:

"No exception of the character claimed by appellant here is mentioned in the California statute. Nothing is said about any transfer by will arising out of an agreement, or as compensation for services, or in consideration of anything whatsoever. It matters not whether the legacy be a gratuitous one or for 'money's worth.' There is nothing in the statute which would indicate an intention on the part of the Legislature that there should be any limitation on the apparently plain language contained therein, or that there should be any exception whatsoever thereto. Everything in the nature of the change of ownership effected through a will is apparently included. The reason for such transfer is not taken into consideration. The result is all that is considered. \* \* \* The statute here does not provide for a tax because someone has a right arising out of a death or otherwise, but only when a transfer of property is brought about by means of a will is a tax imposed, which is a tax upon the vehicle carrying the right rather than a tax upon the right itself. It is in effect a declaration of law that when a will is used as a conveyance of property a tax must be paid for that privilege."

It is to be confessed that the precise question involved in your inquiry is not to be determined by the above authorities. Mr. Smith and Mrs. Cade claimed that the decedent, Dr. F. G. Patton, had contracted with them that he would make certain bequests in their favor. These contracts he did not perform at all in one instance, and did not fully perform in the other. Each brought suit against the estate for specific performance of the alleged respective contracts. In each action the remedy sought was in equity, and was justified only by the maxim: "Equity regards that as done which ought to be done." Mrs. Cade might have disregarded the written contract which she sought to enforce, and have sued for the value of her services. Mr. Smith might conceivably have sued for damages by reason of his removal to Dallas in reliance upon the promised testamentary transfer. But it appears

from your statement that both sought relief in equity by reason of their contractual rights. The language of the Supreme Court of Kansas in *McGill vs. Gerhards*, 162 Pac., 1149, is, therefore, quite applicable.

"Since the defendants have chosen to take title by the will it is of no consequence that they might have security through some other mode of acquisition or through some other mode of legal right thereto."

In our investigation we have found but two decisions that may be said to involve the identical question submitted to us in connection with the settlement in favor of Mr. Smith and Mrs. Cade. In *Nelson vs. Schoonover*, 89 Kan., 779, 132 Pac., 1183, a husband purchased certain lands, taking title in the name of his wife, but under an agreement that she should make a will devising it to him. This agreement was not performed by the wife, but under her will it was directed that her property should be divided equally between her husband and her son. The husband thereupon brought an action against the son and the executor, alleging that under the facts as stated the real estate belonged to him, and sought specific performance of the contract to make a will in his favor. Upon rehearing the court said:

"It is suggested that an effort may be made to charge the land which the plaintiff has held to be entitled with an inheritance tax. The plaintiff does not derive title to the property by descent or will, but by contract. Under the findings of the trial court, which have been sustained upon the appeal, the property was in a sense his before his wife's death. In all events he had paid for it, and was not chargeable with an inheritance tax."

In *Gleason and Otis on Inheritance Taxation*, at page 48, it is said of the Kansas decision above cited: "This case would seem against the weight of authority." The opinion upon rehearing does not appear to have been carefully considered and the matter here discussed seems to have been collateral to the real issue in controversy.

This Department is of the opinion that the better rule is embodied in the decision of the New York Court of Appeals in *In re Kidd's Estate*, 188 N. Y., 274, 80 N. E., 924. That case involved substantially these facts: George W. Kidd, the testator, died leaving a will. Thereafter a stepdaughter of the testator sued the executors and trustees of the will and the other beneficiaries thereunder, alleging an antenuptial agreement between her mother and the deceased, whereby, upon a good and sufficient consideration, deceased had agreed to adopt the plaintiff, give her his name, and make her his heir, and that in case there should be issue of the marriage, he would, by will, bequeath and devise all of his property equally between the plaintiff and his other children; and in case there should be no issue of the marriage, he would devise and bequeath all of his property to the plaintiff. Pending this litigation the State Comptroller and the executor of the will compromised the State's claim for inheritance taxes. The plaintiff stepdaughter being successful in her suit, brought an action to set aside the compromise and have the estate declared non-taxable, on the ground that it passed by reason of a contract. The court said:

"While the principal argument before us has been devoted to the question whether the compromise made between the executor and the Comptroller can now be set aside or attacked collaterally, we do not find it necessary to consider the question, since we are of opinion that giving full effect to the judgment in

the Supreme Court action, nevertheless, the estate is liable to the transfer tax. The contract between the plaintiff's mother and the deceased, which has been enforced by the judgment of the Supreme Court, was to bequeath and devise to his stepdaughter, by will, either the whole property he might leave or a portion of it, dependent on the existence of other children. It was not a contract to convey, but a contract to make a will in her favor. Had the deceased performed his agreement and given her his property by will, the estate would have been subject to the tax. \* \* \*

"It does not affect the question of the liability of the estate to taxation that, in consequence of the failure of the testator to carry out his promise, Mrs. Dickinson was obliged to resort to a court for relief. The method by which a court of equity in a proper case (for there is not in all cases an absolute right for its enforcement) enforces an agreement of the character of the one before us is well settled. It does not set aside the will, for in the present case such a judgment would do the plaintiff in the Supreme Court action no good, for she was neither heir at law nor next of kin; but it converts the devisees under the will, or the heirs at law or next of kin, as the case may require, into trustees for the beneficiary under the original agreement. The subject has been quite recently before us in the case of Phelan vs. United States Trust Co., 186 N. Y., 178, 78 N. E., 943. There Judge Werner wrote for the court: 'The principle upon which such agreements are sustained was stated by Lord Camden as early as the year 1769 in *Burfour vs. Ferraro*, *Hargrave's Jurid. Arg.*, 304, and it was not then new: \* \* \* 'Though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement. A covenant to leave so much to his wife or daughter, etc. \* \* \* These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke. This court does not set aside the will, but makes the devisee heir, or executor trustee to perform the contract.' Therefore the devolution of the property has in fact taken place under the will, and such devolution is subject to the transfer tax."

It is our opinion that the foregoing reasoning would be applied to a determination of that portion of your inquiry relating to the deduction claimed to have arisen from the compromise payments to Mrs. Cade and Mr. Smith. The beneficiaries under the will, we think, would be held to have taken the property of Dr. Patton charged with a trust in favor of these persons to the extent of the settlement made with them respectively.

You are therefore advised that neither the amount paid by the executor to Ben W. Smith nor the amount paid by him to Florence R. Cade is deductible as a debt due by the decedent, but that these respective amounts are to be taken into consideration in determining the inheritance tax due the State.

The third section of your inquiry, relating to the payment by the executor to J. C. Patton, presents two hypotheses materially different in their effect upon a correct answer.

It appears that J. C. Patton, a lawyer, rendered services to his brother, the testator. The testator provided in his will for the devise of certain oil properties to J. C. Patton, and during his lifetime indicated that this was in reward for the professional services rendered. The properties having been disposed of prior to Dr. E. G. Patton's death, it became impossible for this provision of the will to be executed. If, then, J. C. Patton took a sum of money or other assets of the estate in lieu of the properties devised to him, it must be said that these substituted properties passed "by will" within the meaning of Article 7487, for assuredly the transfer was by reason of the will, and would not have been made except therefor.



If, however, J. C. Patton disregarded the will, and claimed the reasonable value of his services rendered during the decedent's lifetime, and the payment made by the executor was in consideration for such services, and not in lieu of the devise included in the will, then the payment was of a debt due by the decedent and is not subject to any inheritance tax.

Very truly yours,

ERNEST MAY,  
Assistant Attorney General.

Op. No. 2590, Bk. 60, P. 302.

GROSS PRODUCTION TAXES—GROSS RECEIPTS TAXES—OCCUPATION  
TAXES—RECEIVERS.

1. A claim of the State of Texas for gross receipts tax on crude oil production due under Chapter 45, Acts of the Second Called Session of the Thirty-eighth Legislature, is a lien against the leasehold interest or oil rights whereby such tax accrued, and such leasehold interest or oil rights pass into the hands of a receiver appointed by a State court of competent jurisdiction and the purchasers from such receiver subject to such lien; and it is the duty of such receiver, for the preservation of the estate, to discharge such lien in preference to other creditors.

2. Occupation taxes accruing under the various subdivisions of Article 7355, Revised Statutes, constitute a lien upon all the stock and fixtures owned or used in making a part of any business or vocation liable to such tax, and such stock or fixtures pass into the hands of a receiver or his assignees subject to said lien; and it is the duty of such receiver, for the preservation of the estate, to discharge such lien in preference to other creditors.

3. Though the State has no express lien upon any specific property for the payment of the gross receipts tax provided for by Chapter 5, Acts of the Third Called Session of the Thirty-eighth Legislature, nevertheless, in a State receivership proceeding, a claim of the State for taxes is paramount and entitled to priority over other creditors, under Constitution, Article 8, Section 15.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 19, 1925.

*Hon. S. H. Terrell, Comptroller of Public Accounts, Capitol.*

DEAR SIR: On behalf of the Attorney General I acknowledge receipt of your letter of February 14th wherein you inquire as follows:

"Does a claim of the State of Texas for gross receipts tax on crude production due under Chapter 45, Acts of the Second Called Session of the Thirty-eighth Legislature, constitute a prior claim in a State receivership proceeding?"

"Does a claim for gross receipts tax on the sale of gasoline in favor of the State of Texas due under Chapter 5, Acts of the Third Called Session of the Thirty-eighth Legislature, constitute a prior claim in a State receivership proceeding?"

"Does a claim for occupation tax, assessed under various subdivisions of our occupation tax laws constitute a prior claim in a State receivership proceeding?"

The only statutory provision for the application of funds in the hands of a receiver appointed by a State court is Article 2135, as follows:

"Art. 2135 (1472). *Application of Funds in Hand of Receiver and Claims Preferred.*—All moneys that come into the hands of a receiver as such receiver shall be applied as follows: "First, to the payment of all court costs of the suit; second, to the payment of all wages of employes due by the receiver; third, to the payment of all debts due by the receiver for materials and sup-

plies purchased during the receivership by the receiver for the improvement of the property in his hands as receiver; fourth, to the payment of all debts due for betterments and improvements done during the receivership to the property in his hands as such receiver; fifth, to the payment of all claims and accounts against the receiver on contracts made by the receiver during the receivership, and for all claims for stock and personal injury claims against said receiver accruing during said receivership, and all judgments rendered against said receiver for personal injuries and for stock killed; sixth, all judgments recovered against the person or persons or corporations in suits brought before the appointment of a receiver in the action. And said claims shall have a preference lien on all of the moneys coming into the hands of the receiver which are the earnings of the property in his hands; and the court shall see that the money coming into the hands of the receiver as earnings of the property in his hands is paid out on the claims against said receiver in the order of their preference as named above; and it shall be the duty of the receiver to pay the funds in his hands which are the earnings of the property while in his hands as receiver on the claims against him in the order of preference named above."

This statute has been construed as applying only to moneys coming into the hands of a receiver which are the earnings of the property involved in the receivership. (*Gulf Pipe Line Company vs. Lassater*, 193 S. W., 779.) It has no application to the corpus of the property or to funds which go to make up the same. By Article 2135 it was clearly not the intention of the Legislature to divest prior liens. It could not be contended, we think, that a receivership terminates or divests a lien subsisting against specific property making a part of the estate in receivership. All the property of such estate passes into the hands of a receiver or his assignees subject to existing liens for taxes. Under an established rule of law this lien is superior to all others, nor does Article 2135 make it secondary to the claims therein enumerated.

In *Houston Ice & Brewing Company vs. Clint*, 159 S. W., 409, it was said by Chief Justice Fly, speaking for the San Antonio Court of Civil Appeals:

"The statute nowhere authorizes the confiscation of mortgaged property to pay certificates given by receiver for debts created by him, and no court can by its orders or decrees make a first mortgage lien held by a party who has not invoked the receivership, or is not a party to it in any manner, second to the claims enumerated in the statute."

The discharge of such liens as that for taxes is a duty of the receiver in connection with the preservation of the estate. In *Farmers Loan and Trust Company vs. Fidelity Insurance, Trust and Safe Deposit Company*, 41 S. W., 113, at page 116, it is said:

"We do not think this act should be construed as a limitation upon the equity powers of the court administering the property through means of a receivership. While it indicates the order of application of proceeds arising from the operation of the property, and gives a lien upon such funds in the hands of the receiver in favor of judgments recovered against the corporation, in suits brought before the appointment of a receiver, it does not take away from the court the exercise of that wise equitable discretion heretofore universally recognized as its prerogative in dealing with the earnings of the property pending the receivership in the manner which will best preserve the interests of all parties."

Your first inquiry relates to the priority or not of a claim of the State for gross receipts taxes on crude petroleum under Chapter 45,

Acts of the Second Called Session of the Thirty-eighth Legislature. This act of the Thirty-eighth Legislature was by way of amendment to Article 7383, Revised Statutes. Paragraph 9 of the amendment reads as follows:

“For the occupation tax, penalties and interest herein provided for, the State shall have a lien on any leasehold interests, ownership of the oil rights or interest owned by the person owing any tax herein provided for.”

Such leasehold interest and oil rights as are contemplated by the statute pass into the hands of a receiver appointed by a State court of competent jurisdiction, and are held by him, subject to the lien of the State for the amount due as taxes on gross production, provided for by Article 7383 as amended. For the preservation of the estate it is the duty of the receiver to discharge the lien, and the claim secured thereby is entitled to priority over all other claims, secured and unsecured, against the property in the hands of the receiver.

By Article 7355 the Legislature provided for certain occupation taxes set forth in the various subdivisions of the statute. Under Article 7361 a lien was fixed as follows:

“Art. 7361. The payment of the specific tax herein provided for shall be required by the collector of taxes to be made before any person, firm or association of persons shall be allowed to engage in any occupation requiring a license under the provisions of this law, this payment to be made for a period not less than three months. All arrearages of taxes that may be due by reason of any such business having been carried on shall be a lien upon all the stock and fixtures owned or used in or making a part of any business or vocation liable to such tax under the provisions of this chapter, and which lien shall authorize the collector to sell, after due notice, so much stock or other personal property of any person, firm or association of persons owing taxes under the provisions of this chapter, as will satisfy such claim, together with the cost of such proceeding.”

The stock and fixtures designated in Article 7361 come into the possession of a receiver appointed by a State court subject to the lien of the State, and if the receiver continues the business in question he also is subject to the tax and the consequent lien. You are advised, therefore, that in such instance the claim of the State is entitled to priority over other claims, and such taxes should be paid by the receiver as a means of preserving the estate.

Occupation taxes upon persons selling gasoline at wholesale in intrastate commerce in this State accrue by virtue of Chapter 5, Acts of the Third Called Session of the Thirty-eighth Legislature. The act itself does not specifically provide for a lien either upon the property used by the debtor in carrying on his business or upon any other part of his estate. By its terms the act is not made a part of that chapter of our Revised Statutes dealing with occupation taxes, and therefore a lien does not arise upon the stock or fixtures used by the wholesaler in the conduct of his business under Article 7361 above quoted. License or occupation taxes are not liens unless made so by law. 26 R. C. L., 388; United States vs. Railway Co., 203 Fed., 963.

We are of the opinion, however, that a claim of the State of Texas for such gross receipts taxes is entitled to priority under Article 8, Section 15, of the Constitution. This section is as follows:

“The annual assessment made upon landed property shall be a special lien

thereon, and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide."

We are of the opinion that under the foregoing provisions of the Constitution all the property of a citizen is subject to the claim of the State of Texas for all his taxes, and that such claim is entitled to priority in a State receivership.

We are familiar with the language used in *State vs. Jordan*, 60 S. W., 1008, wherein the statement is made that until the enactment of Article 662<sup>1</sup>, making unpaid taxes a lien upon all the property of a taxpayer who makes an assignment for the benefit of creditors, or where his property is levied upon by creditors by writs of attachment or otherwise, or where the estate of a decedent becomes insolvent, the State "in no event had a lien on personal property for taxes, nor upon real estate except for the taxes due upon each separate piece." The question submitted to us in your inquiry was not involved in that case and the language above quoted was not necessary to the decision. Under Article 7624, Revised Statutes, all personal property of a citizen is made subject to summary action by the tax collector to enforce payment of taxes. Whether a technical lien was thereby fixed we deem immaterial.

In 23 Ruling Case Law, page 109 (Receivers, Section 119), it is said:

"The appointment of a receiver and the taking of property into the hands of a court through its officer do not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in custodia legis to the same extent that it was while in the possession of the owner, and whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims except judicial costs."

In *Central Trust Company vs. New York City and Northern Railroad Company*, 1 L. R. A., 260, it was held by the New York Court of Appeals that the claim of the State for the franchise tax of a corporation in the hands of a receiver was entitled to priority. The court said:

"It may be admitted that in a strict and technical sense these taxes when first imposed are not a lien upon any specific property of the corporation. But we are of the opinion \* \* \* that the State has a paramount right to collect them before the moneys applicable to said payment shall be paid away by the receiver."

In *Taylor vs. Sutherlin-Meade Tobacco Company*, 107 Va., 687, 60 S. E., 132, 14 L. R. A. (N. S.), 1135, appears this statement of the law:

"It is the universal rule that a court as the representative of the sovereignty of the State will make no order for the dispositions of funds in custodia legis until provision is made for the payment of taxes and levies due to the Commonwealth and its municipalities."

In *Greeley vs. Provident Bank et al.*, 11 S. W., 980, it was said by the Supreme Court of Missouri:

"It may be conceded that the State did not have an express lien on the assets that went into the hands of a receiver, but it had a right paramount to other creditors to be paid out of those assets; a right which it could have enforced through its revenue officers by the summary process of distress, but for the fact that the property and assets of its debtor it was in the administration and distribution of those assets to respect that paramount right upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in the distributing of it; and to make no order for the distribution of the assets in custodia legis except in subordination to that right."

The only reported Texas case which might appear to be contrary to this opinion is *I. & G. N. Railroad Company vs. Coolidge*, 62 S. W., 1097. In that case the Court of Civil Appeals denied a receiver priority over a claim alleged to have been advanced by him for the payment of taxes upon certain lots belonging to the defendant railroad company. The court held that the tax lien upon said lots only existed to secure the amount of taxes due thereon, and that this lien should not have been extended so as to secure the payment of the taxes due upon the other property of the defendant. A writ of error was granted by the Supreme Court, but was later dismissed for the reason that it was shown that the Court of Civil Appeals decision did not settle the case so as to give the Supreme Court jurisdiction.

In view of that provision of our Constitution above quoted, and of the statute granting to the collector the right to seize and sell such personal property of a delinquent taxpayer as might be necessary to pay all taxes lawfully due by him, we cannot avoid the conclusion that all personal property in the hands of a receiver is subject to a claim of the State of Texas for taxes, and that such claim is prior to the rights of other creditors.

It may be that the real property owned by the debtor is not subject to a lien for taxes other than those assessed against the specific realty. This seems to be the holding in the *Coolidge* case. However, whether by reason of an express lien or not, it is our opinion that under the general principles of law illustrated by the cases and texts above quoted from, the State is entitled to priority in a receivership proceeding, and the receiver should be required to pay all taxes due at the time of his appointment or accruing pending his administration, if there be sufficient funds in his possession.

You are, therefore, advised that each of the questions asked by you is to be answered in the affirmative.

Respectfully,

ERNEST MAY,  
Assistant Attorney General.

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Op. No. 2586, Bk. 60, P. 334.

**TAXES—FORECLOSURE OF LIEN—EFFECT OF JUDGMENT ON LIEN HELD  
BY THE STATE FOR UNPAID TAXES.**

1. The State has a separate and distinct lien for each year's taxes and a separate and distinct cause of action arises thereunder for the enforcement of such lien, and when the taxes for each year become delinquent such lien in favor of the State is created independent of any and all other liens acquired by the State for any previous year against the same property on account of

unpaid taxes and nothing short of actual payment of the taxes will extinguish the said lien.

2. When there are several years' delinquencies the causes of action may be combined and foreclosure of the several liens asked for in the same proceeding and the land sold to satisfy all the taxes due against the property for all the years reported delinquent, and when such a method for the collection of taxes is employed, it is deemed advisable to bring one action rather than several suits for the enforcement of the lien for each year separately.

3. As to the judgment mentioned, it is impossible to give you an opinion on its validity without having the pleadings and copy of the judgment before us, but if the judgment is regular and disposes of all parties and issues and the court determined the issue of existence of such tax liens for the years named against the State and rendered judgment accordingly, that it would seem the judgment would be conclusive until set aside and would be a bar to any action on the part of the State to foreclose the lien on the land to satisfy the unpaid taxes for 1892 and 1893.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 12, 1925.

*Hon. H. Snodgrass, County Attorney, Bee County, Beeville, Texas.*

DEAR SIR: We are in receipt of your letter of February 6th, addressed to the Attorney General, reading:

"Certain property in this county went delinquent for the taxes due the State and county for the years 1892, 1893, 1894 and 1895.

"In 1902 the county attorney of this county filed suit on said property for the taxes due the years 1894 and 1895, and recovered judgment foreclosing the tax lien and said property was sold thereunder. In this suit no mention was made of the taxes due for 1892 and 1893.

"In 1917 the county attorney of the county filed suit on said property to recover the taxes due for 1892 and 1893, making the record owner of said property at the time said taxes went delinquent and the then owner who had acquired the tax title of 1902 parties to the suit, who pleaded that the State 'having sued and recovered upon a portion of its demand, has split its cause of action,' it was thereby estopped from maintaining further action for the recovery of the taxes due for 1892 and 1893, and further that the State's claim for the taxes for 1892 and 1893 was merged and satisfied by virtue of the judgment entered in 1902 for the 1894 and 1895 taxes and the sale of said property thereunder. In said suit filed in 1917 the defendants recovered judgment holding said property 'discharged from all liens or claims of the State of Texas for the taxes for the years 1892 and 1893' and vesting a good and perfect title in the then owner.

"Will you be kind enough to advise me whether or not said judgment rendered in 1917 is valid, and whether or not the State can now maintain its suit for the recovery of said taxes for the years 1892 and 1893."

Replying thereto you are advised that under the authority of State vs. Liles, reported in Southwestern Reporter, Vol. 212, page 517, it seems that the State has lost its liens on the land for the unpaid taxes for the years 1892 and 1893. This is a case decided by the El Paso Court of Civil Appeals, the majority opinion having been written by Justice Higgins and the facts in the case being stated as follows:

"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 re-

covered 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."

And the opinion of the court is as follows:

"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 years previous to that for which the sale was made. See note and cases cited. *Ann. Cas.*, 1913A, 675; 37 *Cyc.*, 1477.

"This rule of decisions it seems obtains in Texas. *City of Houston vs. Bartlett*, 29 *Texas Civ. App.*, 27, 68 *S. W.*, 730 (writ of error refused); *Ivey vs. Teichman*, 201 *S. W.*, 695. 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. *Vieno vs. Gibson*, 85 *Texas*, 432, 21 *S. W.*, 1028; *Brown vs. Canterbury*, 101 *Texas*, 86, 104 *S. W.*, 1055, 130 *Am. St. Rep.*, 821. See also *Rembert vs. Wood*, 16 *Texas Civ. App.*, 468, 41 *S. W.*, 525; *Alston vs. Piper*, 34 *Texas Civ. App.*, 589, 79 *S. W.*, 357. The doctrine of these cases it would seem should apply to tax liens.

"We are of the opinion, therefore, that the court properly refused a foreclosure for taxes for the years antedating the foreclosure sales for the years 1904 and 1908."

Chief Justice Harper of the court writes really a dissenting opinion, but says that he concurs with the opinion written by the majority of the court. Justice Harper says:

"Article 7684. *Rev. Stat.*, *Vernon's Sayles'*, provides that all lands or lots which have been returned delinquent since 1885, 'or may hereafter be returned delinquent or reported sold to the State or to any city; \* \* \* said taxes shall remain a lien upon the said land, \* \* \* and may be sold under the judgment of the court for all taxes, interest, \* \* \* shown to be due by such assessment for any preceding year.' To me this language means that the State's lien shall remain for each and every year until the taxes are paid and cannot be divested except by payment. In *Traylor vs. State*, 19 *Texas Civ. App.*, 86, 46 *S. W.*, 81, it is held that the lien remained where the land was reported sold to the State by virtue of this same statute, and the provision 'shall remain a lien' applies with equal force to lands 'returned delinquent' as to land sold to the State or any city."

It seems that in deciding this case the Court of Civil Appeals has based its decision upon the cases of the *City of Houston vs. Bartlett*, 68 *S. W.*, 730; *Ivey vs. Teichman*, 201 *S. W.*, 695, and *Vieno vs. Gibson*, 21 *S. W.*, 1028. In neither of those cases was the lien sought to be enforced preserved by any statute until the indebtedness for taxes were actually paid. And it would appear that the court lost sight of or overlooked Article 7528 of the Revised Civil Statutes, which provides: "All taxes upon real property shall be a lien upon such property until the same shall have been paid," and said court has evidently lost sight of the constitutional provision, Section 15, Article 8, which reads as follows:

"The annual assessment made upon landed property shall be a special lien thereon."

We are inclined to think that if this constitutional provision and the article of the Revised Statutes had been considered by the court this decision would have been otherwise.

The Supreme Court has not passed directly on this question, but in view of the constitutional provision and the article of the statute referred to above, we do not see how any holding could be made other than one preserving the lien on the land in favor of the State until the taxes are actually paid and that nothing short of actual payment of the taxes will amount to an extinguishment of said lien.

The State has a separate and distinct lien for each year's taxes and a separate and distinct cause of action arises thereunder for the enforcement of such lien, and when the taxes for each year become delinquent such lien in favor of the State is created independent of any and all other liens acquired by the State for any previous year against the same property on account of unpaid taxes and nothing short of actual payment of the taxes will extinguish the said lien.

When there are several years' delinquencies the causes of action may be combined and foreclosure of the several liens asked for in the same proceeding and the land sold to satisfy all the taxes due against the property for all the years reported delinquent, and when such a method for the collection of taxes is employed, it is deemed advisable to bring one action rather than several suits for the enforcement of the lien for each year separately.

As to the judgment mentioned, it is impossible to give you an opinion on its validity without having the pleadings and copy of the judgment before us, but if the judgment is regular and disposes of all parties and issues and the court determined the issue of existence of such tax liens for the years named against the State and rendered judgment accordingly, that it would seem the judgment would be conclusive until set aside and would be a bar to any action on the part of the State to foreclose the lien on the land to satisfy the unpaid taxes for 1892 and 1893.

Mr. W. W. Caves, former Assistant Attorney General, has rendered an opinion on this question and we quote from such opinion for your benefit the following:

"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."

Yours very truly,

R. J. RANDOLPH,  
Assistant Attorney General.



Op. No. 2632, Bk. 61, P. 303.

INSTITUTIONS OF PURELY PUBLIC CHARITY—TAXATION—EXEMPTIONS  
THEREFROM.

1. Real property belonging to an institution of purely public charity and rented or leased is not exempt from taxation, regardless of how the revenues derived therefrom are used by such institution.

2. No property comes within the exemption from taxation authorized by Constitution, Section 2, Article 8, unless it is both owned and used exclusively by an institution of purely public charity.

3. Property belonging to the Presbyterian Clinic, an institution of purely public charity, and used exclusively by such institution in the dispensation of its charity, but rented or leased to another, is subject to taxation.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, December 30, 1925.

*Hon. Claude D. Bell, Assistant Criminal District Attorney, Dallas, Texas.*

DEAR SIR: This will acknowledge receipt of your letter of December 28th addressed to Hon. Dan Moody, Attorney General, relating to exemption from taxation of property belonging to the Presbyterian Clinic, a corporation, such property being a lot 92x100 feet out of Block 247 in the city of Dallas, Texas, and situated at the corner of Bryan and Harwood Streets.

The commissioners court of Dallas County, through and by their county judge, has also forwarded to this Department a communication requesting the opinion of this Department as to whether or not such property is exempt from, or subject to taxation. In addition to the above communications, we have been furnished a brief prepared by Hon. R. L. Stennis, one of the directors of the Presbyterian Clinic and representing same as attorney before the commissioners court and this Department, wherein it is contended that the above property is exempt from taxation under the Constitution and statutes of this State. The Presbyterian Clinic was incorporated as an institution of purely public charity for the purpose of supporting a clinic for free medical and surgical treatment for children. No charge is made or permitted for treatment of any child in this institution and no discrimination is made, but all children are treated regardless of race, color or creed.

From the information furnished us there can be no question raised as to this institution being one of purely public charity and since its organization it has treated thousands of poor children of Dallas without charge and without discrimination. A large number of the best physicians and surgeons of Dallas giving a large part of their time without charge to the treatment of poor children at this clinic. The clinic building is located at 3617 Maple Avenue in the city of Dallas, Dallas County, Texas.

It is to be observed that the property in question is situated at the corner of Bryan and Harwood Streets in the city of Dallas, while the building owned and occupied as a clinic by this corporation is located at 3617 Maple Avenue, Dallas, Texas. Therefore, the clinic, that is, the buildings occupied and used for free medical and surgical treatment for children, is located in a different part of the city of Dallas from the property for which exemption from taxation is sought, and in addition to this material fact, it is the purpose and intention of the Pres-

byterian Clinic to lease this property and use the revenues derived therefrom to maintain its clinic. The commissioners court of Dallas County in their communication to this Department requests that we give them an opinion based on the following assumptions:

"1. Assuming that the Presbyterian Clinic is incorporated under the laws of Texas and is an institution of purely public charity.

"2. Assuming that the Presbyterian Clinic now is and for several years has been maintaining a free clinic for children, using and occupying property other than the property above referred to.

"3. Assuming that the property above referred to was acquired in June, 1924, as part of the endowment of said Presbyterian Clinic under conditions requiring the property to be leased to others and all rents and revenues therefrom to be used to sustain and operate a free clinic for all children, and assuming that all rents and revenues have been used for this and no other purpose and that the total income of the Presbyterian Clinic from this endowment and from all other sources, including these rents and revenues, is insufficient to meet the necessary expenses for sustaining and operating this free clinic and has been and is being and must continue to be supplemented by voluntary contributions.

"4. Is the above described lot exempt from taxation?"

It is contended by Mr. Stennis that the property located at the corner of Bryan and Harwood streets in the city of Dallas is exempt from taxation by virtue of the provisions made in Section 2 of Article 8 of the Constitution, authorizing the Legislature by general laws to exempt "institutions of purely public charity," and he further urges in support of this contention, that under the provisions made in Section 6 of Article 7507, Revised Civil Statutes of 1911, designated as Section 7 of Article 7150, Revised Civil Statutes of 1925, the Presbyterian Clinic is relieved of the payment of taxes on such property.

The term "exemption" presupposes a liability and in the law of taxation it is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment. Unless restrained by constitutional provisions, the Legislature of a State has full power to exempt any persons or corporations or classes of property from taxation according to its views of public policy or expediency.

The Constitution of this State expressly forbids the exemption of all property from taxation except that class of property specifically exempted under its provisions. Endeavoring to conform with the provisions made in Section 2 of Article 8 of the Constitution, the Legislature provided:

"That all buildings belonging to institutions of purely public charity, together with the lands belonging to and occupied by such institutions, not leased or otherwise used with the view to profit, unless such rents and profits and all moneys and credits are appropriated by such institutions solely to sustain such institutions and \* \* \* for the maintenance of persons who are unable to provide for themselves, whether such persons are members of such institutions or not."

The Legislature defined an institution of purely public charity as one which dispenses its aid to its members and others in sickness or distress, or at death, without regard to poverty or riches of the recipient, also when the funds, property and assets of such institutions are placed and bound by its laws to relieve, aid and administer in any way to the relief of its members when in want, sickness and distress, and provide

homes for its helpless and dependent members and to educate and maintain the orphans of its deceased members or other persons.

We think it is to be admitted that our Legislature had the power to define the term "purely public charity" as it did in Section 7, Article 7150, Revised Civil Statutes of 1925, but did not have authority to so define such term to the extent that the inevitable result would be to exceed and enlarge upon the meaning of such term as used and meant by the makers of our Constitution. An alleged statutory grant of exemption from taxation will be strictly construed. Such a privilege or immunity cannot be made out by inference or implication, but must be conferred in terms too clear and plain to be mistaken and in fact admitting of no reasonable doubt, and where it exists it should be carefully scrutinized and not permitted to extend either in scope or duration beyond what the terms of the concession clearly requires or so as to create an absolute and irrevocable exemption unless the language of the Constitution or statute clearly so requires.

In so far as exemption from taxation is concerned, the Constitution of this State places a limitation upon the Legislature and one which the Legislature cannot legally exceed, and we think that the courts of this State have continuously and uniformly held that property so owned and used as is the property in the instant case, is not exempt from taxation, notwithstanding the provisions made in Section 7 of Article 7150, Revised Civil Statutes of 1925.

Section 2 of Article 8 of the Constitution of this State provides that the Legislature, by general laws, may exempt "institutions of purely public charity," and further provides that all exemption laws other than those therein mentioned shall be null and void. This provision became effective January 7, 1907, and is a re-enactment of the same provision in the Constitution of 1876. It makes no mention of endowment funds of such institution. In the case of *Morris vs. Lone Star Chapter No. 6, Royal Arch Masons*, 5 S. W., 519, decided November 1, 1887, by the Supreme Court upon identically the same language embodied in the old Constitution, it was held that the Constitution only exempts property actually and directly used by the institution of purely public charity. The more recent cases of *Houston vs. Scottish Rite Masons*, 230 S. W., 978, and 233 S. W., 551, and *State vs. Settegast*, 254 S. W., 925, reversing 227 S. W., 253, of Supreme Court cases, declared that portion of Article 7150, Section 7, which attempts to exempt all property the revenues of which is used by institutions for charitable purposes to be unconstitutional and without effect.

In discussing the question of the exemption of property from taxation, the Supreme Court of this State in its decision rendered March 12, 1924, 259 S. W., 926, holding the Santa Rosa Infirmary to be exempt, clearly distinguished that case from the cases above cited by the use of the following language:

"It is apparent if any part of it is rented out and the relation of landlord and tenant created, that that very fact would necessarily destroy the exclusive use necessary to be retained by the owner to bring its property within the plain terms of the Constitution."

In the case of the *City of Houston vs. Scottish Rite Benevolent Association*, supra, Mr. Justice Greenwood, speaking for the Supreme Court of this State, said:

"Where the language of Constitution, Article 8, Section 2, authorizing the exemption from taxation of buildings used exclusively, and owned, by institutions of purely public charity, as construed by the Supreme Court, was carried without change into the subsequent amendment of the section, the presumption is conclusive that the people readopted the provision with knowledge of its declared intent.

"No building comes within the exemption from taxation authorized by Constitution, Article 8, Section 2, unless it is both owned and used exclusively by an institution of purely public charity.

"It does not satisfy Constitution, Article 8, Section 2, authorizing the Legislature to exempt from taxation a building of an institution used exclusively and owned by an institution of purely public charity, that the use of the building by others than the institution was permitted by the owner to obtain revenues to be devoted entirely to its work of public charity, nor is the requirement satisfied by the fact that those sharing the use pay no rent, as the actual direct use must be exclusive on the part of the charity."

A case more directly in point, both in question of law and fact, will be found in *State vs. Settegast*, supra, where it was there admitted that the Hermann Hospital Estate is an institution of purely public charity as it is here that the Presbyterian Clinic is an institution of purely public charity and the Commission of Appeals by Judge German held that:

"Property consisting of six regular city blocks, on which were located rented cottages or houses belonging to a charitable institution, the rent from which was used solely for the benefit of such institution, held not within the constitutional exemption from taxation in favor of charitable institutions, since the property was not used exclusively by such institution."

It follows, therefore, and you are so advised, that under our Constitution relating to the exemption of property from taxation as construed and interpreted by the Supreme Court of this State, the property belonging to the Presbyterian Clinic and situated at the corner of Bryan and Harwood Streets in the city of Dallas, is not exempt from taxation.

We acknowledge with due appreciation the valuable assistance rendered this Department in this matter by the brief prepared and furnished by Hon. Claude D. Bell, assistant criminal district attorney of Dallas County, and also the brief furnished us by Mr. Stennis.

Yours very truly,

C. L. STONE,  
Assistant Attorney General.

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Op. No. 2618, Bk. 61, P. 76.

#### CONSTITUTIONAL LAW—DEBT—BONDS OF THE UNIVERSITY.

1. The Board of Regents of the University of Texas is without authority to borrow money for University purposes and issue bonds and create an obligation to pay such debt out of future revenues of the University to be collected over a period of as much as fifteen years. The obligation thus attempted to be created would be void and of no effect and could not lawfully be paid, since it would be a debt in violation of Section 49 of Article 3 of the Constitution of the State of Texas. Chapter 175, Acts Thirty-ninth Legislature, is unconstitutional to the extent that it authorizes the creation of such a debt.

2. The foregoing is subject to the exception that pursuant to statute a State debt could be created to supply a casual deficiency in the revenue, based

on future revenues, provided such debt, together with other existing State debts, if any, did not exceed in the aggregate the sum of \$200,000.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, November 19, 1925.

*Hon. W. M. W. Splawn, President, University of Texas, Austin, Texas.*

DEAR DR. SPLAWN: The Attorney General is in receipt of your communication of the 10th instant in which you request an opinion in reference to the proposed issuance of bonds by the University of Texas in order to borrow money and make immediately available for certain University purposes future revenues of the University.

It is not necessary to state the details of the proposition made to the Board of Regents by certain financial concerns. It will be sufficient for the purpose of this opinion to state that the question involves an answer to the following question:

Has the Board of Regents of the University of Texas authority to borrow as much as three million dollars and create an obligation to pay the same out of future revenues of the University, to be collected over a period of fifteen years?

This Department has given careful consideration to your inquiry and we have reached the conclusion that the Board of Regents of the University of Texas is without authority to borrow money for University purposes and issue bonds and in that way create an obligation to pay such debt out of future revenue of the University, to be collected over a period of as much as fifteen years. This, however, is subject to the exception that in order to supply casual deficiencies in the revenues of the University the Board of Regents would be authorized to create debts based upon future revenues so long as the same do not increase the total debts of the State created to supply casual deficiencies in the revenue above the sum of \$200,000. The reasons for arriving at this conclusion will now be stated.

It is true that the Thirty-ninth Texas Legislature enacted a statute approved April 3, 1925, effective the same date, the same being Chapter 175 of the General Laws of the Regular Session of that Legislature, providing, among other things, as follows:

"The Board of Regents of the University of Texas shall expend the interest which has heretofore accrued and that which may hereafter accrue on the Permanent University Fund, and also all other income of said fund and all income resulting from the use of the University lands, including all proceeds from grazing and mineral leases, which proceeds are now in the State Treasury or may be hereafter received from such leases, for permanent improvements to be erected on the campus of the University of Texas or at any of the branches of the University, and the Board of Regents may pledge said interest and income for a term of not exceeding fifteen years to make said funds immediately available."

Assuming that this statute would authorize the Board of Regents to borrow money and to repay it out of future revenues of the University, we are confronted with the question whether this provision of the statute is violative of Section 49 of Article 3 of the Constitution of this State, 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 deficiency

in the revenue shall never exceed, in the aggregate at any one time, two hundred thousand dollars."

Here we have a plain, unequivocal provision of the Constitution inhibiting the creation of debts by or on behalf of the State, with certain exceptions. All of the exceptions but one are immaterial in so far as our question is concerned. The exception in reference to the creation of debts to supply casual deficiencies in the revenue will be discussed later along in this opinion.

The act of the Legislature above quoted from must give way, of course, to whatever extent it may be in conflict with this constitutional provision. Would the borrowing of this money in the manner described create a debt, and if so, would such debt be "by or on behalf of the State" within the meaning of the Constitution? Both of these questions have heretofore been answered by this Department under a prior administration. Substantially the same question was propounded to the Attorney General and an opinion was prepared and rendered by Hon. C. M. Cureton, at that time Attorney General and now Chief Justice of our State Supreme Court, under date of March 8, 1919, addressed to Hon. Jno. H. Bailey and other members of the State Senate. The question was as to the validity of a proposed act of the Legislature authorizing the Board of Regents of the University of Texas to issue bonds up to \$4,500,000 and to obligate such Board of Regents for and in behalf of the University of Texas to pay the bonds at such times, not to exceed fifty years from their date, at interest at a rate of not to exceed five per cent, as the Board of Regents might determine. The future income of the University was to be pledged to the payment of the interest and the creation of a sinking fund.

In reaching the conclusion that the issuance of such bonds would involve the creation of debts, the Attorney General in the opinion just referred to used the following language:

"This provision of the Constitution is clear and explicit and expressly declares that no debt shall be created by or on behalf of the State, except for the purposes therein named. The obligations created by Senate Bill No. 283, in our opinion, constitute and evidence debt. A debt is that which is due from one person to another. Words and Phrases, 2nd Series, Vol. 1, page 1226. That these debts authorized by this bill would be debts by or on behalf of the State, we believe to be clear. The University of Texas and its Board of Regents are public agencies of the State, in fact the Regents themselves are public officers of the State.

"Cavanaugh vs. Looney, 7 U. S. Supreme Court Advanced Opinions (Lawyers' Co-op.), p. 179.

"Tucker vs. Pollock, 21 R. I., 317.

"Neil vs. Ohio Agricultural College, 31 Ohio State, p. 15.

"M. O. Royer, 123 Cal., 614.

"Thomas vs. Illinois Industrial University, 71 Ill., 310.

"Henn vs. State University, 22 Iowa, 185."

In disposing of the question whether a debt of the University would be a debt of the State of Texas, Attorney General Cureton, in the opinion mentioned, said:

"The conclusion to be reached from what has been said and from a consideration of these authorities, as well as others which will be cited, is that the University of Texas is a State institution, all of its property State property and its Board of Regents public officers. Harris' Constitution, Article 7, Sections 10 to 15, inclusive. Cooley's Constitutional Limitations, 6th Ed., pp. 655 to 661.

"*Cerl vs. School District No. 2*, 133 U. S., 562.

"*Cerl vs. School District No. 2*, 124 U. S., 197.

"*Reid vs. Actmon*, 117 Mass., 384.

"*Board of Education vs. Hackmann*, 48 Mo., 243.

"*Long vs. Fuller*, 68 Penn. State, 170.

"*Williams vs. School District No. 6*, 33 Vt., 271.

"*Harris' Constitution*, Art. 16, Sec. 30a.

"*Revised Statutes*, Arts. 26 to 54, inclusive.

"*Kimbrough vs. Barnett*, 93 Texas, 310.

"*Buchanan vs. Graham*, 81 S. W., 1239.

"This being the status of the University and its Board of Regents, it is clearly merely an agency of the State, and all acts done by or on behalf of the University are done by or on behalf of the State. Debts, therefore, created by the University or its Board of Regents would be debts created by the State, or by the Board of Regents on behalf of the State, and such debts would, therefore, be within the inhibitions of Section 49, Article 3 of the Constitution above quoted."

That a debt is created when the Board of Regents borrows money and agrees to pay it back out of future revenues, is too plain for argument. Likewise, any argument that a lawful debt of the University of Texas or the Board of Regents of that institution is not a debt by or on behalf of the State of Texas, is in our opinion wholly untenable. The University of Texas is a State institution supported by State revenues. It is a governmental undertaking and agency and is in no sense a private institution or an institution unconnected with the State of Texas. Its authority and activities are the State's authority and activities and its obligations are the State's obligations.

There are other provisions in the Constitution in reference to the creation of debts having reference to cities and counties, and in construing these provisions the appellate courts of this State have made it plain that the word "debt" as used in such provisions of the Constitution includes obligations created to be paid out of the revenues of future years. Thus, Sections 5 and 7 of Article 11 of the Constitution of Texas contain inhibitions against the creation of debts by cities and counties without, at the time of creating such obligation, setting aside a certain amount of taxes to take care of interest and sinking fund. The rule is well established that within the meaning of these provisions of the Constitution a debt is not created if the same is based on current revenues for the year during which the obligation was created. In the case of *McNeal vs. City of Waco*, 89 Texas, 83, 33 S. W., 322, the Supreme Court of the State of Texas laid down the rule as follows:

"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."

We here refer to the authorities cited at pages 86 to 103 of the Report and Opinions of the Attorney General of Texas for 1920-22. Among others, the following will be found:

*City of Corpus Christi vs. Woessner*, 58 Texas, 462.

*City of Terrell vs. Dissaint*, 71 Texas, 770, 9 S. W., 593.

*Howard vs. Smith*, 91 Texas, 8, 38 S. W., 15.

*City of Tyler vs. Jester*, 97 Texas, 344, 78 S. W., 1058.

*Ault vs. Hill County*, 102 Texas, 335, 116 S. W., 359.

The foregoing is sufficient, we think, to sustain our position in holding that the proposition submitted involves the creation of a debt in violation of the Constitution, and is for that reason unauthorized.

We assume, as a matter of course, that the proposed loan was not intended to be based on current revenues, since it would be unnecessary to borrow money based on such revenues; on the other hand, the same are available for University purposes.

Attention is also called to the fact that the Constitution does not inhibit the creation of debts to take care of casual deficiencies in the revenue. In the event there should be a casual deficiency in the revenues of the University, the Constitution would not be violated by the creation of a debt up to \$200,000; provided, of course, that there are not outstanding State debts amounting to that much. To state it a little more accurately, the debt which could be created to take care of any casual deficiency in the revenues of the University could not be in such an amount as would increase the total State debt above \$200,000. We presume that the Board of Regents is not interested in a debt within this limitation of \$200,000 and for that reason it is unnecessary for us to determine whether there is any casual deficiency in the revenues of the University justifying the creation of a debt in any amount whatsoever.

Yours very truly,

L. C. SUTTON,  
Assistant Attorney General.

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Op. No. 2607, Bk. 61, P. 322.

CONSTITUTION—UNIVERSITY LANDS—LEGISLATIVE POWERS—EASEMENT—POWERS OF BOARD OF REGENTS.

1. The grant of an easement or right of way to the American Telephone and Telegraph Company over and across University lands, with the right to the perpetual use by said company of the land embraced within such grant, for the purpose of constructing, maintaining and operating its lines of telephone and telegraph, including the erection of necessary poles, wires, cables and fixtures upon, over and across said property, does not violate the constitutional provision requiring said lands to be sold under such regulations, at such times and upon such terms as may be provided by law.

2. The Legislature has the power to grant or authorize the grant of such an easement to the American Telephone and Telegraph Company, and through the privilege and right accorded telephone and telegraph companies to exist, construct, maintain and operate their lines of telephone and telegraph within the State, it has given its implied consent to said company to enter upon University lands and appropriate a right of way thereon, and over and across said property, for the construction, maintenance and operation of its telephone and telegraph line.

3. By virtue of the exclusive control and management invested in the Board of Regents over University lands said Board has the power and authority in carrying out and giving effect to such legislative implied consent to grant an easement or right of way to the American Telephone and Telegraph Company over and across the University lands located in Culberson and El Paso Counties.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, July 8, 1925.

*Board of Regents, University of Texas, Austin, Texas.*

GENTLEMEN: We are in receipt of your letter of late date through Mr. R. E. L. Saner of Dallas, Texas, Special Agent for University



lands, requesting an opinion of Attorney General Moody on the question as to whether the Board of Regents has the power and authority to grant an easement to the American Telephone and Telegraph Company over lands owned by said institution, with the right to the perpetual use by said company of the land embraced within such grant, for the purpose of constructing, operating and maintaining its lines of telephone and telegraph, including the erection of necessary poles, wires, cables and fixtures upon, over and across said property.

Before going into the question and discussing it, it becomes necessary to consider the constitutional provision requiring University lands to be sold and determine whether the grant of such an easement or right of way over University lands would violate or contravene such provision. The provision referred to with respect to University lands appears as Section 12 under Article 7 of the State Constitution, and reads as follows:

"The land herein set apart to the University fund shall be sold under such regulations, at such times and on such terms as may be provided by law, and the Legislature shall provide for the prompt collection, at maturity, of all debts due on account of University lands heretofore sold, or that may hereafter be sold, and shall in neither event have the power to grant relief to the purchasers."

In the case of *Smissen vs. The State*, 90 S. W., 113, Chief Justice Stayton of the Supreme Court, considering the constitutionality of an act of the Eighteenth Legislature authorizing the leasing for a term of years of the public free school lands, with the reservation of the right of the State to sell said lands embraced within the lease contract at any time the Legislature, within its discretion, should decide that a sale of said lands should be made, held that the Legislature had the power to authorize such leasing of the public free school lands of the State as would not interfere with the right of the State to sell them or as would not frustrate or to any extent defeat or prevent the sale of said lands whenever the Legislature might deem proper. This holding indicates that the Legislature would not have the power to authorize any disposition of the public free school lands that would in anywise interfere with, frustrate or to any extent defeat or prevent a sale of said lands whenever the Legislature might deem such a sale advisable. The court in deciding the question presented in that case was construing Section 4 of Article 7 of the State Constitution, which reads as follows:

"The lands herein set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law; and the Legislature shall not have power to grant any relief to purchasers thereof. The Comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the Board of Education herein provided for, in the bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law; and the State shall be responsible for all investments."

It will be observed that the above quoted section, so far as the same makes provision for the sale of public free school lands, is identical in language with Section 12 of the same article of the Constitution pertaining to the sale of University lands, and any construction placed

upon said Section with respect to the sale of public free school lands, of course, will apply with equal force to the section governing sales of University lands. The court in writing its opinion in this case expresses itself in the following language:

“A power clearly legislative in its character not expressly denied to the Legislature, ought not to be held to be denied by implication, unless its exercise would interfere with, frustrate or to some extent defeat the exercise of a power expressly granted.”

From this expression one is justified in concluding that the Legislature cannot exercise any power that would interfere with, or prevent a sale of University lands.

In another part of the opinion the writer expresses himself upon the subject in the following language:

“The direction in the Constitution that the lands shall be sold is doubtless mandatory and leaves no discretion in the Legislature as to the mode in which the lands shall be ultimately utilized. The section quoted, however, left it to be determined by the Legislature at what time and on what terms and under what regulations the sales should be made. These powers were necessarily discretionary. That the people did not intend that the lands made a part of the common school fund should be utilized by a system of leasing for a long or indefinite period would seem manifest, for if this might be legally done, one Legislature might authorize leases to be made, which would deprive a succeeding Legislature of the power to sell the land unincumbered, although the succeeding Legislature might be of the opinion that the proper time for sale had arrived and persons were ready to comply with terms and regulations deemed advantageous by the Legislature. It may be conceded that it was not intended by the people when they adopted the Constitution that any leases should be made without reservation of right to sell even for fixed and short periods whereby any impediment to sales would be created, for it must have been intended that every Legislature should have the power to determine whether the time had come to place the lands upon the market, and if so determined, at once so to place them.”

“The power to sell need not have been expressly granted by the Constitution, for, in the absence of a prohibition, the Legislature would have had that power, and for this reason we hold that the intention of the people by the section of the Constitution under consideration was to make the exercise of this power mandatory. The effect of this is to withdraw from the Legislature the power to adopt a system for the ultimate utilization of the common school lands otherwise than through sales, but as much was left to the discretion of the Legislature, as to the time and terms on which sales should be made, we cannot hold that it was thereby intended to withhold from the Legislature the power to temporarily utilize such lands in any manner deemed proper by the Legislature, which would not, for a time at least, disable it to fully and freely exercise the power expressly granted.”

From the above expressions contained in said opinion it is apparent that if the lease under consideration by the court in that case had not been made subject to the right of the State to sell said land at any time the Legislature, within its discretion, should deem proper, or had been made to run for a definite period of time, or a term of years, the court would have held said lease to be in violation of the Constitution upon the grounds that same would have interfered with, frustrated or to some extent defeated or prevented a sale of said lands, should the Legislature deem it advisable to authorize such a sale of said lands in the meantime or during the life of said lease and before the termination thereof.

Having determined that a lease of University lands for a definite

period of time or for a term of years not made subject to the sale of said lands embraced within said lease, is in violation of the Constitution, it becomes necessary to distinguish, if there is any difference in effect, between an easement or right of way over and across these lands and such a lease. The holder of such a lease contract for a definite period of time or for a term of years, the said lease not having been made subject to the sale of the property, would have the right to exclude from the possession of said lands, during the life of said lease, any purchaser holding under the State, and for that reason interfere with the sale to that extent. Any act on the part of the Legislature or any disposition of said land that would place the properties where actual possession thereof could not be delivered immediately to the purchaser after a sale had been made, would be deemed such an interference with the right of the State to sell said lands at any time the Legislature might deem proper as would be violative of that constitutional provision requiring University lands to be sold. The owner or holder of an easement or a right of way over and across University lands, although his interest in the land to that extent might be permanent, and he may have a right to use said right of way perpetually, would not be in a position to deny to a purchaser from the State actual possession of the lands over and across which the right of way or easement is extended. A person claiming the lands under a sale by the State would have the right to take actual possession of the properties embraced within the sale, and such right of way or easement would in nowise interfere with or frustrate or to any extent defeat or prevent a sale of said property. The sale simply would be made subject to said right of way or easement. Such a right of way or easement would not prevent a sale, for the land could be sold with the right of way or easement operating against it as well as it could otherwise, and we do not think the right of way or easement in question would violate the constitutional provision requiring University lands to be sold.

In the case of *Texas Central Railway Company vs. Bowman*, 97 Texas, 417, Judge Williams of the Supreme Court, passing upon the question as to whether the Legislature had the power to grant a right of way or easement to a railroad company over and across public free school lands, held that the power of the Legislature to devote the general property of the State to public purposes without other compensation than such as arises from the advantages resulting from such use of it, is therefore not only not taken away, but is expressly recognized, and we quote from the opinion in that case, as follows:

"If the contention based upon the provisions creating and providing for the disposition of the school fund that they take away all power from the Legislature to grant rights of way over the lands thus appropriated, is sound, it follows that these lands cannot be subjected to any public use whatever or dealt with otherwise than by outright sale. The objection would apply equally to legislative attempts to authorize the location upon them of public roads, courthouses, and even public schoolhouses, for the contention is in effect that as the lands must be sold nothing else can be done with them. This argument loses sight of other legislative powers which inhere in the sovereign and which are conferred by the sovereign upon the Legislature. Such restrictions upon legislative action as there may be in the provisions last referred to, are implied, and cannot be held to exclude the existence of other powers further than the latter may be inconsistent with the accomplishments of the objects of those provisions."

"In the construction of Constitutions, as well as the statutes, it has been

often held that the power necessary to the exercise of a power clearly granted will be implied, but we know of no case in which the express grant of a power legislative in its character has been held to carry with it an implied prohibition to exercise a power of that character, unless such implication is necessary to the full and free exercise of the power given."

"The purpose for which the school lands are required to be sold is the raising of money to support the schools and this may be promoted in many ways by the exercise of other powers by the Legislature. Such powers are left in that body by the Constitution and may be employed upon this land whenever the attempted exercise does not conflict with, and especially where it promotes the power to sell to advantage. To the advancement of the purpose of selling the land advantageously by settling up the country, bringing them into demand and thereby increasing their value, the Legislature might well regard the granting to railroad companies of rights of way over them as a legitimate means."

Under the authority above referred to and upon a consideration of the above quotations from Judge Williams' opinion in the case, it is clearly apparent that the court recognized the building of railroads within the State over and across public free school lands causes said lands to enhance in value and results beneficially in many ways to the country through which said railroads run. It is evident that railroads cause settling up of the country, thereby bringing said lands into demand and insuring a sale thereof to a better advantage and at greatly increased values. The granting of rights of way or easements to railroad companies over these public lands is really an aid to the constitutional provision requiring said lands to be sold rather than in violation thereof.

In the case of Imperial Irrigation Company vs. Jayne, 104 Texas, 415, the Supreme Court held that the Legislature had authority to grant easements on the public school lands of the State for the construction of dams and reservoirs for irrigation purposes, notwithstanding the constitutional provision requiring said lands to be sold. The Imperial Irrigation Company by an act of the Legislature had been granted an easement on the public school lands for a dam and reservoir site, and under such authority had appropriated about 450 acres of a section of free school land located in Pecos County, and had constructed thereon a large reservoir in which to impound water necessary for their irrigation plant. Jayne had purchased the entire section from the State and brought suit against the Irrigation Company for damages and also for the title and possession of land embraced within the reservoir site, attacking the grant of such an easement and seeking to have it declared void upon the grounds that it was in contravention of the constitutional provision requiring said lands to be sold, and for that reason the Legislature exceeded its powers in making such a disposition of said land. Judge Dibrell wrote the opinion of the court in that case and in passing upon the question as to whether the Legislature had the power to grant such an easement to the Irrigation Company gives expression to his views in the following language:

"It has been held, and it seems with great force of reason, that the purpose of the Constitution was not to restrict the Legislature in dealing with the public school lands further than to say they should be sold, and that the purpose of the constitutional provision was not to fetter the Legislature with restrictions so narrow as to deprive it of the exercise of that generous and wise policy in dealing with the public domain in order to foster public enterprises

and thereby promote the general welfare of the whole people. Such a construction of the Constitution would deny the Legislature the power to authorize the opening of public roads over the public school lands, or the granting of rights of way to railroad companies, or sites for public schoolhouses, or sites for dams or reservoirs to furnish water to the people of our cities located in the arid and semi-arid sections of the State. It would also stop the building of telegraph and telephone lines and cripple the entire commerce of the country."

This seems to indicate very clearly that the Legislature is authorized to exercise the power of eminent domain and grant an easement to telegraph and telephone companies over and across public free school lands of the State for the purpose of constructing and maintaining their lines of telegraph and telephone.

Referring to the case of *Smissen vs. The State*, the opinion having been written by Chief Justice Stayton of the Supreme Court, Judge Dibrell in the *Irrigation Company* case remarks:

"It is not held in that case, nor would we be understood as holding in this case that the Legislature has power to dedicate any considerable portion of the public school lands to any purpose not in harmony with the constitutional provisions limiting its authority, but the effect of our holding is that for the purpose of facilitating the sale of such lands and immeasurably enhancing their value, the Legislature has the power to exercise the right of eminent domain confided to it by the people and forever reserved by it by implication, and for a public use, grant an easement on any of said land for the purpose of public roads, right of way for railroads, telegraph and telephone companies and for dam and reservoir sites for impounding waters to be used for irrigation purposes and such other public utilities as a great public necessity demands. This we hold is nothing more than the exercise of that power which is inherent in the sovereign government and with which it never parts though it may dedicate, set apart and grant its lands; there is always an implied reservation of the power of eminent domain and while the title is held by the State the Legislature may exercise the power of such eminent domain without compensation in so far as such lands are to be affected. It grows out of necessity, and without the exercise of which society and governments could not exist. The exercise of this power as here contended for does not deprive the Legislature of its authority to sell the lands on which the easement is granted, for the title in the fee does not pass by the grant of the easement, and the property may be sold subject to such easement as in cases where public roads and railroad rights of way have been granted by the Legislature or by its authority."

Mr. Lewis in his work on *Eminent Domain*, Section 9, lays down this rule:

"Eminent domain, as we have already seen, is a sovereign power and devolves upon those persons in a State who are clothed with the supreme authority. In the States of the American Union these persons are the people, or, more strictly, that portion of the people invested with the elective franchise. The power of eminent domain has been delegated by the people to the legislative department of the government in the general grant of legislative power."

"Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the Legislature. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance."

"Since all property is subject to the power of eminent domain, it matters not for what purpose it is held, nor how the title or use may be involved or restricted, nor what the estate or interest which any person has therein. The property of colleges or other educational institutions and lands conveyed to trustees for an academy, are subject to the power."

Under the authorities cited above, it is very clear that the Legislature has the power to grant to the American Telegraph and Telephone Company the right of way or easement over and across the University lands. Telegraph and telephone companies are public enterprises engaged in a business for public purposes and the construction of their lines over and across any lands within the State is recognized as a contribution in a large measure to an influence causing lands located along said lines to enhance in value more rapidly. The building of such a line over and across University lands in Culberson and El Paso Counties will no doubt furnish means of communication to persons buying those lands in said counties. A construction of said line it seems would have a tendency to settle up the country in that part of the State and will bring the lands into demand, and no doubt will be the means of obtaining a better price when said lands are placed on the market for sale.

Having reached the conclusion that the Legislature has the power to grant to the American Telegraph and Telephone Company a right of way or easement over and across University lands located in Culberson and El Paso counties, the next question to be determined is whether the Legislature has exercised that power, and if not, whether it is necessary that they should exercise such power before said Telegraph and Telephone Company would be authorized to construct its lines over and across said lands. We find in the Revised Statutes, authorizing the incorporation of telegraph and telephone companies within the State, subdivision 11, under Article 1121, which reads as follows:

"To construct and maintain a telegraph and telephone line."

Under Article 1231, Revised Statutes of 1911, it is provided:

"Corporations created for the purpose of constructing and maintaining magnetic telephone lines are authorized to set their poles, piers or buttons, wires and other fixtures along, upon and across any of the public roads, streets, and waters of this State in such a manner as not to incommode the public in the use of such roads, streets and waters."

Article 1234 of said Revised Statutes of 1911 contains the following provision:

"Any corporation created as herein provided, may construct, own, use and maintain any line or lines of telegraph whether wholly or partly beyond the limits of this State."

Acts of 1913, page 92, authorizing consolidations, contains this provision:

"Any person, firm or corporation organized under the laws of Texas owning a local telephone exchange, whether wholly within or partly within the State limits, shall have power to purchase and may join with any other individual, firm or corporation in constructing, leasing, owning, using or maintaining any other local telephone exchange upon such terms as may be agreed upon between such persons or the directors or managers of the respective corporations, and may own and hold any interest in such local telegraph exchange or may become lessees thereof on such terms as the respective persons, firms, or corporations may agree. In case of the purchase, lease or acquisition of one telephone exchange by a company owning another when both systems are operating in the same incorporated city or town, the consent of such city or town shall be secured."

Article 1238 of said Revised Statutes of 1911 provides:

"All persons, companies, firms or corporations doing a telephone business in this State shall be compelled to make physical connections between their lines at common points for the transmission of messages or conversation from one line to another. Such connections shall be made through the switchboard of such persons, companies, firms or corporations, if any is maintained at such points, so that persons so desiring may converse from points on one line to points on another."

The above quoted statutory provisions are the only ones we have been able to find bearing upon the question as to whether telegraph and telephone companies are authorized to construct and maintain lines of telegraph and telephone over and across the public lands of the State. It will be observed that none of said provisions expressly authorizes such construction and maintenance of said lines over and across the public free school lands or University lands. The provision authorizing telegraph companies to set their poles, piers, buttons, wires, and other fixtures along, upon and across any of the public roads, streets and waters of this State, we think applies also to telephone lines. The authority under this provision is purely permissive and does not imply a prohibition against the construction or building of telegraph and telephone lines over and across University lands, and while authority is expressly given to said companies to construct and maintain their lines upon and across any of the public roads, streets and waters of the State, it does not expressly provide that the construction and building of said lines shall be confined wholly to such routes or locations.

Being no implied prohibition against the construction and maintaining of telegraph and telephone lines over and across University lands, and being no legislation upon the subject expressly granting rights of way over and across these lands to telegraph and telephone companies for the construction and maintenance of their lines, the next inquiry is whether there is any implied consent on the part of the Legislature to the granting of such an easement or right of way. From a consideration of the provisions of the statute set forth hereinabove, it seems clear that telegraph and telephone companies are fully authorized to exist in this State and to transact and carry on a telegraph and telephone business and to construct and maintain their lines within the State of Texas, and not being confined to any particular way over which to build their lines, it naturally follows that they are permitted to construct them over and across any territory within the State, including all public lands, selecting a route most convenient and best adapted and suited for their purposes.

In view of the above, we hold that the Legislature has exercised the power of eminent domain in this instance and has authorized through such implied consent an appropriation of a right of way over and across University lands to be used by telegraph and telephone companies in the construction and maintenance of their respective lines, and this brings us to the question as to whether the Board of Regents has the power and authority to act under such implied legislative consent and, in giving effect thereto, grant to the American Telegraph and Telephone Company the right of way or easement over and across University lands located in Culberson and El Paso Counties. The

powers of the Board of Regents over University lands are set forth and contained in Article 2633 of the Revised Statutes of 1911, said article reading as follows:

"The Board of Regents of the University of Texas are invested with the sole and exclusive management and control of the lands which have heretofore been, or which may hereafter be, set aside and appropriated to, or acquired by the University of Texas, with the right to sell, lease and otherwise manage, control and use the same, in any manner, and at such prices and under such terms and conditions as may to them seem best for the interests of the University, not in conflict with the Constitution of this State; provided, that such land shall not be sold at a less price per acre than the same class of land of other funds may be sold at under the statutes."

It will be observed that the Board is vested with the sole and exclusive management and control of these lands and is given the right to lease and use the same in any manner as may to them seem best for the interest of the University, not in conflict with the Constitution of the State. The power of sale is also conferred upon said Board, but this can be exercised only under such regulations, at such times and upon such terms as may be prescribed by law. Therefore, being a restricted power, we do not think that said Board would be authorized under such a power to grant or execute the easement in question, and if it has the power and authority to execute such a grant the same must be found to exist by virtue of its having the sole and exclusive management and control of the properties with the right to use them in any manner as may to them seem best for the interest of the University. The sole and exclusive management and control of a piece of property authorizes the manager or the one in control to do any and all things necessary to the protection and preservation of the property and to use the same or permit others to use it in any manner as may to him seem best for the best interest of the property, and may improve the same in such a way as will enhance the value thereof, and with the consent of the owner may grant rights of way or an easement over and across said property to be used perpetually by any telegraph or telephone company in the construction and maintenance of their lines of telegraph and telephone. The Legislature having given its implied consent for such telegraph and telephone companies to appropriate University lands for rights of way in the construction and maintenance of their lines of telegraph and telephone over and across said lands, we are of the opinion that the Board of Regents by virtue of its sole and exclusive management and control of said lands, with the right to use them in any manner as may to them seem best for the interest of the University, has the power and authority to give effect to such legislative consent and grant to the American Telegraph and Telephone Company an easement or right of way over and across University lands located in Culberson and El Paso Counties.

Therefore, in answer to the question submitted, you are advised that the Board of Regents has the power and authority to grant to the American Telegraph and Telephone Company the easement mentioned.

Yours very truly,

R. J. RANDOLPH,  
Assistant Attorney General.



Op. No. 2583, Bk. 60, P. 237.

UNIVERSITY REGENTS—TERM OF OFFICE.

1. The terms of office of the present Board relate back to the organization of the Board in 1913 under the constitutional amendment of November, 1912, and the Act of 1913 passed pursuant to said amendment.
2. The term of office of a regular appointee of the Board of Regents begins with his appointment, and confirmation by the Senate in regular session, and expires at the convening of the regular session of the second Legislature thereafter.
3. The term of office of a vacancy appointee runs only for the unexpired term of his predecessor.
4. The terms of office of one-third of the members of the Board expire during each regular session of the Legislature.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, February 9, 1925.

*Senators Murphy, Wirtz, Holbrook, Moore of Cooke, and Russek, Senate Chamber, Austin, Texas.*

GENTLEMEN: On February 3, 1925, there was transmitted to this Department Senate Simple Resolution No. 25, which reads as follows:

"Whereas, By an amendment to the Constitution of this State adopted November, 1912, and proclaimed December, 1912, and known as Sec. 30a, Article 16, the number and terms of office of the members of the Board of Regents is prescribed to be fully regulated by law; and

"Whereas, By Act of the Legislature, 1913, known as Articles Nos. 4042, a, b and c, provision is made for the appointment of members of the Board of Regents, one-third of the members to be appointed at each regular session of the Legislature; and

"Whereas, On February 10, 1913, Governor Colquitt submitted the names of seven Regents and at a later time submitted the names of two more, and they were confirmed; and

"Whereas, Considerable confusion exists as to the date of the terms of office of the members of the Board of Regents and it is the desire of the Senate to be correctly advised as to the date of the terms of office;

"Resolved, That the Attorney General of Texas be, and he is hereby requested to advise the Senate, the dates when the term of each member of the Board of Regents of the University of Texas begins and expires, and the length of term of each, and whether their terms begin and expire on the same day of the month, though in different years, and whether the appointment of a Regent to succeed another is for a full term of six years from the date of the appointment or for the unexpired portion of the term."

The resolution embraces several inquiries of this Department: First, the dates when the term of each member of the Board of Regents of the University of Texas begins and expires; second, the length of term of each member; third, whether their terms begin and expire on the same day of the month, though in different years; and, fourth, whether the appointment of a Regent to succeed another is for a full term of six years from the date of the appointment, or for the unexpired term.

By an amendment to the Constitution of this State adopted in November, 1912, and proclaimed in December, 1912, it was provided as follows:

"The Legislature may provide by law that the members of the Board of Regents of the State University and Board of Trustees or Managers, of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six years, one-third of the members of such boards to be

elected or appointed every two years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section."

In pursuance to such amendment to the Constitution, the Legislature in 1913 enacted three articles, known now as Articles 4042 a, b and c. The first article provides that the Board of Regents of the University shall be composed of nine persons, and other provisions not material here. The second article provides that the members of such Board shall be selected from different portions of the State, and shall be nominated by the Governor and appointed by and with the advice and consent of the Senate. This article further provides, "In the event of a vacancy on said Board, the Governor shall fill said vacancy until the convening of the Legislature and the ratification by the Senate. The members of said board who shall be in office at the time this act takes effect shall continue to exercise their duties until the expiration of their respective terms, as shall be determined according to the requirements of Section 3 (Article 4042c), and additional members shall be appointed in the manner prescribed herein, to fill out the terms of the members herein provided for." The third article mentioned above provides that the membership shall be divided into equal classes, numbered one, two and three, as determined by each board at its first meeting after this act shall become a law, which classes shall hold their offices two, four and six years, respectively, from the time of their appointment. It further provides, "And one-third of the members of each board shall hereafter be appointed at each regular session of the Legislature to supply the vacancies made by the provisions of this act and in the manner provided for in Section 2 (Article 4042b) who shall hold their offices for six years, respectively."

The answer to the inquiries made by the resolution requires a construction and interpretation of the act passed by the Legislature pursuant to the constitutional amendment, as well as certain other sections of the Constitution which will be hereinafter mentioned. It has been somewhat difficult to get a compilation of the facts with reference to the many appointments made by the different executives since 1915 for membership on the Board of Regents of the University, but we have secured from the University Archives a compilation showing in chronological order the several Regents and appointees since the year 1913 down to and including the year 1924, which is attached to and made a part of this opinion for your information.

On February 8, 1913, Governor Colquitt nominated, and the Senate thereafter in a short time confirmed, W. H. Burgess, F. W. Cook, George W. Littlefield, Clarence Ousley, Alex Sanger, J. D. Sayers and W. H. Stark. On June 7, Joseph Faust was appointed, and on July 1, A. W. Fly was appointed, both in the year 1913, and they were confirmed by the Senate August 12, 1913. The Hon. J. D. Sayers resigned August 21, 1913, and Will C. Hogg was appointed to succeed him August 22, 1913. Joseph Faust resigned September 20, 1913, and J. W. Graham was appointed to succeed him on the same date.

On September 20, 1913, the Board of Regents organized under the new law which had then taken effect, and drew lots for the two, four and six-year terms, in compliance with the law. Those who drew two-year terms were Ousley, Graham and W. H. Stark. Those who

drew four-year terms were Burgess, Hogg and Sanger. Those who drew six-year terms were Cook, Fly and Littlefield.

It is made plain by the provisions of Article 4042c, above quoted, that one-third of the members of the Board of Regents shall be appointed at each regular session of the Legislature to supply the vacancies made by the provisions of the act. In pursuance of that portion of the statute, appointments were made in January, 1915, to fill the places made vacant by the expiration of the terms of the above named Regents who had drawn two-year places, and the persons named in January, 1915, were Dr. George McReynolds, Dr. S. J. Jones and H. Faber. Prior to the expiration of Mr. Ousley's term, he resigned August 3, 1914, and Dr. McReynolds was appointed to succeed him, and then Dr. McReynolds was appointed to succeed himself in January, 1915, and these appointments were all confirmed by the Senate on February 3, 1915.

It is therefore plain that the intention of the Legislature in the enactment of the law mentioned, as well as the constitutional provision, Section 30a, Article 16, above, that one-third of the members of the board were to be appointed every two years, and this was the interpretation placed on it by the executive in making the appointments. The appointments, however, of Dr. McReynolds, Dr. Jones and Mr. Faber in January, 1915, were for six-year terms, as were also the appointments made in 1917 at the expiration of the terms of the original board who drew the four-year terms, and also the appointments made in 1919 at the expiration of the terms of those who drew six-year terms.

The words used in Article 4042c, "These classes shall hold their offices two, four and six years, respectively, from the time of their appointment," were interpreted, as above shown, to mean that those who drew two-year terms should go out of office at the convening of the next regular session of the Legislature, which was in January, 1915. The same is true as to the four and six-year terms, so that the words "the time of the appointment" in this connection related to the original terms as fixed by the provisions of the Act of 1913. It thereafter became the duty of the Governor, because he is the appointing power, to nominate to the Senate at each regular session of the Legislature thereafter, three members of such board. This interpretation of the law is supported by the plain language of the law, as well as by the necessity of uniformity and regularity of the operation of the law, that is, in having one-third of the members of the board to be appointed every two years during the regular session of the Legislature.

It is a general rule that where no time is fixed by law for the commencement of an official term, it begins to run from the date of the appointment or election, as the case may be, rather than the time of the qualification of the officer, because, obviously, if this were not the rule it would enable him to enlarge the term of his predecessor without shortening his own, or if he should be his own successor he would be constantly gaining by his continual neglect to qualify. It is also a rule of law that where the law prescribes the length of the term, but no date is fixed for the beginning or ending of the term, it has been held that the appointive power has a right to fix the commencement of the term, and when the same is fixed by the appointment first made, all subsequent terms of office necessarily have reference to such initial period. 22 R. C. L., Sec. 251. and cases there cited. It is further,

however, to be observed that where the Constitution of a State has prescribed the term of an office, the Legislature obviously has no power to alter it by either extending or shortening the period. It is a general rule, held to by most text writers, that of two possible modes of construction, that the one should be followed which fixes the term of office at the shortest period, and the practical construction of the statute as exemplified by the interpretation placed on it by the appointing power or by the public officer himself, is a factor of considerable importance in reaching the proper construction of a law regulating the tenure of office. *Robertson vs. Coughlin*, 82 N. E., 678.

Where a provision exists in law that appointments shall be made by and with the advice and consent of the Senate, as in the law under consideration, the executive can only exercise such power without such advice and consent where, since the adjournment of the Senate, a vacancy exists by the death or resignation of the incumbent, or some other happening by which the duties of the office are no longer discharged. If the Senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of the Senate. *Mechem on Public Officers*, Sec. 134. If the vacancy occurs or exists while the Senate is not in session and the concurrence of the Senate has not been had, the appointment is temporary and contingent upon confirmation. In the event that the appointment is not confirmed by the Senate at its next session, the appointment becomes inoperative. But where the nomination is approved, the right and authority of the officer are held to relate back to the time of his appointment, and do not begin only with his confirmation. *Id.*, Sec. 134.

The above are general rules which are sustained by the weight of authority, so far as we have been able to determine, in the construction of statutes relating to the tenure of office.

By the express terms of Article 4042b, in the event of a vacancy on said board the Governor shall fill said vacancy until the convening of the Legislature and the ratification by the Senate. This plainly means that in the event of a vacancy on said board during the adjournment of the Senate in the interim between its sessions, the Governor shall fill said vacancy by appointing some person who holds until the convening of the Legislature and ratification by the Senate. Of course, if the appointee is not ratified or confirmed, then the office immediately becomes vacant. If, however, he is confirmed, his title to the office relates back to the time of his appointment. For instance, when Hon. Clarence Ousley, who drew a two-year term, resigned in August, 1914, the Governor appointed Dr. McReynolds. Dr. McReynolds was confirmed by the Senate and was appointed for a six-year term in January, 1915. His confirmation by the Senate related back to December 11, 1914, when he was first appointed in the place of Mr. Ousley.

It is a well settled rule when both the duration of a term of office and the time of its commencement or termination are fixed by the Constitution or statute, a person elected or appointed to fill a vacancy in such office holds only for the unexpired portion of the term. 22 R. C. L., Sec. 255, and 50 L. R. A. (N. S.), 343, note. See also *State vs. Rose*, 85 Pac., 296, 6 L. R. A. (N. S.), 843. It also seems to be the weight of authority that the term of office of one elected or appointed to fill a vacancy in a board of several officers will be held to

be for the unexpired term only, where the clear intent of the creating power is that the entire board shall not go out of office at once, but that different groups should retire in regularly recurring intervals. This is the very situation here, where it appears that the Legislature made it the duty of the appointing power to name to the Senate three Regents at each regular session of the Legislature to supply the vacancies made by the provisions of the Act of 1913 making three Regents' terms expire at intervals of two, four and six years. It is to be observed that the policy of the framers of our Constitution is that in filling vacancies by appointment or by election, such appointment or election shall be to fill the unexpired term only. Section 27 of Article 16 of the Constitution provides specifically to this effect in cases of elections. Likewise, Section 12 of Article 4 of our Constitution provides that all vacancies in a State or district office, except members of the Legislature, shall be filled by the Governor by appointment, which if made during the session of the Legislature, same shall be with the advice and consent of two-thirds thereof, but if made during a recess, such person or some other person shall be nominated to the Senate during the first ten days of its session. If rejected, the office shall immediately become vacant. And this section also makes other provisions prohibiting the Governor from appointing the same person who has been theretofore rejected by the Senate, and any appointment to fill a vacancy shall continue until the next session of the Senate or until the regular election to the office, should it sooner occur.

It is therefore plain, it seems to us, that an appointment to the Board of Regents of the University made by the Governor during the adjournment of the Senate to fill a vacancy caused by the death, resignation or some other cause, of a former member, empowers the appointee to occupy said office only until the next session of the Senate, when, if confirmed, he holds said office for the unexpired portion of his predecessor's term. So far as we have been able to determine, this view is held by all the text-writers on the subject, though, of course, there are conflicting decisions of courts, depending usually on the difference of wording of the particular statute under consideration.

It is certain beyond any doubt that the terms of office of the Regents of the University are six years. Of course this applies only after the drawing provided for in the constitutional provision and the enactment of the Legislature pursuant thereto. It is likewise certain that one-third of the members of said board shall be appointed at each regular session of the Legislature after the enactment of Articles 4042 a, b and c. Since it is made the duty of the appointing power to appoint at each regular session of the Legislature, it seems to us to be clear that the beginning of a regular term of office of a Regent is during the regular session of the Legislature at which he is appointed and confirmed. Under the particular wording of the statute, and in consonance with all well reasoned authority, his confirmation is necessary before he becomes entitled to the commission of the office. In some jurisdictions, it has been held that the commission is the expression of the will of the appointing power, and that it is not until the commission is issued that the appointment is consummated. This, however, cannot be very material for the determination of the inquiries of the resolution. But it being the duty of the appointive power to appoint

three persons to the Board of Regents at each regular session of the Legislature, and the time for the regular session being fixed, it must be true, we think, that the beginning of the term of such members must be during that session. There is, however, a provision in our Constitution, Section 17 of Article 16, which provides that "all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." This provision is plain and has been interpreted many times by the courts. It would, therefore, seem that members of the Board of Regents could be what is commonly called "holdovers," unless in accordance with the provisions of the articles mentioned above the appointing power nominated their successors to the Senate and they were confirmed. We do not think it particularly material as to the day of the month that a Regent is appointed, because, as stated heretofore, the term of office is for six years beginning during the regular session of the Legislature and ending at the convening of or during the session of the second succeeding regular session thereafter. By the chart attached to this opinion it is apparent that this has been the interpretation placed upon the constitutional provision and the law since their enactment, until the year 1923, when there were no appointments made to the Board of Regents until June of that year. Under the plain language of the statute it would appear that there could be no doubt about this interpretation. For instance, the Hon. Will C. Hogg was appointed on August 22, 1913. He drew a four-year term. His successor, J. W. Butler, was appointed on January 27, 1917. Butler resigned, and there were several appointments made, namely, John Mathis, G. W. Brackenridge, both of whom resigned, and finally L. J. Wortham was appointed and proceeded to fill out the term of J. W. Butler, which expired at the convening of the Legislature in January, 1923, though as stated above, the appointing power made no appointments in that year until June, when C. M. Caldwell was appointed.

The phrase, "term of office," means the fixed period of time for which the office may be held. 29 Cyc., 1396. Since the Legislature, under the constitutional provision, has no power to change the term of office, either to shorten or to lengthen it, the act of the Legislature of 1913 cannot have placed upon it any other interpretation than one which fixes the beginning of the terms of office of three members of the board at each regular session of the Legislature thereafter, to serve six years from the date of such session of the Legislature. The appointments, if not made during the session of the Legislature, are not consummated until the appointments have been confirmed by the Senate, and if made in June of the year 1923, as some have been made, it seems to us that it must be said that the expiration of those terms of office will be at the convening of the regular session of the Legislature in 1929.

It is not possible for this Department to specifically answer the inquiry of the resolution as to the particular dates when the term of each member of the Board of Regents, as now constituted, begins and expires, because we have no information as to the places which were intended to be filled by the recent appointments of the Governor as shown by the executive message on page 247, Senate Journal of date February 2, 1925. The chart attached to this opinion gives as much information as is possible to get from the commission register in the Secretary of

State's office. We are, however, of the opinion that the term of office of Mrs. H. J. O'Hair, who was appointed in May, 1921, will expire at the convening of the regular session of the Legislature in 1927, unless, of course, under Section 17 of Article 16 of the Constitution, her successor is not appointed and confirmed during that session; that the term of Mr. R. G. Storey will expire, unless the above named article of the Constitution shall apply, at the convening of the regular session of the Legislature in 1929, since he was confirmed by the Senate to fill out the unexpired portion of the term of Marshall Hicks, who was appointed in June, 1923; that Mr. H. J. L. Stark's term expired at the convening of the regular session of the Legislature in 1925, and that he is a holdover under the above named article of the Constitution.

The above illustrations, we think, should serve to show that, in our opinion, the terms of the several members of the Board of Regents of the University of Texas are fixed by Article 4042c and the constitutional provision under which said article was enacted, which require that the appointing power shall appoint three members of such board at each regular session of the Legislature after the act takes effect. Therefore, the term of office is for six years beginning with that session of the Legislature and ending with the convening of the regular session of the second Legislature thereafter.

Further explaining the effect of this opinion, we respectfully advise that the term of office of the person who is filling the term of E. H. Perry, who was appointed in 1921, will expire with the convening of the regular session of the Legislature in 1927; that of the person filling the term of F. C. Jones will expire at the convening of the regular session of the Legislature in 1927; that of the person filling the term of Dr. Joe Wooten and that of C. M. Caldwell, with the convening of the regular session in 1929; and that of those persons filling the terms of F. W. Cook, John Sealy and G. W. Littlefield, expired with the convening of this regular session of the Legislature, and that the Regents now filling those places are holdovers under the constitutional provision above quoted.

Yours very truly,

WRIGHT MORROW,  
First Assistant Attorney General.

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Op. No. 2637, Bk. 61, P. 337.

WAREHOUSES—EXTENT TO WHICH THEY ARE SUBJECT TO CONTROL BY  
COMMISSIONER OF AGRICULTURE.

1. Warehouse corporations chartered under the provisions of Article 5578, Chapter 3, Title 93 of the Revised Statutes of 1925, are obligated by duties and amenable to the regulatory authority laid down in said Chapter 3, including the giving of bond under requirements of Article 5582.

2. Public warehouse corporations operating under a bond, either as laid down in Article 5661, Chapter 4, Title 93 of the Revised Statutes of 1925, or else as prescribed in Article 5569 of Chapter 2, same title, are, as bonded warehouse corporations, subject to certain of the provisions of Chapter 3, same title, and obligated by duties and amenable to the regulatory authority defined (1) in Article 5586, as to examination of their affairs by the Commissioner at their expense, (2) in Article 5591, as to suit upon refusal to submit to ex-

amination, (3) in Article 5593, as to Commissioner's rights when corporation is unsafe.

3. Public warehousemen, whether individuals or corporations, are by Article 5611, Article 3, placed under the control of the Commissioner and are also within the purview of Article 5600, same Chapter, with reference to fire insurance, and Article 5601, relating to charges for storage.

4. No public warehouse corporations, except those chartered under the provisions of Article 5578, are required to comply with Article 5585 as to making statement of affairs, nor, with exception of such corporations, are their permits subject to denial or revocation by the Commissioner under Article 5598.

5. No non-corporate public warehouseman is subject (1) to Article 5585, as to making statement of affairs, (2) to Article 5586, as to examination of its affairs, (3) to Article 5591, as to refusal to submit to examination, (4) to Article 5593, as to Commissioner's right when concern is found unsafe, (5) or to Article 5598, as to denial or revocation of permits.

6. All warehouse corporations chartered under subdivision 81, Article 1302, Revised Statutes, 1925, are public warehousemen.

7. All public warehousemen, whether corporate or non-corporate, are required to give bond under the provisions of Article 5569 and Article 5661.

8. Private warehousemen are, by virtue of the statutory definition of public warehousemen (Article 5568), only those who store personal property of their own or another's *without charge*.

9. Private warehousemen as such are not within the regulatory authority of the Commissioner, nor within any of the provisions of Chapters 2, 3 and 4 of Title 93, Revised Statutes, 1925.

10. A private warehouse may, however, with reference to a particular transaction become a public warehouse by simply storing property of another for hire, and as such operate under the provisions of the Uniform Warehouse Receipts Act, and to the extent of such public warehouse transactions, the Commissioner, by Article 5662, is given a general supervision over such a private warehouse.

ATTORNEY GENERAL'S DEPARTMENT,  
AUSTIN, TEXAS, January 13, 1926.

*Hon. Fred W. Davis, Director of Warehouses, Department of Agriculture, Austin, Texas.*

DEAR SIR: Mr. Stone has referred to me your letter of November 13, 1925, in which you ask for an opinion on the following questions:

1. "Are public warehousemen operating under a bond as laid down in Article 5661, Chapter 4 (Title 93, Revised Statutes, 1925), obligated by duties and amenable to the regulatory authority laid down in Chapter 3 (same title)?"

2. "Are warehouse corporations chartered under subdivision 81, Article 1302, Revised Statutes, 1925, now required to give bond and obey regulations and duties as laid down in Chapter 3, Title 93?"

3. "If it is optional and they fail to enter the bonded system, has the Commissioner (now) of Agriculture any regulatory authority concerning them?"

Our statutory law with reference to warehouses is very extensive, and through repeated amendments there arises some difficulty in dovetailing its parts. Much confusion may be avoided by keeping in mind several important statutory classifications and their relation to one another.

In the first place, Chapter 2, Title 93, Revised Statutes, 1925, entitled "Warehouses and Warehousemen," defines the law in general with reference to *public warehouses* without distinction as to whether corporate or non-corporate, and recognizes as excepted from its provisions *private warehouses* and public warehousemen issuing receipts such as issued by private warehousemen. The term "public warehousemen" is so defined in Article 5568 as to include any person receiving any personal property *in store for hire*, apparently leaving as private ware-



housemen only those storing personal property of their own or of others *without charge*.

In the second place, Chapter 3, Title 93, providing for the creation of *market and warehouse corporations*, sixty per cent of the incorporators of which must be engaged in agriculture, horticulture or stock raising, recognizes in one class, and in the main relates only to, such special corporations, and recognizes in another class what are termed *bonded warehouse corporations* (Article 5586), and also *public warehouses* (Articles 5596, 5600, 5603 and 5611).

In addition to this it may be remarked that Chapter 4 of Title 93, called "The Uniform Warehouse Receipts Act," provides that warehouse receipts may be issued by *any warehouseman*, and prescribes terms of such receipts and the duties of what are termed merely "warehousemen." The term "warehouseman" is, however, in Article 5664 of this act defined as meaning "a person lawfully engaged in the business of storing goods for profit." This definition makes the term "warehouseman" as used in this act practically synonymous with *public warehouseman* as defined in Article 5568 of the then existing law. In the light of this, the only conclusion justified by the apparent distinction between public warehousemen and private warehouses found in Articles 5661 and 5662 of the Uniform Warehouse Receipts Act is that a private warehouse may operate under the provisions of this act in particular transactions, and with reference to such transactions becomes a public warehouse, thereby giving the Commissioner, by virtue of Article 5662, the right to exercise a general supervision over it as operating under the provisions of said act. Such construction is supported by the general rule that the State is not authorized to interfere in the operations of private business except to the extent that it is affected with a public interest.

The kinds of corporate warehouses which may be created are *public warehouses* for the storage of products and commodities, under Article 1302, subdivision 81, *warehouses for the storage of products of the soil*, under article 1302, subdivision 82, and the *special warehouse corporations* defined in Chapter 3, Title 93, above referred to. With these statutory classifications and distinctions in mind, we believe that your questions will practically answer themselves upon the face of the warehouse statutes.

Article 5661, to which you specially refer, embraced in the Uniform Warehouse Receipts Act, provides in effect that any person may become a public warehouseman under the provisions of said act by filing with the county clerk of the county where located a bond for \$5000, conditioned that he will conduct his business in accordance with the provisions of said Uniform Warehouse Receipts Act.

Article 5569 in the then existing Public Warehouse Act (Chapter 2), prescribing the certificate and bond required of one before transacting business in a public warehouse, plainly relates to the same general matter contemplated by Article 5661, and is in substantial accord therewith, and as far as possible the two articles should be harmonized in their application.

Obviously, every public warehouseman, whether an individual, a partnership or a corporation, excepting only corporations chartered under the provisions of Article 5578, is controlled by these articles

(5661 and 5569) and required to give bond under the terms and conditions there prescribed. If such public warehouseman happens to be a corporation and chartered under the provisions of Article 5578 (Chapter 3), it is obligated by all the duties and amenable to all the regulatory provisions laid down in Chapter 3, including the giving of bond under the terms of Article 5582. If, on the other hand, such public warehouseman be a corporation, but chartered under the provisions of subdivision 81, Article 1302, instead of under Article 5578, then the claim of the attorney to whom you refer is correct and such public warehouse corporation, not chartered under the provisions of Article 5578, is not required to comply with Article 5585, requiring "each such corporation" (plainly meaning such corporation as authorized to be created by the preceding provisions of Chapter 3) to file with the Commissioner a statement of its affairs.

Every bonded warehouse corporation is, however, expressly controlled by Article 5586, and subject to an examination by the Commissioner of its affairs, at its expense. Every bonded warehouse corporation, as being a "corporation subject to the provisions of this chapter (Chapter 3)," is also amenable to Article 5591 upon failure to submit to examination, as well as to Article 5593, giving to the Commissioner certain regulatory rights with reference to a public warehouse corporation found unsafe upon examination.

A non-corporate public warehouseman is neither required, under Article 5585, to make a statement of its affairs, nor, under Article 5586, to submit to an examination of his affairs; nor are the provisions of Articles 5591 and 5593 applicable thereto. Yet he is nevertheless by Article 5611 "placed under the management and control of the Commissioner," as are all public warehousemen. He, as well as all corporate public warehousemen and warehouse corporations operating under the provisions of Chapter 3, is also within the purview of Article 5600, with reference to fire insurance, and Article 5601, relating to charges for storage.

Article 5598, giving the Commissioner the power to deny a permit to do business "under this chapter" (Chapter 3), and to revoke a permit under certain conditions, like Article 5585, requiring a statement of affairs, does not apply to non-corporate public warehousemen, nor to corporate public warehousemen, unless they be incorporated under the provisions of Chapter 3.

The generality of your first question, making no distinction between non-corporate and corporate warehousemen, or if the latter, as to how incorporated, compels the foregoing somewhat piecemealed answers thereto.

With reference to your second question, any warehouse corporation chartered under the provisions of subdivision 81, Article 1302, is by virtue of the terms of said statute necessarily a public warehouse corporation, and, being such, is required to give bond as prescribed in Article 5569 or Article 5661. As to whether such public warehouse corporations are required to obey the regulations and duties as laid down in the other provisions of Chapter 3, we believe that we have made sufficient answer above with reference to each of the regulatory articles of said chapter which you apparently have in mind.

Your third question assumes that the giving of bond by public ware-

houses is optional, which, in our judgment, is contrary to the law, as above indicated. By this, however, we do not mean to say that every warehouse without exception is required to make bond under the law. Article 5662 recognizes the existence of private warehouses in immediate conjunction with the requirement of bond of public warehousemen in Article 5661. Again, Article 5577 expressly recognizes the existence of private warehouses and their exception from the provisions of the law relating to public warehouses. Though this article was expressly repealed by the Second Called Session of the Thirty-sixth Legislature, Chapter 54 (see *Longwell Transfer vs. Elliott*, 267 S. W., 346), the 1925 codification again makes that article the law. Private warehouses as such are, therefore, not required to give bond, though by virtue of Article 5568, defining public warehousemen, a private warehouseman is narrowed down to one storing personal property of his own or another's without charge. Private warehouses are, however, by virtue of Article 5662, within the general supervision of the Commissioner (now) in so far as they operate under the provisions of the Uniform Warehouse Receipts Act, and he may in his discretion prescribe rules and regulations for the conduct of same, not inconsistent, of course, with the law.

Article 5611, to which you specially refer as bearing on this matter, does not, we believe, make it optional with public warehouses whether they give bond or not. By its provisions all public warehouses are placed under the management and control of the Commissioner and all warehouse corporations for the storing of farm, ranch or orchard products not incorporated under the provisions of Article 5578 are authorized to amend their charters so as to take the benefit of the provisions relating to corporations chartered under either subdivision 81 or 82 of Article 1302. Though such course is apparently optional with such corporations, whether public or private warehousemen, they are not entitled to the benefits of Chapter 3, unless they follow this course and thereby make themselves amenable to the duties prescribed in the same connection. If they are chartered under subdivision 81, they are public warehouses, and as such in any event under the management and control of the Commissioner.

Though answering your questions has made necessary a somewhat extended review of the Warehouse Law, our opinion, of course, is intended only to answer as far as possible the three questions set out in the first part hereof. Some special cases may make a distinction with reference to what is here intended to be simply a general statement as to the extent of the control of the Commissioner on the three questions submitted.

Yours very truly,

C. W. TRUEHEART,  
Assistant Attorney General.