

## **OFFICIAL OPINIONS**

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



## OPINIONS RELATING TO ELECTION AND SUFFRAGE

Op. No. 2899

ELECTIONS—STATUTES CONSTRUED—SECRETARY OF STATE—DUTY TO  
CERTIFY NAMES OF STATE NOMINEES TO COUNTY CLERKS—  
TIME WHEN CERTIFICATE SHOULD BE MADE.

1 It is the duty of the Secretary of State to certify the names of nominees of the Democratic Party of Texas for state office to the respective county clerks.

2 It is not to be presumed that the Legislature intended to create a hiatus in the law; rather the contrary is to be presumed. Where it is possible to do so from a reading and from construction of the whole of statutory provisions, any gap or omission in the express wording of the statute should be filled in by construction if the legislative intent can be ascertained and given effect by so doing, thus applying the rule of construction to the effect that that which arises by necessary implication is as much a part of the law as that which is expressly provided.

3 The Secretary of State should certify the names of nominees for state office to the several county clerks of this state at the same time he certifies the nominees for district office, which is not later than October first, or at least within sufficient time to permit the county clerks of this state to perform their statutory duties, taking into consideration a reasonable time for the transmittal of the certificate, preparation by the county clerks of the ballot form, the not-less-than ten days which the names certified must be posted, the time necessary to have ballots printed, and the fact that the ballots must be prepared so as to permit absentee voting twenty days before election day.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, September 28, 1932.

*Mrs. Jane Y. McCallum, Secretary of State, Austin, Texas.*

DEAR MADAM: Your letter of September 26th addressed to Attorney General Allred has been received and referred to the writer for attention. Your letter reads:

“A careful search fails to reveal the existence of any statute requiring the Secretary of State to certify the names of State officers to the county clerks for inclusion in the official ballot for the general election.

“It has been the custom of this office to make such certification at the same time the forms required by Article 2925 are furnished, that is, ‘at least thirty days before each general election’. It would appear, however, that such certification might be delayed until at least twenty days before the election, in view of the provisions of Article 3165.

“Your opinion is requested as to whether this custom is a proper one.”

Your letter raises two questions, to-wit:

First. Is it the duty of the Secretary of State to certify the names of the nominees of the Democratic Party of Texas for state office to the respective county clerks?

Second. If this question is answered in the affirmative, then at what time does it become the duty of the Secretary of State to make this certification?

These questions will be discussed in the order in which they appear above.

While no statute in terms prescribes that the Secretary of State shall certify the names of nominees for state offices to the county clerks of this state, except the names of independent candidates (Art. 3161), yet all nominations for state offices are certified to the Secretary of State. (Arts. 3138, 3157, 3159, R. C. S. 1925.) Under Article 3132, Revised Civil Statutes, 1925, the county clerks are directed to post in a conspicuous place in their offices the names of all candidates whose names have been certified to them, to be printed on the official ballot, and they are directed to order such names printed on the official ballot as otherwise directed in the statutes, that is, as directed by Article 3131.

Article 3132, supra, reads:

“Each county clerk shall post in a conspicuous place in his office for the inspection of the public, the names of all candidates that have been lawfully certified to him, to be printed on the official ballot, for at least ten days before he orders the names to be printed on said ballot; and he shall order all the names of the candidates so certified printed on the official ballot as otherwise provided in this title.” (See Art. 3131.)

Under the article above quoted, it would clearly be the duty of the county clerk to post the names of all the candidates lawfully certified to him, including candidates for state and district offices.

Article 2978, Revised Civil Statutes, 1925, with respect to the official ballot for the general election in November, in part reads:

“It shall contain the printed names of all candidates whose nominations for an elective office have been duly made and properly certified.”

Therefore the official ballot must contain the names of all candidates whose nomination has been properly certified, and necessarily can contain no name that has not been thus certified.

It can be seen from the above statutes that it is the duty of the county clerk to make up the form of the official ballot for his county with the names of nominees that have been properly certified to him. Other provisions of the statutes provide that the state and district conventions shall canvass the votes, declare the nominees, and through their chairman and secretary certify the names of such nominees to the Secretary of State, as hereinabove pointed out.

As above stated, there is no express provision contained in the statutes requiring the Secretary of State to certify the names of nominees for state offices so certified to that official, to the county clerks in the various counties of the state, except for independent candidates; nor is there any provision in the statutes that any other official shall certify the nominees for state offices to the county clerks, except where there has been a final determination of a contest for such an office, in which event Article 3152, as amended by the Acts of the Forty-second Legislature, Chapter 241, provides that a certified copy of the judgment of the district court shall be transmitted to the officers charged with the duty of providing the official ballot.

It is not to be presumed that the Legislature intended to create a hiatus in the law; rather the contrary is to be presumed. Where it is possible to do so from a reading and from construction of the whole of the statutory provisions, any gap or omission in the express wording of the statute should be filled in by construction if the legislative



intent can be ascertained and given effect by so doing. It is an elementary rule of construction that that which arises by necessary implication is as much a part of the law as that which is expressly provided.

Here we have the names of all state nominees certified to the Secretary of State and the statutes prohibiting the county clerk from ordering any name printed on the official ballot which has not been duly certified to him. The writer has found no statutory provision requiring any person or any state or election official to make a certificate of the nominees to the county clerk. It is therefore necessary to determine the legislative intent as to how the certification of nominees of state offices was to be placed in the hands of the several county clerks of this state. It is the writer's opinion, and you are so advised, that it is the duty of the Secretary of State to make this certification of the names of the nominees for state office to the several county clerks of this state, because the Secretary of State is the only person in a position to so certify, since the statutes require the certificate of nomination to be made only to him, and since the statutes expressly require him to certify the names of independent candidates for state office, it seems to follow by necessary implication that he is the person who must certify the names of the state nominees to the several county clerks. The provision for certification for one group of candidates in the same class should be construed, in the absence of a provision for another group, as applying to all candidates in that class. The Secretary of State has always performed this duty and has considered that it was necessary for him to make this certification to the county clerks of Texas in order for them to prepare the official ballots.

We now come to the question as to the time when the Secretary of State shall perform the duty of making the certification of nominees for state office to the several county clerks.

I note that in your letter you state that it has been the custom of your office to make such certification at the same time the forms required by Article 2925 are furnished, that is, at least thirty days before each general election. Article 2925 reads:

"At least thirty days before each general election the Secretary of State shall prescribe forms of all blanks necessary under this title and furnish same to each county judge."

It is the writer's opinion that this article has no application whatever to the certification by the Secretary of State to the county clerks of the names of the nominees for state office. As the writer understands the matter, there are certain blank forms which are used by the county authorities for the printed matter needed in the management of the election, in fact you so state in your letter. The certificate of the Secretary of State certifying the names of the nominees duly certified to his office entitled to have their names placed upon the ballots when finally printed, is neither a form nor a blank to be used in the general election. Such certificate is made, as we have seen, to the county clerk, whereas Article 2925 requires the forms of blanks necessary under the law to be furnished, to be sent to the county judge at least thirty days before the election.

In this regard, I call your attention to the fact that it would be necessary for the county clerk to have posted the names of the nominees at least ten days before it would be necessary for the county judge or himself to have these forms or blanks in their hands. In other words, under the statutes the county clerk cannot order the ballots printed until he has posted the names of the nominees certified to him not less than ten days before ordering the same to be printed.

The provisions of Article 3132, *supra*, require the county clerk to post the names of all candidates certified to him to be printed on the official ballot for at least ten days before he orders such names to be printed on said ballots. I would also call your attention to Article 2956, Revised Civil Statutes, 1925, as amended by the Acts of 1931, Forty-second Legislature, Chapter 105, Page 180, which in part reads:

“Any qualified elector, as defined by the laws of this state, who expects to be absent from the county of his or her residence on the day of election, may vote, subject to the following conditions, to-wit: at some time not more than twenty days nor less than three days prior to the date of such election, such elector shall make his or her personal appearance before the clerk of the county of his or her residence and shall deliver to such clerk his or her poll tax receipt, or exemption certificate, entitling him or her to vote at such election, and said clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election, which shall then and there be marked by said elector, apart and without the assistance or suggestion of any person, and in such manner as said elector shall desire same to be voted; \* \* \* \*”

It will be noted from the above quoted statute that it is contemplated that a voter shall have the privilege of voting 20 days before the election if he is to be absent from the county on election day and desires to take advantage of the privilege therein provided. The ten days required for posting, and the permitting of absentee voting twenty days before election day, accounts for thirty days, without considering the time necessary to transmit the certification made by the Secretary of State to the several county clerks of Texas, and the time necessary for the county clerk to make up the form of the ballot, and the time necessary to print the ballots after the names have been posted the required ten days. Surely if the Secretary of State is required to make the certification as above specified, then it should be made in time to enable the county clerks to obey the statutes hereinabove discussed. It is a matter of common knowledge that from one to three days would be required from the time the Secretary of State makes the certificate to transmit it from the seat of government to the county clerks whose counties are farthest removed from the seat of government. It would also require several days in which to have the ballots printed. It can thus be seen that a certificate from the Secretary of State thirty days before the general election would not afford to the county clerks sufficient time to perform their statutory duty and have the ballots printed twenty days before the general election.

The writer is not unmindful of the rule that when the construction of a statute is doubtful, the construction given it by officers of the state charged with the duty of its enforcement, is entitled to great weight, and I have kept in mind the provision of your letter stating

that it has been the custom of your office to make the certification at least thirty days before each general election. However, in that regard I call your attention to the fact that Article 2956, supra, was amended by the Forty-second Legislature so as to permit absentee voting not more than twenty days before the election, and that therefore absentee voting had been permitted not more than ten days before the election. It can thus be readily seen that it requires an additional ten days under the present law to permit the county clerk to perform his duty under the statute, which was not required during the election in 1930 and previous elections thereto.

Article 3135, Revised Civil Statutes, 1925, requires the Secretary of State to certify the names of nominees for district office not later than October first of such year. It seems to me that common sense dictates that the Secretary of State should at the same time certify the names of the nominees for state office which have been duly certified to her. It is in keeping with the spirit of the statutes pertaining to elections that all official certifications should be made by the Secretary of State at one time to enable the respective county authorities immediately thereafter to proceed regularly with the formation of the complete official ballot for such county. The specific requirement of Article 3135 that such certificate of the Secretary of State as to nominees for district office must be "*not later than October first*", is the only place in the statutes where the time is fixed for the certification by the Secretary of State to the respective county clerks, except where a nominee has died or declined the nomination, as provided in Article 3165, Revised Civil Statutes, 1925, which in the opinion of the writer is to permit the Secretary of State to make a correction in his prior certification where necessary on account of the circumstances therein mentioned.

It is further the opinion of the writer that although a nominee has died or declined the nomination, his name would have to be certified to the various county clerks along with the names of the other nominees so certified, and unless a nomination is made to fill the vacancy so created, the name of the candidate who has died or has withdrawn his candidacy should be printed on the official ballot in the proper column. (Art. 3019, R. C. S. 1925.) Article 3165, therefore, makes provision only for the correction of a certificate already made, where a vacancy in the nomination has been filled in accordance with the provisions of said article.

There is no apparent reason why the district candidates should be certified not later than October first and the state candidates at a later date. The statutes in no place provide that the Secretary of State shall make two separate certifications. Indeed such a procedure would tend to confuse the officials making up the final completed ballot, and certainly if made much later would not enable such officials to both post the names of candidates as required by law and print the official ballots in sufficient time to permit absentee voting twenty days before the date of the general election.

The writer is cognizant of the fact that in certain instances certification of the names of nominees to the county clerks would have to be made *before* October first. For example, the following hypothetical case will illustrate the point: Since general elections are held on

the first Tuesday after the first Monday in November, it is possible that a general election day would fall on the second day of November. If such were the case, certification by the Secretary of State of the names of the various nominees, state and districts, on October first would not be in sufficient time to permit the various county clerks to comply with the duties imposed upon them by statute, as shown by the discussion herein.

Should it be argued that the date set forth in Article 3135 providing the time within which the certification must be made by the Secretary of State of nominees for district office does not apply to certification of nominees for state offices, then it would still be necessary for the Secretary of State to certify in sufficient time to enable the county clerks to comply with the other statutory provisions hereinbefore discussed, and when we consider the time necessary for the transmittal of the certificate of the Secretary of State to the several county clerks, the time necessary for the county clerk to compile the form of the official ballot, the not-less-than ten days required for posting before the clerk can order the names printed on the ballots, the time necessary for the printing and return to the county clerks of the ballots so as to permit absentee voting twenty days before election day, we can see the necessity, even in the case of state officers, of requiring the Secretary of State to certify the names of the nominees which have been duly certified to her in ample time to permit the county clerks to perform their statutory duty.

Since the general election is to be held this year on November 8th, and since there seems to be no reason why the certificate of the Secretary of State cannot be made at the present time, it is the writer's opinion, and you are so advised, that you should certify the names of the nominees for state office to the several county clerks of this state at the same time you make your certificate of nominees for district office, which is not later than October first, or at least within sufficient time to permit the county clerks of this state to perform their statutory duties as herein discussed, taking into consideration a reasonable time for the transmission of your certificate and the preparation by the county clerks of the ballot form and the time necessary to have said ballots printed, in addition to the time required for the posting of the names to be printed on said ballot, and keeping in mind the fact that the ballots must be prepared so as to permit absentee voting twenty days before election day.

Trusting that I have fully answered your inquiries, I am

Yours very truly,  
 (Sgd.) HOMER C. DEWOLFE,  
 Assistant Attorney General.

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Op. No. 2926

CONSTITUTIONAL AMENDMENTS (U. S.)—ELECTIONS—FORM OF BALLOT  
 H. B. NO. 807. ACTS REGULAR SESSION, FORTY-THIRD  
 LEGISLATURE—WORDS AND PHRASES.

1 A proposed amendment to the Constitution of the United States which not only contemplates the repeal of an existing amendment, but which also contains other matter is not a proposed amendment "which repeals another amendment to the Constitution of the United States," within

the meaning of Section 7a, House Bill No. 807, Acts Regular Session, Forty-third Legislature of Texas.

2. The official ballot containing the names of nominees for delegates and alternates to a convention to consider the ratification or rejection of an amendment to the Constitution of the United States, proposed by Congress February 20, 1933, should be prepared in the form prescribed by Section 7, House Bill No. 807, supra, instead of in the form prescribed by Section 7a of said Act; that is, the ballot should set out the substance of the proposed amendment, and the names of the nominees favoring the adoption of the amendment should be printed in a perpendicular column headed "For Ratification of the above Amendment," and the names of nominees opposing ratification of the proposed amendment should be printed in a perpendicular column headed "Against Ratification of the above Amendment."

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OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, July 8, 1933.

*Honorable W. W. Heath, Secretary of State, Capitol.*

DEAR SIR: Your letter of June 28, addressed to the Attorney General, has been received and referred to the writer for attention and reply. Your letter reads, in part, as follows:

"Should the form of the official ballot to be used in the special election to be held in Texas on August 26th be in compliance with Section 7 of the hereto attached copy of House Bill No. 807, or should the same be in the form of Section 7a of said bill?"

House Bill No. 807, Acts Regular Session, Forty-third Legislature, provides that whenever the Congress of the United States shall submit to the respective states a proposed amendment to the Constitution of the United States, and shall propose that it shall be ratified or rejected by conventions in the several states, that an election shall be held in this State to select thirty-one delegates and thirty-one alternates to hold a convention, and ratify or reject the proposed amendment on behalf of the State; said delegates and alternates to be elected by the voters at large, one delegate and one alternate from each of the thirty-one senatorial districts of the State. It is provided that the election provided for shall be held on the fourth Saturday in August of the year in which the amendment is submitted, if the election can be held at that time in compliance with the provisions of the Act; otherwise, the delegates and alternates are to be elected at the General Election next succeeding the submission of the amendment. The Act provides for the nomination of thirty-one delegates and thirty-one alternates by those opposing the ratification of the amendment, and for the nomination of thirty-one delegates and thirty-one alternates by those voters favoring the ratification of the proposed amendment. The names of the nominees of those favoring the adoption of the amendment and of those opposing the adoption of the amendment are certified to the Secretary of State in accordance with the provisions of the Act, and it is made the duty of the Secretary of State to certify the names of such nominees to the County Clerk of each county of the State. Section 7 of the Act provides, in part, that:

"The election shall be by ballot, separate from any ballot to be used at the same election, and shall be prepared as follows: It shall first state

the substance of the proposed Amendment. This shall be followed by appropriate instructions to the voter. It shall then contain perpendicular columns of equal width headed respectively, in plain type 'For Ratification of the above Amendment,' and 'Against Ratification of the above Amendment.' In the column headed 'For Ratification of the above Amendment' shall be placed the names of the nominees or delegates and alternates nominated as in favor of the ratification; in the column headed 'Against Ratification of the above Amendment' shall be placed the names of the nominees or delegates and alternates nominated as opposed to the ratification. The voter shall be entitled to vote for any number of candidates whose names appear on such ballot, not to exceed thirty-one delegates and thirty-one alternates \* \* \*

Section 7a, in part, provides:

"Provided, however, that if such proposed amendment, is one which repeals another amendment to the Constitution of the United States then it shall not be necessary to state the substance of the proposed amendment; and in lieu of the words 'for ratification of the above amendment,' and 'against ratification of the above amendment' at the top of the two perpendicular columns, there shall be inserted the words 'For repeal of the ----- amendment,' and the words 'Against repeal of the amendment,' respectively, the number of such amendment which it is proposed to repeal to be inserted in the blank space above, as e. g. 'For repeal of the Eighteenth (18th) Amendment,' and 'Against Repeal of the Eighteenth (18th) Amendment.' \* \* \*

The Seventy-third Congress of the United States has proposed the following amendment to the Constitution of the United States:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The proposal also contains a provision that the proposed amendment shall be inoperative unless it shall have been ratified as an amendment to the Constitution of the United States by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission of said proposed amendment.

A reading of the terms of the proposed amendment to the Constitution of the United States discloses that, while it contemplates the repeal of the eighteenth amendment to the Constitution of the United States, it has the further affirmative provision prohibiting the transportation or importation of intoxicating liquors into any state, territory or possession of the United States for delivery or use therein in contravention of the laws of such states, territory or possession. The amendment proposed and submitted for ratification, is not simply a proposed repeal of another amendment; it proposes the addition to the Constitution of the United States a provision not presently contained therein. In effect, it is an amendment to an amendment.

You are, therefore, respectfully advised that, in our opinion, the proposed amendment above quoted is not one which, within the meaning of Section 7a of House Bill No. 807, supra, "repeals another amendment to the Constitution of the United States." It necessarily follows that, in our opinion, the ballot in the forthcoming election of delegates and alternates to a convention to consider ratification or rejection of the proposed twenty-first amendment to the Constitution

of the United States, should be prepared in the form prescribed by Section 7, House Bill No. 807, Acts Regular Session, Forty-third Legislature.

Respectfully submitted,  
**GAYNOR KENDALL,**  
 Assistant Attorney General.

Op. No. 2945

ELECTIONS—STATE AND COUNTY POLL TAX—CITY POLL TAX.

1. Residents of cities authorized to levy a city poll tax are not required to pay said tax as a prerequisite to voting in state and county elections.
2. Residents of cities authorized to levy a city poll tax are required to pay said tax as a prerequisite to voting in city elections.
3. A resident of a city authorized to levy a poll tax must have duly paid said city poll tax as well as the state and county poll tax in order to qualify as a voter therein.

OFFICES OF THE ATTORNEY GENERAL,  
 Austin, Texas, March 27, 1934.

*Hon. W. B. Newby, Chairman Bell County Democratic Executive Committee, Temple, Texas.*

DEAR SIR: We have your letter inquiring whether a duly paid city poll tax is a necessary prerequisite to voting in city elections. We have had scores of similar inquiries from officers and citizens in other sections of the state. Numerous inquiries also have been made as to the necessity of holding a duly paid city poll tax by residents of cities that have legally levied such a tax as a prerequisite to voting in State and county elections. In other words, is the resident of a city a qualified voter in State and county elections who holds his State and county poll tax but who has not paid a legally levied city poll tax.

Since the answer to each question necessarily involves a consideration of the same constitutional and statutory provisions, we are taking the liberty of discussing both in this opinion. In order that we may broadly illustrate the reasons supporting our conclusions, we are drawing upon the facts and circumstances presented by your letter, as well as those contained in others.

The confusion which exists concerning the correct answer to these questions is largely due to the effect that the adoption of the Nineteenth Amendment to the Constitution of the United States had upon State suffrage laws then in force. On August 26, 1920, when the Nineteenth Amendment became effective, the laws of Texas levied a poll tax only upon male citizens between the ages of twenty-one and sixty. Since the Nineteenth Amendment prohibited a state from depriving a citizen of the United States of the right to vote on account of sex, all laws imposing such an unlawful discrimination were rendered void and inoperative.

This department, therefore, ruled that the statutes requiring the payment of a poll tax by male citizens only were void in so far as such payment was made a prerequisite to voting. Opinions of the Attorney General, 1920-22, page 234; 1926-28, page 133.

The discrimination against male citizens in State and county elections was also removed by the Legislature in 1920. This was accom-

plished by amending Article 7046 (then Article 7354) so as to levy a poll tax on all citizens, male and female, between the ages of twenty-one and sixty. Ch. 6, Acts, Fourth Called Session, 36th Legislature.

Since 1920, therefore, both men and women have been required to hold a duly paid state and county poll tax as a prerequisite to voting in state and county elections. The validity of the amendatory act extending the poll tax requirements to women was broadly sustained in *Stuart vs. Thompson*, 251 S. W. 277.

That a citizen must hold a duly paid State and county poll tax in order to qualify as a voter in municipal elections has never been seriously questioned in this State. Only "qualified electors" of the State are eligible to vote in city elections. Sec. 3, Art. 6. One who "is subject to pay a poll tax under the laws of the State" is not a "qualified elector" unless he shall have duly paid the tax. Art. 6, Sec. 2. It necessarily follows that one is ineligible to vote in a city election who has not duly paid a State and county poll tax.

Whether one who is subject to pay a city poll tax shall have duly paid it in order to qualify as a voter in a State and county election is a more difficult question. As early as 1905 this department held the payment of duly levied city poll taxes to be an indispensable prerequisite to voting in state elections. Opinions of the Attorney General, 1906-08, p. 107.

In 1909 the San Antonio Court of Civil Appeals, in *Savage vs. Umphries*, 118 S. W. 893, 904, held to the same effect. This department consistently adhered to that opinion until, as stated above, the Nineteenth Amendment to the United States Constitution was adopted.

Notwithstanding this department ruled in 1920 that Article 1030, Revised Civil Statutes (then Art. 927), authorizing certain cities and towns to levy a poll tax on male citizens only was invalid to the extent that it might be applied as a bar to the right of suffrage in either municipal or in state and county elections, the Legislature allowed it to remain in the code until 1931. During this eleven-year period, while municipalities were only authorized to levy a discriminatory poll tax, citizens who were otherwise qualified were very properly permitted to vote in all elections without a city poll tax receipt. It is evident, therefore the prevalent belief that no city poll tax is required as a qualification for voting in any election is founded on the practices and habits of that eleven-year period. Evidently believing the payment of a city poll tax to be unnecessary as a prerequisite to voting in state and county elections, many thousands of Texas citizens failed to pay the levies made by their cities and now find themselves dis-franchised, if the former opinions of this department and of the courts are decisive of the questions now before us.

As we have already suggested, the Legislatures waited until 1931 to amend Article 1030 so as to authorize cities and towns to levy a poll tax on all citizens, male and female, and thus remove its discriminatory feature. Now that cities and towns are again vested with legislative authority to levy a poll tax on citizens of both sexes, we must determine whether the decisions of the courts have settled



the questions before us, or whether the constitutional and statutory provisions involved are, under the changed conditions of this day, open for further construction on this point.

Article 6 of the Constitution, in both exclusive and inclusive terms, prescribes the qualifications of voters. Section 1 thereof enumerates the classes of persons who shall not be permitted to vote. Section 2 clearly designates those persons who shall be entitled to qualify as voters and prescribes the conditions for such qualification. Among other conditions it is provided "that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this state and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election."

In determining what the people intended to accomplish by the adoption of the proviso just quoted from Section 2 of Article 6, it will be helpful to briefly review the history of poll tax legislation in this State. It was not until 1876 that the Constitution authorized the Legislature to levy such a tax. Originally, it was simply a revenue measure and the payment of the tax was never regarded as a necessary prerequisite to voting. The qualifications for voting had been so clearly defined in the Constitution of 1876 it was regarded as essential to amend that instrument before the Legislature could legally impose such a requirement upon the voters.

The Twenty-seventh Legislature, in 1901, by joint resolution, submitted the necessary amendment to Section 2 of Article 6 for a vote of the people. Acts, 27th Leg. p. 322. It was adopted as above quoted in 1902.

Enabling legislation was first adopted by the Regular Session of the 28th Legislature in 1903. Acts, 28th Leg. p. 133. That act, of course, represents the contemporaneous and original construction which the Legislature of Texas placed upon the new constitutional provision. It is especially significant that the Legislature at that time made no effort to restrict or expand the provisions which had been approved by the people in November of the previous year. Section 2 of the enabling act of 1902, adopted the identical language of Section 2 of Article 6. Indeed, the Legislature may well have considered that no change was either proper or necessary for Section 2 was made self-enacting by its own terms.

It is important to observe the wording of the pertinent proviso of Section 2 of the Act of 1903:

" \* \* provided, further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before he offers to vote at any election in this State, and hold a receipt showing the payment of his poll tax before the first day of February next preceding such election."

Two years later the Twenty-ninth Legislature repealed the Act of 1903 and adopted an entirely new act regulating elections in this State. Ch. 11, p. 520, Acts, First Called Session, 29th Legislature.

The proviso relating to poll tax payments was then made in Section 2 of the Act of 1905 to read as follows:

"\* \* \* and provided further, that any voter who is subject to pay his poll tax under the laws of the State of Texas or ordinances of any city or

*town in this State* shall have paid said tax before he offers to vote at any election in this State, and hold a receipt showing the payment of his poll tax before the first day of February next preceding such election."

It is thus seen that the statutory requirement for the payment of a poll tax levied by the "ordinances of any city or town in this state" was added to the constitutional requirement for the payment of poll taxes levied "under the laws of the State of Texas" not by the Legislature first construing Section 2 of Article 6, but by a subsequent Legislature. Section 2 of the Act of 1905 has been retained in substantially that form until the present day. It is now Article 2955, Revised Civil Statutes.

It must be conceded there is a vast difference between the constitutional guaranty of a right to vote upon the payment of "a poll tax under the laws of the State of Texas" and the statutory requirement not only of that tax but, in addition thereto, a receipt showing the payment of any poll tax levied under the "ordinances of any city or town in this State" as a prerequisite to voting in State and county elections.

If the Legislature was authorized by the amendment to Section 2 of Article 6 to impose the additional burden and requirement of a city poll tax as a prerequisite to voting in a State election, such authority must be read into its terms under some rule of statutory construction. It is certain that no such authority is expressly given. Whether any such authority exists in the Legislature is at least a highly debatable and doubtful question.

To hold such a statutory requirement is valid under the circumstances, violates an elemental rule of construction. The authorities with which we are familiar unanimously agree that when the elective franchise has been granted by the Constitution of a State, it cannot be denied or abridged by the Legislature. 20 C. J. p. 62, Sec. 16, and authorities cited. It is equally well settled in this and in other states that statutes tending to limit the citizen in his exercise of the right of suffrage should always be liberally construed in his favor. *Owens vs. State*, 64 Texas, 500.

The Texas courts have repeatedly declared that the Constitution itself defines the qualification of a legal voter, and that the Legislature is without power to restrict or extend these requirements. *Ramsay vs. Wilhelm*, 52 S. W. (2d) 757, 760; *Cameron vs. Connally*, 299 S. W. 211; *Davis vs. State*, 12 S. W. 957.

We are unable, in view of these authorities, to escape the positive conviction that the legislative act of 1905 adding the requirement of a city poll tax as a prerequisite to voting in State and county elections was an unauthorized and invalid attempt by the Legislature to abridge and restrict a right guaranteed by the Constitution. This, we think, is true particularly because of the direct and positive terms with which the Constitution fixes the qualifications of voters. *State vs. Monahan*, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661, 20 C. J. p. 62, Sec. 16.

There are other reasons why the added burden of a city poll tax imposed upon the elective franchise by the Act of 1905 cannot stand as a prerequisite to the right of voting in State and county elections.

The only reference to a city poll tax in the Constitution is contained in Section 3 of Article 6. Even there the power of a city to levy such a tax is only implied and is expressed in the form of the prohibition "that no poll tax for the payment of the debts" of a city shall ever be levied upon persons disqualified to vote in city bond elections.

This provision of Section 3 was a part of the Constitution of 1876, and up until the act of 1905 had never been regarded as anything more than a limitation upon the taxing power of cities. This is certainly true in so far as it affected the right of a citizen to vote in State elections. It is difficult to understand how this provision of the Constitution of 1876, which has never been amended, could now be relied upon as forming any constitutional basis for the added poll tax requirement of 1905.

We concede, as we must, that the Legislature, in the absence of constitutional inhibitions, may delegate to municipal corporations the discretionary legislative power to levy a city poll tax for municipal purposes. Neither do we question, in this opinion, the Legislative authority under the Constitution, to regulate municipal elections and to authorize cities to levy poll taxes, and to require their due payment as a prerequisite to voting in such city elections. But we do emphatically declare there is no constitutional basis or warrant for the abandonment by the Legislature of this State of its duty to safeguard and protect the constitutional rights of its citizens to vote in State and county elections without restriction or abridgment of that right by purely local governments.

The right to vote in State elections is one directly affecting the State at large, while the right to vote in city elections would ordinarily affect only the citizens of the particular community. The delegation of the discretionary legislative power to a city to levy a poll tax, and then to require the payment of that tax as a prerequisite to voting in State elections, is, in our judgment, a double delegation of legislative power. It amounts to authorizing a mere political subdivision of the State to legislate upon and to restrict and burden a right which is derived from the sovereign itself. We think that such a delegation of legislative power is unlawful and unauthorized under the Constitution.

We believe the logic of the situation requires us to rule that city poll taxes can only affect the right to vote in city elections, and that they cannot, under the clear terms of the Constitution, be allowed to abridge or restrict one's right to vote in a State election.

Granting, for the sake of argument, that the Act of 1905 was, at the time, a valid exercise of legislative power, we believe subsequent legislative enactments relating to the same subject matter and the changed conditions of modern times, have rendered its operation and effect unconstitutional. Since 1905 many thousands of political subdivisions, for election purposes, have been created. A former state auditor determined that there are more than eight thousand different political subdivisions in this State authorized to levy taxes. To this number must be added other thousands where elections may be held on other questions.

There is, of course, an overlapping, one with the other, of all these political subdivisions, depending upon the nature of the election which is held. Thousands of these subdivisions are composed partly of municipal territory, and partly of rural areas. Within such a subdivision there may be two or more cities, one of which is authorized by the Legislature to levy poll taxes and another which is not. And though all citizens in a given political subdivision may hold State and county poll taxes, many of them residing in a city which is authorized to levy a poll tax might be denied a vote because of failure to pay the city tax. At the same time citizens residing in another city in the same political subdivision would not be required to hold a city poll tax for the simple reason, either that none was levied by the city, or that the Legislature had not authorized such a city to levy a poll tax.

This picture could be enlarged upon with multiplied hundreds of examples. For instance, there are hundreds of cities in Texas that do not have authority from the Legislature to levy a poll tax. Other cities located in the same areas and having substantially the same populations and being otherwise similarly situated are authorized, under the laws of Texas, to levy poll taxes.

We need only suggest from this that there would be a total lack of reasonableness, uniformity and impartiality in poll tax requirements if we should hold that the payment of a city poll tax is an indispensable prerequisite to voting in state and county elections. Under all the authorities, a provision which imposes upon a particular class of voters conditions and requirements not imposed upon all others similarly circumstanced, is void. Moreover, all laws regulating suffrage must be reasonable, uniform and impartial. 20 C. J. p. 62, Sec. 16, and authorities cited.

We are not unmindful of the case of *Savage vs. Umphries*, supra, decided in 1909. The case was tried by the District Court of Potter County in 1908. While the opinion in the *Savage* case discussed Article 2955 (then Sec. 2 of the Act of 1905) in the light of Section 2 of Article 6 of the Constitution, none of the present contentions against the validity of the statute were presented to the court. It is undoubtedly true that few of the facts and circumstances militating against the validity of the statute at this time were in existence at the time that case was decided. We have no doubt but that if the question of the necessity of holding a city poll tax in order to vote in a state and county election were presented to that court under modern conditions of discrimination and inequality, it would strike the statute down.

Courts frequently observe that they are under no duty to go beyond the record before them in search of reasons to hold an act of the Legislature invalid. It is very probably true that most of the vices which now exist in Article 2955 and which we have discussed in this opinion, either did not exist in 1908 and 1909, or else they were not presented and urged to the court.

In any event, the court, in that case, did not have before it any of the propositions which we are here called upon to decide, nor

have we been able to find any other case in this State which has decided them.

We have drawn no distinction between primary and general elections in what has been said. It is clear that the Legislature intended the provisions of Article 29.55 should apply with equal force in all elections, primary and general. That they have been so applied throughout the years is known to everyone. It is therefore unnecessary for us to modify our judgment because of what was said by the Supreme Court of Texas in *Koy vs. Schneider*, 218 S. W. 479; on rehearing 221 S. W. 880.

The Court held in the *Koy* case that the term "election" as used in Section 2 of Article 6 of the Constitution referred to general elections as distinguished from primary elections, and therefore its provisions making only male persons qualified electors would not invalidate an act of the Legislature authorizing women to vote in primary elections. Since the decision in the *Koy* case, that section of the Constitution has been amended so as to extend the right of suffrage in all elections to both sexes. Since the only point which it was necessary for the court to decide in that case cannot again arise, we feel it could have no bearing upon the questions we are called upon to decide.

Here we are confronted with a statute prescribing the qualifications of voters indiscriminately in all elections, general and special. That any distinction should be made in its application to such elections is not even hinted. Indeed it is a part of the whole scheme of legislation designed to regulate all elections. It undertakes to determine in certain and express terms who shall be qualified to vote in any election in this state. It cannot be construed as only applying to primary elections, and we think there can be no doubt that the Legislature never intended it to be so construed.

We feel, therefore, that our conclusions are applicable alike to all elections, primary and general. In the absence of any decision in this State to the contrary, we feel constrained to so rule.

In view of what has been said, we are of the opinion and you are so advised:

(a) That a citizen holding a duly paid state and county poll tax receipt should be permitted to vote in state and county elections regardless of whether he has paid a city poll tax.

(b) That residents of cities authorized to levy a poll tax should not be permitted to vote in a city election unless they hold both a duly paid State and county and a city poll tax.

All opinions of this department in conflict herewith are hereby expressly overruled.

Very truly yours,

ELBERT HOOPER.

First Assistant Attorney General.

Op. No. 2953.

ELECTIONS—DEMOCRATIC PRIMARIES—POWER TO EXCLUDE NEGROES—  
FROM PARTY PRIMARIES.

1. The Democratic Party, acting through its State Convention, may legally exclude negroes from voting in its primaries and from membership in the Democratic Party.
2. In view of the resolution of Democratic State Convention, negroes are not entitled to vote in primary elections of Democratic Party.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, July 9, 1934.

*Hon. D. B. Wood, County Attorney, Williamson County, Georgetown, Texas.*

DEAR SIR: We take this opportunity to reply to your letter of June 29, 1934, in which you requested that this Department advise you whether a negro, who is otherwise a qualified elector, is legally entitled to vote in the Democratic Primaries to be held on the fourth Saturday of this month and the fourth Saturday of August, 1934.

This office has received numerous inquiries pertaining to the question which you have submitted, coming alike from negroes who wish to vote in the forthcoming primaries of the Democratic Party, from election judges, officials of the Democratic Party, and from officers and candidates for office. The answer to your question depends solely upon the proper interpretation of the statutes of this State, and in view of the fact that the Legislature has made it a penal offense for any person to vote in a primary election where he is not entitled to vote, and on the other hand has made it a penal offense for an election judge to refuse to allow a person to vote who is entitled to vote in a primary election, we feel that it is the duty of the Attorney General to answer the question for the benefit of all persons interested in its determination.

In order to understand definitely the question presently considered, it is necessary to trace the history of the question from the decision of the case of *Nixon vs. Herndon*, 47 Sup. Ct. 446, 273 U. S. 536, 71 L. Ed. 759, to the present time. Article 3107, Revised Statutes of Texas, 1925, provided that:

“In no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same.”

In *Nixon vs. Herndon*, supra, the Supreme Court of the United States held that Article 3107, supra, was a denial of the equal protection of the laws of Texas to negro citizens of the United States, in contravention of the Fourteenth Amendment to the Federal Constitution, and that the statute was therefore void.

Apprised of its error, the Legislature of Texas sought to obtain the same end by what Mr. Justice Cordozo terms “an essential diversity of method.” Shortly after the decision of the *Herndon* case,

the Texas Legislature amended article 3107 so that it thereafter read, and now reads, as follows:

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party." (Chap. 67, Acts First Called Session, 40th Legislature.)

The State Executive Committee of the Democratic party of Texas, pursuant to the power apparently granted to it by the Legislature, adopted a resolution barring negroes from participation in the Democratic primaries held in Texas in 1928. In consequence of this resolution of the State Executive Committee, Nixon, a negro living in El Paso, was again denied the privilege of voting in the Democratic primaries in this State. Once again, his complaint found its way to the Supreme Court of the United States, and resulted in a five to four decision of the questions involved. *Nixon vs. Condon*, 52 Sup. Ct. 484, 286 U. S. 73, 76 L. Ed. 984.

This decision plays so important a part in the determination of our present inquiry, that we find it expedient to quote extensively from the majority opinion written by Mr. Justice Cardozo. The pertinent portion of the opinion in the case cited reads:

"In *Nixon vs. Herndon*, 273 U. S. 536, 71 L. Ed. 759, 47 Sup. Ct. 446, decided at the October Term, 1926, this court had before it a statute of the State of Texas (Article 3039a, Revised Civil Statutes, afterwards numbered 3107) whereby the legislature had said that 'in no event shall a negro be eligible to participate in a democratic party primary election (held in that State),' and that 'should a negro vote in a democratic primary election, the ballot shall be void,' and election officials were directed to throw it out. While that mandate was in force, the Negro was shut out from a share in primary elections, *not in obedience to the will of the party speaking through the party organs, but by the command of the State itself, speaking by the voice of its chosen representatives*. At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States.

"Whether a political party in Texas has inherent power to day without restraint by any law to determine its own membership, we are not required at this time to affirm or to deny. \* \* \*

"A narrower base will serve for our judgment in the cause at hand. \* \* \*

"We recall at this point the wording of the statute invoked by the respondents. 'Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.' *Whatever inherent power a State political party has to determine the content of its membership resides in the State convention*. Bryce, *Modern Democracies*, vol. 2, p. 40. *There platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally, is true more particularly in Texas, where the statute is explicit in committing to the State convention the formulation of the party faith*. (Article 3139). The State Executive Committee, if it is the sovereign organ of the party, is not such by virtue of any powers inherent in its being. It is, as its name imports, a committee and nothing more, a committee to be chosen by the convention and to consist of a chairman and thirty-one members, one from each senatorial district of the State (Article 3139). To this committee the statute here in controversy

has attempted to confide authority to determine of its own motion the requisites of party membership and in so doing to speak for the party as a whole. *Never has the State convention made declaration of a will to bar Negroes of the State from admission to the party ranks. Counsel for the respondent so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as delegates of the party, but as the delegates of the State.* Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.

\* \* \*

"We do not impugn the competence of the legislature to designate the agencies whereby the party faith shall be declared and the party discipline enforced. *The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.* They are then the governmental instruments whereby parties may be established or continued. *What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere.* They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.

\* \* \*

"With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon vs. Herndon*, 273 U. S. 536, 71 L. Ed. 759, 47 Sup. Ct. 446, *supra*. *Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black.* \* \* \*" (Italics ours.)

In other words, the Supreme Court has held that, in attempting to bar negroes from Democratic primaries in this State, the State Executive Committee of that party was exercising delegated legislative powers, and that its action in that regard was the action of the State of Texas, and not that of a voluntary political association. So viewed, the action of the State Executive Committee clearly was within the prohibition of the Fourteenth Amendment, and the case of *Nixon vs. Herndon*, *supra*, governed the decision of the controversy.

*Nixon vs. Condon*, *supra*, was decided May 2, 1932. The State Convention of the Democratic Party was held in Houston, Texas, on the 24th day of May, 1932, and that convention, in the light of the holding of the Supreme Court in said case, adopted the following resolution:

"Be it resolved, that all white citizens of the State of Texas, who are qualified to vote under the constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

The validity of the action taken by the State Convention in adopting the foregoing resolution excluding negroes from membership in the Democratic Party in this State, was challenged in the case styled *County Democratic Executive Committee, in and for Bexar County*



vs. Booker, 53 S. W. (2d) 123. The Court of Civil Appeals at San Antonio by a two to one decision upheld the validity of the aforesaid resolution: Cobbs, late Associate Justice of said Honorable Court, dissented from the conclusions reached by the majority. Certified questions to the Supreme Court of Texas were dismissed on the ground that there was an absence of necessary parties to the suit. 52 S. W. (2d) 908.

The conclusion of the majority of the Court of Civil Appeals at San Antonio that the resolution adopted by the State Convention of the Democratic Party on May 24, 1932, is valid in law should, of course, be respected and followed in the forthcoming primary elections.

The vice at which the Supreme Court of the United States has struck in the past is that coming from the action of a state or its official delegates in preventing negroes' from participating in the affairs of a voluntary political association, irrespective of the will of the majority of the members of that party or association. In all cases coming before that Honorable Court, state action is the predicate for its judgment in leveling the "barriers of color" raised by the State.

It is well settled in the decisions of the Supreme Court of the United States that the Fourteenth and Fifteenth Amendments have no application to the affairs or action of private associations or individuals; the prohibition pronounced in those amendments is leveled at governmental action taken by the United States or by any of the several states of the United States. Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; *United States vs. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 150; *James vs. Bowman*, 190 U. S. 127, 47 L. Ed. 979, 23 Sup. Ct. 678; *Nixon vs. Condon*, supra.

The Democratic Party of Texas is a voluntary political association operating for private purposes; it is not a governmental agency. *Waples vs. Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917A. 253. Therefore, if it can be said that the Democratic Party, acting of its own volition, has decided that negroes or members of any other race, shall be ineligible to participate in the primary elections and other functions of that organization, it cannot be said that thereby the Constitution of the United States has been violated.

We think that it is within the undoubted powers of a voluntary political association to regulate the content of its membership, and prescribe such qualifications as it desires as conditions precedent to membership in the association, subject only to those limitations with which the Legislature of the State has circumscribed that power. *Koy vs. Schneider*, 110 Tex. 369, 221 S. W. 880, 218 S. W. 479; *County Executive Committee vs. Booker*, supra; *Nixon vs. Condon*, supra.

To us it seems that only one question is presented by your inquiry, to-wit: whether the Legislature of Texas has taken from the inherent powers of the Democratic Party of Texas the right to prescribe the qualifications of its members to such an extent that that party cannot legally bar negroes from participation in its activities.

The Legislature has declared that only those persons who are qualified voters shall be eligible to participate in the primary elections (Tucker vs. Bagby, 52 S. W. (2d) 804), and that no person may be disqualified from participation in a primary election because of former political views or affiliations, or because of membership or non-membership in organizations other than the political party. Other than the two instances noted, there exists in living statutes no prohibition denying to the Democratic Party of Texas the power of prescribing the qualifications of the members of that party, unless the provisions of Article 3107, as amended by Chapter 67, *supra*, are to be construed as taking away that power from the party itself, and vesting the same only in the State Executive Committee of that party. The problem with which we are concerned, therefore, is simply one of statutory construction, and the cardinal rule of construction is to determine the intention of the Legislature in the enactment of the statute considered.

In reaching the conclusion that the resolution of the State Convention of the Democratic Party of Texas was legal and valid, the Court of Civil Appeals at San Antonio in the Booker Case, *supra*, necessarily determined that Article 3107, as amended, did not have the effect of withdrawing *in toto* from the Democratic Party of Texas the power to prescribe the qualifications of its members. The Supreme Court of the United States in many cases has said that it will accept as binding the decisions of the Appellate Courts of the State as to the meaning of a statute enacted by the Legislature of that State, and hence it is our opinion that the Supreme Court of the United States would follow the Booker Case in its construction of the statute.

Moreover, a fair construction of the statute itself leads to no other conclusion than that it was not the intention of the Legislature to preempt the field and set down in rules of law the qualifications for membership in the Democratic Party of this State. The very terms of the article under consideration negative that theory, because it is expressly stated therein that a political party may, "in its own way determine who shall be qualified to vote or otherwise participate in such political party."

The Supreme Court of the United States has said that "whatever inherent power the State political party has to determine the contents of its membership resides in its State Convention."

The State Convention of the Democratic Party of Texas has spoken and, in speaking, has bound all persons by its action. The Democratic Party has thus, in good faith, conformed to the laws of the State and to the Constitution and laws of the United States as the same have been expounded and explained by the Supreme Court of the United States. Its actions should be respected, and in our opinion, will be respected and observed by the courts of this State and of the United States.

In view of the resolution passed by the State Convention of the Democratic Party on May 24, 1932, you are respectfully advised that, in our opinion, negroes are not entitled to participate in the

primary elections of the Democratic Party to be held on the fourth Saturday of this month and on the fourth Saturday in August, 1934.

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

Op. No. 2949.

ELECTIONS — EXPENSES OF RUN-OFF PRIMARIES — ASSESSMENT OF  
CANDIDATES — ARTICLES 3108, 3116, AND 3119, R. C. S. 1925,  
AND AMENDMENTS CONSTRUED.

1. The statutory method provided for raising revenue to defray costs incident to holding all primary elections requisite to nomination of candidates for all offices for which a political party nominates candidates, is by assessment of the candidates participating, subject to limitations prescribed by law as to the amount which may be assessed against candidates for nomination for certain offices.

2. The county executive committee of the political party making nominations is charged with the responsibility of providing election supplies, polling places, etc., and of raising revenue to defray the cost of holding all necessary primaries in the county.

3. Candidates for county and precinct offices are subject to assessment of their prorata part of expenses incident to holding all primaries necessary to nominate all candidates for which the political party makes nominations, irrespective of whether county and precinct candidates are nominated by majority or plurality vote.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, April 17, 1934.

*Hon. Murrell Buckner, Chairman Democratic Executive Committee,  
Dallas County, Union Terminal Building, Dallas, Texas.*

DEAR SIR: Your recent communication to the Attorney General reads in part as follows:

"Article 3106, Texas Election Laws, provides,

"Majority or plurality vote.—The county executive committee shall decide whether the nomination of county officers shall be by majority or plurality vote, and, if by a majority vote, the committee shall call as many elections as may be necessary to make such nomination, and in case the committee fails to so decide then the nomination of all such officers shall be by a plurality of the votes cast at such election"

"From this article, the County Executive Committee has authority to order either a majority or plurality vote. In other words first primary and then a run-off primary.

"Since the Legislature has seen fit to reduce salaries of all county officials, it is very doubtful if Dallas County is going to have enough candidates to file to pay for holding two primaries in this county, as it cost \$20,000.00 to hold the two primaries. and if enough candidates do not file in order to pay the expenses of the two primaries, the Dallas County Democratic Executive Committee is going to rule that there will be only one primary—in other words, there will be no run-off, and the plurality vote of candidates will decide the nominees for the county.

"The question I want to ask you is this: The candidates for State offices, under the law, are required to have a run-off, but the candidates for State offices are not assessed in the County except those who are running for the Legislature who pay \$1.00 a piece. Now who is going to pay for the run-

off in a county for the candidates for State offices, when the County Executive Committee has only had one primary and the man who received the plurality vote in that primary won and therefore no second primary held? The county candidates cannot and will not put up the money for a run-off primary for State offices. They have no interest in it and therefore, as stated above, who is to pay the expense of the run-off primary in the county for the candidates for State offices?"

We take this opportunity to comply with the request expressed in the above quoted letter.

As you have observed, the statutes provide that candidates for nomination for state and district offices are required to be nominated by majority vote, and if no candidate receives a majority of the votes cast at the first primary election, the statutes provide that the two highest candidates shall be voted upon at a second, or run-off primary. Article 3102, R. C. S. 1925. On the other hand, candidates for nomination for county offices may be nominated either by majority or plurality vote, as the county executive committee shall decide. Article 3106, *supra*.

The legislative plan for raising revenue to defray the expenses incident to holding of primary elections is plainly delineated by statute.

Article 3118, R. C. S. 1925, provides that there shall be for each political party required by law to hold primary elections for the nomination of its candidates, a county executive committee, composed of a county chairman, and one member from each election precinct in such county.

Article 3117, R. C. S. 1925, provides that:

"The various county committees of any political party, on the third Monday in June preceding each general primary, shall meet at the county seat and determine by lot the order in which the names of all candidates for all offices requested to be printed on the official ballot shall be printed thereon."

Articles 3108 (as amended Chapter 105, Acts Regular Session, 42nd Legislature), 3116 (as amended Chapter 54, Acts Regular Session, 40th Legislature) and 3119, R. C. S. 1925, read respectively as follows:

"At the meeting of the county executive committee provided in Article 3117, the county committee shall also carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks and messengers, to report the result in each precinct to the county chairman, as provided for herein, and all other necessary expenses of holding *such primaries* in such counties and shall apportion such cost among the various candidates for nomination for county and precinct offices only as herein defined, and offices to be filled by the voters of such county, or precinct only, (candidates for State offices excepted), in such manner as in their judgment is just and equitable, giving due consideration to the importance and emoluments of each such office for which a nomination is to be made, and shall, by resolution, direct the chairman to immediately mail to each person whose name has been requested to be placed on the official ballot a statement of the amount of such expenses so apportioned to him, with

the request that he pay the same to the county chairman on or before the Saturday before the fourth Monday in June thereafter."

"Art. 3116. Must Pay—Amend by adding after 'as hereinbefore provided' in the first sentence and before 'no candidates for nominations for State Senator or Representatives,' the following 'Provided, however, that no candidates for nomination for chief justice or associate justice of a Court of Civil Appeals or for representative in Congress or for district judge or district attorney or any other district office in representative or judicial district composed of four or more counties shall be required to pay more than one (\$1.00) dollar to any county executive committee or other person for any particular county as his portion of such expense for holding such primary and shall not be required to pay any other sum or sums to any other person or committee to have their name placed on the ticket as such candidate,' and by changing the sentence 'No candidates for nomination for State Senator or Representative in the Legislature shall be required to pay more than one dollar to any county executive committee or other person for any particular county, as his portion of such expenses for holding such primary' to read 'No candidates for nomination for State Senator or Representative in the Legislature shall be required to pay more than one (\$1.00) dollar to any county executive committee or any other person or any particular committee as his portion of such expense for holding such primary.'"

"Art. 3119. Supplies—The executive committee shall have a general supervision of the primary in such county, and shall be charged with the full responsibility for the distribution to the presiding judge of all supplies necessary for holding same in each precinct. If the duly appointed presiding officer shall fail to obtain from the executive committee the supplies for holding such election, such committee shall deliver the same to the precinct chairman for such precinct, and, if unable to deliver the same to such presiding officer or precinct chairman not less than twenty-four hours prior to the time or opening the polls for such primary, such committee shall deliver the same to any qualified voter of the party residing in such precinct, taking his receipt therefore, and appointing him to hold such election in case such presiding officer or precinct chairman shall fail to appear at the time prescribed for opening the polls."

Examination of the statutes above quoted discloses that the duty of providing polling places, election supplies, and providing for the compensation of election officers and for other necessary expenses incident to the holding of all primaries requisite under the law to arrive at a nomination of candidates for county, district and state offices of a political party, is devolved upon the county executive committees of each county in the State.

The manner in which the funds necessary to defray the expenses may be raised is likewise prescribed and regulated by statute. The county executive committee of each county is required by law to estimate the expenses of holding all primaries in the county requisite to nomination of party candidates for the succeeding general election, and to "apportion such costs among the various candidates for nomination for county and precinct offices only, as herein defined, and offices to be filled by the voters of such county, or precinct only, (candidates for State offices excepted), in such manner as in their judgment is just and equitable, giving due consideration to the importance and emoluments of each such offices for which a nomination is to be made \* \* \*."

Additional revenues may be derived by the county executive committee from assessments of candidates for offices other than county

and precinct offices, but this power is subject to the limitations contained in Article 3116, supra, as amended.

The method provided for the raising of funds to pay the expenses of all primaries necessary to be held in the particular county is by assessment of the candidates for nomination for the various offices, subject to the restrictions on such assessments as is provided by the statutes hereinabove quoted. Under the statutes the county executive committee of the several counties of the State are not permitted to assess candidates for State offices; they are restricted in assessing candidates for nomination for district offices where the district is composed of four or more counties to one dollar per candidate in each county, and are restricted in assessing candidates for nomination for State representative and State senator to one dollar per candidate. Irrespective of whether nomination of candidates for county and precinct offices is arrived at by majority or plurality vote, it follows that the general assessment for expenses incident to holding the general primary and run-off and all other primaries requisite to arriving at nomination of candidates for all offices for which the party makes nominations, must fall upon the candidates for nomination for county and precinct offices and for district offices in districts composed of less than four counties. If a candidate for nomination refuses to pay to the county executive committee the amount legally assessed against him, the statutes prohibit the county executive committee from permitting his name to be printed on the primary ballot as a candidate for nomination for office. Article 3116, supra, as amended.

It may be that the statutory method of providing funds to defray the costs incident to the holding of primary elections works undue hardships on candidates for nomination for county and precinct offices; be that as it may, the method provided by law for the raising of such funds is so clearly defined and limited that no question can exist as to the legislative intention in the premises. If a change in the method be desirable, the proper forum for effecting the change is the Legislature of the State.

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

**OPINIONS RELATING TO PUBLIC LANDS**

Op. No. 2920.

PUBLIC LANDS—REFUNDS ON LAND SALES—WARRANTS ON  
TREASURY—CLAIMS VS. STATE

1. Article 4350, R. C. S. 1925, prohibits the issuance of a State warrant to any person indebted to the State until his indebtedness is paid.
2. Refunds under Article 5411, R. C. S. 1925, cannot be approved where the claimant owes a debt to the State.
3. Suggestion that official certificates issued as basis of claims against State show whether claimant is indebted to State.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, June 21, 1933.

*Hon. George H. Shppard, State Comptroller of Public Accounts,  
Austin, Texas, and*

*Hon. J. H. Walker Commissioner General Land Office, Land Office  
Building, Aus'in, Texas.*

GENTLEMEN: Under recent date this office has received for examination and approved two refund claims filed by Humble Oil & Refining Company and two refund claims filed by Shell Petroleum Corporation, all filed under the terms of Article 5411, R. C. S. 1925, which article provides for refunds of money paid the State for lands or leases thereon where the State's title to the land fails.

The claims filed are all accompanied by affidavits of the claimants and by statements of fact from the Commissioner of the General Land Office, as required by law.

The two claims filed by Humble Oil & Refining Company total the sum of \$88.00, and are for refund of rentals paid on two oil and gas leases, one a lease on the S $\frac{1}{2}$  of the S $\frac{1}{2}$  of the N $\frac{1}{2}$  of Section 22, Block 13, Certificate 8/1644, H & G N Ry. Co. in Reeves County, and the other a lease on the W $\frac{1}{2}$  of the SW $\frac{1}{4}$  of Section 24, Block 13, Certificate 8/1645, H & G. N. Ry. Co. in Reeves County.

The two claims filed by Shell Petroleum Corporation total the sum of \$128.00 and are likewise claims for refund of rental paid the State on two oil and gas leases, one a lease on the E $\frac{1}{2}$  of Section 28, Block A57, Public School Land in Winkler County, and the other a lease on the N $\frac{1}{2}$  of Section 206, Block D, Certificate 272, John H Gibson Survey in Yoakum County.

Article 4350, R. C. S. 1925, as amended by Chapter 243, General Laws, Regular Session, 42nd Legislature (1931) reads as follows:

"No warrant shall be issued to any person indebted to the State, or to his agent or assignee, until such debt is paid."

The term "person", as used in this article, includes corporations.

The State of Texas, acting by and through its present Attorney General, James V Allred, has filed suits in the 53rd District Court of Travis County against both Humble Oil & Refining Company and

Shell Petroleum Corporation for the recovery of bonus and rental alleged to be due by those corporations on oil and gas leases on public free school lands of Texas. The suit against Humble Oil & Refining Company is for \$110,071.52, plus interest. The suit against Shell Petroleum Corporation is for \$68,523.85, plus interest. Both suits are now pending and have not yet been tried. The claim of the State under these circumstances is sufficient to deny to claimants the refund warrants sought. *Sherman vs. Hatcher*, 117 Tex. 166, 299 S. W. 227. In our opinion we are not authorized to approve the refunds until the indebtedness of the refund claimants to the State is paid.

Various statutes make it the duty of the Attorney General to pass upon the legality of various kinds of claims against the State. The Attorney General usually does not know whether or not the claimants or refund claimants are indebted to the State. We suggest that the officer transmitting claims against the State to this department for approval also furnish what information he may have as to the indebtedness to the State, if any, of the person requesting a State warrant. The official certificates furnished claimants could show whether or not the claimant owes any debt to the State, to the knowledge of the officer furnishing the certificate. Once the claim reaches the Comptroller, he can examine his records to determine whether there be any past due indebtedness for taxes.

Copies of this opinion are being mailed to Humble Oil & Refining Company and Shell Petroleum Corporation. The instruments in support of the claims submitted by them will be returned to them.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

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Op. No. 2954

PUBLIC LANDS—MEXICAN GRANTS—SUBMERGED LANDS—SEASHORE

1. Title to permanent lakes and marshes in Musquiz Grant in Jackson County was reserved to the State by law and by express terms of grant.

2. Under civil law, line of highest tide in winter separates privately owned upland from State owned seashore. This was the law in force in 1833 when Musquiz Grant was made, and governs rights acquired under that grant.

3. Since lakes were expressly reserved to State by terms of Musquiz Grant, and by general law, Land Commissioner is now authorized to issue oil and gas leases on Menefee lakes in Jackson County.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, September 5, 1934.

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

DEAR SIR: Your inquiry of August 2, 1934, addressed to the Honorable James V. Allred, Attorney General, has been referred to the writer for answer. It reads as follows:

"Enclosed is a translation of the field notes of the Ramon Musquez Grant in Jackson County. The construction given this Grant by the Land Office is that the title to the salt water lakes in the Grant did not pass from the government, and that these lakes belong to the State of Texas.



Menefee Lake No. 1 and Menefee Lake No. 2 within the boundaries of this Grant are subject to the ebb and flow of the Gulf tides and therefore come within the statutory prescriptions of areas subject to lease by this Department.

"In addition to the exclusion of these lakes by the field notes of the Grant within which they are situated, the Mexican law provided that water like air could not be reduced to ownership. This inhibition will be found in "Ordenanzas de Tierras y Aguas, Capitulo" of Vol. II Escriche. In the Spanish it reads: 'El Aire y el Agua no Pueden ser Sometidos a la Propiedad'. Translated it would read: 'Air and water cannot be subjected to ownership'.

"Also is enclosed a copy of protest dated July 25, 1934, against selling oil and gas lease on Menefee Lake No. 2. This protest is signed by Thomas E. Toney and Muia H. Toney, which was received in this office July 26, 1934.

"Leases on these two lakes were advertised for sale at 10 o'clock July 31, this year. On Lake No. 1 we have a bid of \$13,760.00 in cash and 1-8 of the gross production as royalty, and on No. 2 we have a bid of \$22,700.00 cash and a royalty of 1-8 of the gross production. The area of Lake No. 1 is 160 acres and of No. 2 100 acres. Both bids are by the Humble Company.

"Our inquiry is whether the construction given the Grant to Ramon Musquez is correct, and if you answer in the affirmative whether the Department would be authorized to issue a lease in view of the adverse claim to No. 2. Our information is that No. 1 is likewise claimed, but I find no written protest."

The enclosed field notes of the Ramon Musquiz Grant describe a tract of land situated between the Lavaca River and Garcitas Creek, bounded to the west generally by two older grants and on a considerable portion of the southeastern margin by "the shore of Matagorda Bay." The field notes and grant recite that "the whole survey" comprises five and one-half leagues of land, "excluding the permanent lakes and marshes which are enclosed in it". In the Spanish field notes the clause of exception reads, "escluyendo las lagunas y pantanos permanentes que en ella se encierran".

The survey bears date of December 31, 1832, the grant (from Coahuila and Texas) having been completed the following year (1833). Of historical interest is the information, supplied by you, that the grantee, Don Ramon Musquiz, is the officer who led the expedition which captured Philip Nolan.

On investigation, we learn that this large grant, containing more than 24,000 acres of land, or more than 37 square miles of territory, follows the shores of Matagorda Bay for a considerable distance. Between the lines of the older surveys and the creeks and bay called for, there lies a large body of upland, marsh land and lakes containing several thousand acres of land in excess of the five and a half leagues called for in the grant. We have no specific information at this time as to the extent of the permanent marsh lands, other than the fact that they are of considerable extent.

Bearing in mind the Mexican laws in force at the time the grant was made, the fact upon the ground, the terms of the grant, the cheapness of land at that time and the expense of the surveying necessary to segregate upland from permanent marshes and lakes, we are of the opinion that the grant did not attempt to convey the permanent lakes and marshland situated between the lines of the older surveys to the west end the shore of Matagorda Bay to the east. We

fully concur in the construction given to the grant by your department, and are of the opinion that title to all permanent lakes and marshes was reserved by the State of Coahuila and Texas by express provision in the grant, as well as by operation of law. *Rosborough vs. Picton*, 34 S. W. 791.

In addition to the authority cited in your letter, attention is called to the Civil Law rule with reference to ownership of the seashore. Under the common law, the dividing line between privately owned upland and publicly owned seashore is the line of ordinary high tide, while under the Civil Law the sovereign owns up to the line of the highest tide in winter. *City of Galveston vs. Menard*, 23 Tex. 349; *Galveston City Surf Bathing Co. vs. Heidenheimer*, 63 Tex. 559; *Rosborough vs. Picton*, 34 S. W. 791. The extent of the Mexican grant under consideration, which was made in the years 1832 and 1833, is determined by the Mexican Civil Law in force at the time the grant was made, and the rights of the holders under that grant are controlled by the Mexican laws in effect at the date of the grant. *Manry vs. Robison*, 122 Tex. 213, 56 S. W. (2d) 438, which contains full discussion and citation of authorities. Spanish and Mexican grants on the seashore in Texas, and Texan grants of that nature made prior to the introduction of the common law in 1840, carry title only to the line of the highest tide in winter, and lands beyond that mark remain the property of the State in the absence of special legislative acts granting submerged lands. *Manry vs. Robison*, supra; *Rosborough vs. Picton*, supra. This rule of the civil law explains the express reservation of the permanent lakes and marshes contained in the grant under consideration. Your letter shows that the Gulf tide ebbs and flows in both of the salt water lakes heretofore offered for lease.

You also ask whether a lease should issue on Menefee Lake No. 2 in view of a written protest filed with your department. The protest reveals that the claimants base their claim upon adverse possession, recognition, and payment of taxes. It has been recently held by the Supreme Court that none of these constitute evidence that title is not in the State. *Weatherly vs. Jackson*, 71 S. W. (2d) 259. Furthermore, it will not be presumed that a ministerial officer attempted to grant submerged lands not subject to grant, and no subsequent recognition or confirmation of such a grant can be presumed. *Rosborough vs. Picton*, 34 S. W. 791, at 792 (Justice Williams, Galveston Court).

It is held in *State of Texas vs. Bradford*, 121 Tex. 515, 50 S. W. (2d) 1065, that the Land Commissioner has no power to sell lands upon which an illegal patent has been issued and is outstanding. In such cases it is the duty of the Attorney General to sue for the land and cancel the invalid patent before the Land Commissioner offers the land for sale. *State vs. Bradford*, supra. That rule has no application to the instant case for the grant under consideration does not attempt to convey the lakes in question. On the contrary, these lakes are excepted from the grant by express words, and no reformation of the grant is necessary. Under the law and under the plain wording of the grant the State's title to the lakes is clear. The mere writing of the letter of protest under these circumstances does not

cast such a cloud on the State's title as to prevent the leasing of the lakes or marshes. In our opinion you are authorized to issue the lease.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

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Op. No. 2951.

PUBLIC LANDS—UNSURVEYED SCHOOL LAND—ARTICLE 5323, R. C. S. 1925—ACT OF 1929 AND ACT OF 1931.

1. Where application of inquiry was filed in the General Land Office and suit was brought against the county surveyor under Article 5323, R. C. S. 1925, prior to the effective date of the Act of 1929, all rights of the applicant under the original act were preserved by the latter act, and the Land Commissioner is authorized to reconsider the application of inquiry before the suit against the county surveyor is tried, if he chooses to do so.

2. In reconsidering such applications of inquiry, the Land Commissioner is restricted to those specific applications of inquiry upon which suits were pending at the effective date of the Act of 1929.

3. Section 6 of the Act of 1931 reviving certain classes of rights under Article 5323 discussed, and rights revived enumerated.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, May 8, 1934.

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

DEAR MR. WALKER: Under date of January 25, 1934, you submitted to this office an inquiry concerning the proper construction of Article 5323, R. C. S. 1925 (now repealed), and subsequent statutes which repealed Article 5323 but preserved certain rights theretofore acquired thereunder. After receipt of your letter of January 25th we advised some of the parties interested in having the question decided that your letter, embracing only what is shown by the Land Office records, was not a sufficient basis upon which to write an opinion concerning the respective rights of the several claimants, but that this office would need in addition a certificate from the District Clerk of Pecos County (the county where the land is situated) showing what mandamus suits, if any, had been filed and were pending in the district court of that county under Article 5323.

The area of land under consideration is claimed to be vacant public free school land bounded on the north by Section 107, CT&MCRY Company Survey, on the west by Surveys 38 and 39, on the south by Survey 37, on the east by Survey 34½, all in Block 194, GC&SFRY Company Survey in Pecos County. At least a part of this area was held to be vacant land in the decision of the El Paso Court of Civil Appeals in *Pandem Oil Corporation vs. Goodrich*, 29 S. W. (2d) 877 (reversed on another ground by the Supreme Court).

That portion of your inquiry dealing with Article 5323 reads as follows:

"The records of the Land Office show the following applications of inquiry with a view to the purchase of the land to which inquiries negative answers were given:

No.	Applicant	Received	Remarks
138	Wolford Thompson	7-9-27	Embraces all of the area and parts of valid surveys.
156	P. L. Childress	9-6-27	Embraces all of the area and parts of valid surveys.
164	Aaron Cummins, Jr.	9-20-27	Embraces all of the area and parts of valid surveys.
194	J. E. McDowald	10-22-27	Embraces western portion of area apparently.
202	J. A. Johnson	10-31-27	Embraces all of the area.
204	Garland Porter	11-1-27	Embraces all of the area.
229	John H. Tyler, Jr.	11-26-27	Embraces western portion of the area, apparently.
253	John H. Tyler, Jr.	1-14-28	Embraces all of the area and extends eastward to No. 62, Blk. 1, I & G. & Ry. Co.
315	Aaron Cummins, Jr.	2-23-28	Embraces all of the area.
321	V. C. Hogan	3-21-28	Description inaccurate, but appears to include the area.
363	John H. Tyler	5-22-28	Embraces all of the area.
366	John H. Tyler	5-22-28	Description inaccurate, but apparently embraces the area.
367	BurrellMcInerney	6-1-28	Apparently embraces the area.
401	T. K. Campbell	9-17-28	Apparently embraces the area.

"You will observe that Aaron Cummins, Jr., whom Judge Higgins represents, filed two applications of inquiry, one September 20, 1927, and the other February 25, 1928. My information is that he has brought suit in Pecos County under Art. 5323, R. C. S. 1925, to compel the surveyor to make a survey of the land. That suit is now pending, but I am not informed under which of these applications he brought it. Judge Higgins informs me that another suit is pending in Pecos County, brought by one of these applicants who filed in this office, subsequently to Cummins. I do not know the name of such applicant, nor the status of the cases in that court.

"Judge Higgins has requested me to submit the matter now to you. He insists that as the decision of the court in the Pandern Oil Corporation vs. Goodrich, 29 S. W. (2) 877, holds the area to be vacant, this Department is authorized to re-consider the Cummins application and direct him to have a survey made, and then to appraise and sell him the land, and that it should do so in view of the judgment cited.

"My inquiry is whether, in view of the holding of the court in the Pandern Oil Corporation case, this Department is authorized to re-consider the applications of inquiry and amend its answer as originally given, and whether its re-consideration would be restricted to applications forming the basis of a suit under Article 5323. It will be noted that the Act of 1931 appears to preserve only such applications as were in litigation at the time of its enactment. You will please not let your answer be restricted to my questions, but make it as full and complete as your understanding of the case will warrant."

The certificates furnished us today from the office of the District Clerk of Pecos County, bearing date of May 4, 1934, reads as follows:

"THE STATE OF TEXAS  
COUNTY OF PECOS

I, J. H. Dyche, District Clerk in and for Pecos County, Texas, do hereby certify that I have examined all the suits filed in the District Courts of Pecos County, Texas, against A. N. Lea, as

County Surveyor of Pecos County, to compel him to make surveys under Article No. 5323 of the Revised Civil Statutes of Texas, that were filed previous to the repeal of said statute and in said examination I find only one case now pending in said Courts, being Aaron Cummins, Jr. vs. A. N. Lea, County Surveyor et al, Numbered 2009, that directly affects the lands described in the petition in said suit, said lands in said petition being generally described as being bounded on the North by Section No. 107, C. T. & M. C. Ry. Co., on the West by Surveys No. 38 and 39, of Block No. 194, G. C. & S. F. Ry. Co., on the East by Survey No. 34½, Block No. 194, G. C. & S. F. Ry. Co. and on the South by Survey No. 57, Block No. 194, G. C. & S. F. Ry. Co., all in Pecos County, Texas, being on the Pecos River and estimated to be about 78 acres of land.

"In so far as I am able to ascertain there are no suits directly or indirectly affecting said lands above described, other than the Cummins suit.

"GIVEN under my hand and seal of office at office, in Ft. Stockton, Texas, this the 4th day of May, A. D. 1934.

(Signed) J. H. DYCKE,  
District Clerk, Pecos County, Texas."

The first inquiry submitted by you concerns your power and authority to now reconsider your former opinion on the application of inquiry, since Article 5323 has been repealed.

The writer, by letter opinion dated May 4, 1934, addressed to you, expressed the personal view that you had such power and authority. We will briefly review what was said in that letter opinion concerning your right to so revise the former holding.

The prospective application of Article 5323, 1925 Revised Civil Statutes of Texas, terminated in 1929 with the effective date of Chapter 22, Acts Third Called Session, Forty-first Legislature, 1929, save and except as to unsurveyed public school lands where application of inquiry had been theretofore made and on which suit was at that time pending. That Act of 1929 taking unsurveyed school lands off of the market preserved the rights of applicants where applications had been made and suit had been filed thereon under the provisions of Article 5323.

Your letter shows that Aaron Cummins, Jr., filed one application in 1927 and another in 1928; that the Commissioner of the General Land Office advised that no vacancy existed, and that the applicant, Aaron Cummins, Jr., filed suit against A. N. Lea, County Surveyor of Pecos County, under the second section of Article 5323, R. C. S. 1925, prior to the repeal of that article. This information is confirmed by the certificate of the District Clerk of Pecos County dated May 4, 1934.

Since the Land Office first advised that no vacancy existed, the El Paso Court of Civil Appeals has handed down its decision in Pandem Oil Corporation vs. Goodrich, 29 S. W. (2d) 877, holding therein that at least a part of the area covered by Mr. Cummins' application is vacant unsurveyed public free school land. This case was reversed by the Supreme Court, but on another ground that did not involve the existence or non-existence of a vacancy. Your letter reflects that the applicant has now asked you to reconsider your former decision and has asked that you hold that the land is subject to sale as unsurveyed school land under the terms of Section 1 of Article 5323. You desire to be advised on this question because of the repeal of Article 5323 by the Act of 1931.

Section 1 of Article 5323 provides that after the making of a written application of inquiry to the Commissioner by the applicant, the Land Commissioner may, if it appears from the records of the Land Office that the area belongs to the school fund or if there is doubt as to the existence of the land as public free school land, authorize a survey of the land by a surveyor designated by the Land Commissioner.

Section 2 of Article 5323 provides that if the Commissioner declines to recognize the existence of the area as public school land and refuses to authorize a survey to be made, the applicant may file a mandamus suit against the county surveyor in the district court of the county in which the land is located. Section 2 then provides that if the final judgment of the court should decree the area or a part thereof to be school land, the surveyor shall make the survey. If the final judgment of the court should be adverse and the final judgment should be that there were no vacancy, then that judgment would be conclusive of the matter and the Land Commissioner could not thereafter decide that the land was vacant land and award the same. *Camp vs. Gulf Production Co.*, 61 S. W. (2d) 773, at 780.

In our opinion, the fact that the Land Commissioner declines to recognize the existence of an area as public school land under Section 1 of Article 5323, does not exhaust the power of the Land Commissioner under the statutes. The initial finding is not final. As said in the recent opinion by Justice Smedley of Section B of the Commission of Appeals:

“The tentative opinion expressed following the preliminary investigation may often be a mistaken opinion.” *Weatherly vs. Jackson*, decided April 18, 1934.

In discussing the power of the Land Commissioner under Article 5323, Section A of the Commission of Appeals, in the case of *Camp vs. Gulf Production Company*, reached the following conclusions:

“Finally, we think the contention of the defendants in error that the act is unconstitutional because it confers upon the land commissioner power and authority to review a judgment of the district court should be overruled. It seems to be asserted in this regard that the part of the act which provides: ‘If upon inspection of the papers the Commissioner is satisfied from the report of the surveyor and the records of the Land Office that the land belongs to the public free school fund,’ etc., attempts to confer upon the land commissioner the power to determine whether the vacancy exists, even after the courts have adjudicated that matter. We think that the act should not be given such a construction. When the suit has terminated by final judgment, it will be presumed that the judgment, and so much of the judgment roll, as may be necessary to properly understand the same, will become a part of the records of the land office. When this is done, the land commissioner must act on the application to purchase in the light of the records of his office, including the judgment and judgment roll, and must give full faith and credit to the judgment. When no suit has transpired, the land commissioner must determine whether a vacancy exists, and the act is intended to confer upon his that power, but, when a suit has been had, the provision of the act which confers on the land commissioner the power to determine the vacancy does not apply, because it has already been determined by the court. In other words, the part of the act which confers on the commissioner the power to determine the vacancy only has application where there has been no judicial determination of the question.

“That our interpretation of the act is a correct one is apparent when we consider the fact that in the first instance the land commissioner is

allowed to exercise his discretion in determining whether a vacancy exists, and it would be unreasonable to hold that it contemplated he should still possess such discretion after a court of competent jurisdiction had adjudged otherwise. The basis for the suit provided for in subdivision 2 is the refusal of the commissioner to recognize the existence of the vacancy. The evident purpose of the legal proceedings provided therein was to reach a decision where the commissioner would have no further discretion in the matter; that is, by a judicial determination of the fact upon which the commissioner had already acted. To give this statute any other construction would impute to the Legislature the intention to pass a law, the operation of which would defeat the very purpose for which it was designed." *Camp vs. Gulf Production Co.*, 61 S. W. (2d) 773, at 780.

It will be noted that the court has said that the Land Commissioner's discretion has ended "after a court of competent jurisdiction had adjudged otherwise". There is nothing in the opinion to indicate that the discretion of the Land Commissioner ends prior to trial of the case and entry of a judgment.

The present suit was filed before the passage of the Act of 1929, taking unsurveyed school lands off of the market, but was postponed by the court pending decision by the Supreme Court of Texas of the case of *Turner vs. Smith*, 61 S. W. (2d) 792, and other cases involving the constitutionality of Article 5323. The certificate of the District Clerk of Pecos County shows that the case of *Aaron Cummins, Jr. vs. A. N. Lea, County Surveyor*, is now pending in the District Court of Pecos County and we have ascertained otherwise that it has not been tried or disposed of.

Under these circumstances, we are of the opinion that the discretion of the Land Commissioner once exercised is not exhausted, but that it is a continuing discretion exercisable at the will of the Land Commissioner until a court of competent jurisdiction has adjudged the matter. In the words of Mr. Justice Critz in the *Camp* case, the part of the act (referring to Article 5323) which confers on the Commissioner the power to determine the vacancy has application where there has been no judicial determination of the question.

Section 1-a of the Withdrawal Act of 1929 provides that "Such withdrawal from sale and lease of unsurveyed public school land shall not apply in cases where application of inquiry has been heretofore made therefor and on which suit is now pending" (Acts 3rd C. S. 41st Leg., 1929, Ch. 22). This section of the Act of 1929 did more than merely preserve the right to prosecute the suit. It provided that Section 1 of the act withdrawing the lands from sale "shall not apply" in cases where suit was pending. Since the Withdrawal Act of 1929 excepted cases where suits were pending, such land was not withdrawn from sale under any section of Article 5323, and every provision of Article 5323 was left in full force and effect as to those lands and applications of inquiry upon which suits were pending at the effective date of the 1929 Act.

The only further question which needs to be discussed in connection with this question is whether or not this discretion of the Land Commissioner ended with the repeal of Article 5323 by Section 13 of Chapter 271, General Laws, 42nd Legislature, 1931. As to the lands upon which suit was filed and pending on the effective date of the Act of 1931, we are of the opinion that it did not.

The Act of 1931 became effective in the year 1931. Article 5323 was expressly repealed by Section 13 thereof and there is no saving clause in the Act of 1931 which refers to unsurveyed school lands upon which suit was pending under Article 5323 at the effective date of the Act of 1929 taking unsurveyed school lands off of the market. However, the case of *Cockrell vs. Work* was decided by the Supreme Court of Texas on May 13, 1933, and in that case a judgment was entered remanding the cause for trial upon the merits. That was a suit filed under Article 5323 in which an opinion was rendered and judgment entered by the Supreme Court almost two years after the effective date of the Act of 1931. Had the repeal of Article 5323 by the Act of 1931 cut off the applicant's rights to pursue all remedies under Article 5323 saved to him by the Withdrawal Act of 1929, then the plaintiff in the case of *Cockrell vs. Work* would not have been entitled to a remand of the case for trial upon the merits. *Cockrell vs. Work*, 61 S. W. (2d) 787. The court would have considered the repeal of Article 5323 even though it were repealed during the pendency of the case, as it considered the Small Bill in *Bradford vs. State*, 121 Tex. 515, 50 S. W. (2d) 1065, and Senate Bill 310 in *Empire Gas and Fuel Co. vs. State*, 121 Tex. 138, 47 S. W. (2d) 265. The principal question involved in each of those cases was the construction of separate statutes passed after the cases were in the courts, the statute considered in the *Empire* case having been passed while the case was pending in the Supreme Court. We are of the opinion that the rights expressly preserved by the Act of 1929 were not impliedly cut off by the Act of 1931.

Based upon the implied construction of these acts by the Supreme Court, we are of the opinion that the repeal of Article 5323 by the Act of 1931 had no effect upon the rights of applicants whose rights were preserved by the Withdrawal Act of 1929, and have since been preserved by the prosecution of their cases. So long as the Cummins suit is pending in the trial court untried and undisposed of, we are of the opinion that every right was preserved to the applicant, including the right of requesting that the Land Commissioner review the previous decision, if the Land Commissioner be of the opinion (based on information subsequently received) that the area belongs to the public free school fund, or that there is doubt as to the existence of the area as public free school land.

In your second inquiry you desire to know whether the Land Commissioner, in reconsidering Cummins' application, is also authorized to reconsider other applications of inquiry on this area of land upon which no suits were filed under Article 5323. The certificate from the District Clerk of Pecos County reveals that the Cummins suit is the only suit under Article 5323 pending against the County Surveyor of Pecos County at this time. We are informed that no case involving this land has been tried under Article 5323.

The Withdrawal Act of 1929 withdrew from sale or lease the surface and the minerals therein of all unsurveyed public free school lands, save and except that land "where application of inquiry has been heretofore made therefor and on which suit is now pending" (Ch. 22, Acts 3rd C. S. 41st Leg., 1929; Art. 5323b *Vernon's Ann. Stat.*). The power to proceed under Article 5323 was reserved to the



Land Commissioner only where suit was pending at the effective date of the act. That power of further considering applications of inquiry does not extend to all applications of inquiry that may have theretofore been made upon an area involved in a suit pending under Article 5323, but extends only to such specific applications of inquiry *on which* suit was pending at the effective date of the 1929 act. An applicant must have filed his application and in addition must have filed his suit where the answer of the Land Commissioner was "No Vacancy", in order to entitle him to have his application reconsidered under the 1929 act.

In a recent opinion by the Supreme Court dealing with Article 5323, the court held that where the Land Commissioner advised a claimant under Section 1 of the article that the existence of the area as vacant land was doubtful, the applicant lost his right to purchase the same by failing to employ a surveyor and have the survey made as provided by Section 1. The opinion in that case was written by Justice Smedley for the Supreme Court, and the part involved reads as follows:

"This answer was given in accordance with Section 1 of Article 5323, and it afforded Thomas the opportunity to complete the purchase by causing a survey to be made and taking the other prescribed steps. He did not employ a surveyor and did not follow up the application. He therefore lost the inchoate right acquired by filing the application of inquiry. *Cox vs. Robison*, 103 Tex. 354, 127 S. W. 806; *Anderson vs. Robison*, 114, Tex. 249, 267 S. W. 456." *Weatherly vs. Jackson*, decided April 18, 1934, not yet reported.

Those applications of inquiry to which an answer of "No Vacancy" was given and upon which suits were not filed prior to the effective date of the Act of 1929, died with the passage of that act, and except where revived by Section 6 of Chapter 271, General Laws, Regular Session, 42nd Legislature, 1931, were thereafter ineffective for the purpose of conferring a right upon the applicant. The inchoate right acquired by filing the application of inquiry was lost by the failure to file a suit upon receipt of the Commissioner's answer of "No Vacancy" prior to the effective date of the Act of Withdrawal of 1929. *Weatherly vs. Jackson*, *supra*.

Under the express wording of the 1929 act, the inchoate right was preserved only on those applications on which suits were pending and the fact that a suit was filed upon that area of land, but by some other claimant and upon some other application, did not preserve the rights of an applicant who filed a letter but no suit.

Mention has heretofore been made in this opinion of those classes of applications of inquiry under Article 5323 which were revived by the Act of 1931. Section 6 of the Act of 1931 (Ch. 271, Gen. Laws, 42nd Leg., 1931) revived three classes of applications under Article 5323, two classes of those revivals having now expired by their own limitations. Those three classes of revivals are as follows:

1 "In cases where a survey has been made in accordance with Article 5323, Revised Civil Statutes of 1925, and the field notes returned to the Land Office prior to August 10, 1929, the Commissioner is authorized and required to examine the field notes and if found to be correct and the land subject to sale, he shall value the same and give notice of such valuation to the applicant."

2. "In cases where the field notes had been approved and the land valued and the applicant failed to file his application in the Land Office prior to August 10, 1929, he may do so within ninety (90) days from the passage of this Act and receive an award."

3. "All applications filed with the Land Commissioner subsequent to June 1, 1927, and prior to October 10, 1929, expressing a desire to purchase unsurveyed public school land, where the official map of the Land Office shows the area applied for not to be included within the boundaries of any previous survey, and an answer that no vacancy existed has been given by the Land Office, are hereby recognized, and all rights thereunder preserved, and the applicant may have the land surveyed by an authorized surveyor of the State. The survey shall be made, and the field notes, together with plat and a report of the surveyor, shall be filed in the Land Office within ninety (90) days after this Act takes effect, and proceeding shall then be had in accordance with the provisions of law in force at the time of the filing of his application of inquiry with the Land Commissioner."

Revivals of the first class were limited to those cases where a survey was made and the field notes filed in the Land Office prior to August 10, 1929. No express limitation was placed upon the time within which the rights of an applicant so revived were to be exercised.

The second class of revivals applied only to that limited class of cases where the field notes had been approved and the land valued prior to August 10, 1929. In such cases the rights so revived expired unless the applicant filed his application for an award in the Land Office within ninety days from the effective date of the 1931 Act.

The third class of revivals applied to that limited class of cases "where the official map of the Land Office shows the area applied for *not* to be included within the boundaries of any previous survey." In such cases the revived right expired unless the survey was made and the field notes, together with the plat and report of the surveyor, were filed in the Land Office within ninety days from the effective date of the 1931 Act. You have orally informed us that no survey and field notes were returned to and filed in the Land Office on the particular area of land in controversy prior to August 10, 1929. None of the classes of revivals set forth in the Act of 1931 have application to the facts of the instant case. In considering applications of inquiry on the land, you are therefore limited to applications of inquiry upon which suit was filed prior to the effective date of the Act of 1929. Other applications were cut off by that act, and with the exception of the limited class of revivals above enumerated, are not now entitled to consideration.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

Op. No. 2950.

PUBLIC LANDS—CHAPTER 271, SECTION 3, ACTS REGULAR SESSION  
42ND LEGISLATURE.

### SURVEYED AND UNSURVEYED LAND

Land included in prior preemptions and also in a school survey, the field notes of which were filed in the General Land Office and delineated on the official map thereof, is surveyed land within the meaning of Section 3 of Chapter 271, Acts Regular Session, 42nd Legislature, even though in each instance the prior surveys were in conflict with senior surveys and no patent was even issued thereon.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, April 6, 1934.

*Honorable J. H. Walker, Commissioner of the General Land Office,  
Austin, Texas.*

DEAR SIR: Your letter of April 3rd addressed to this department has been received. It reads:

"I would be glad to have your construction of the definitions of surveyed and unsurveyed school land as found in the Act regulating the sale of school land approved May 29, 1931, as the law may apply to the following case.

"In 1902 a survey of 218.5 acres was made in Montgomery County under the law regulating the sale of unsurveyed land. It appearing from the maps and other records of the Land Office that the survey covered two preemption surveys, the school survey was rejected because the office was unable to procure affidavits of abandonment of the preemptions. These preemption surveys were made under the Act of May 26, 1873, and the field notes of one filed in this office June 11, 1880 and of the other January 24, 1887. No proof of occupancy of either has ever been filed in the Land Office, and further than the application and field notes, this department has no information regarding them. Each, however, is in conflict to some extent with older and superior surveys.

"An application for the survey of that part of the preemptions not in conflict with older and superior surveys was filed with the County Surveyor of Montgomery County and it has been filed in this office together with field notes thereunder within the time required by law. The area, as stated, is included in the two preemptions and also in the former school land survey but its extent is only to include 34.3 acres. In other words the parts of the preemptions not in conflict with older and superior surveys total 34.3 acres. This would mean that the field notes of the preemption surveys are not correct in that all the area embraced was not subject to homesteading and it would mean that all of the school land survey was not subject to sale.

"My inquiry is whether the area is unsurveyed land and subject to sale as such."

In addition to the facts set forth in your letter, the writer has been advised orally by Mr. Pierce Stevenson of your department that the land with which you deal in your inquiry is delineated upon the official map of the Land Office.

In view of the fact that Chapter 271, Section 3, Acts of the Regular Session of the 42nd Legislature defines the words "surveyed" and "unsurveyed land" as these terms are used in this act, we are bound by this definition, even though we be unable to give the words "surveyed land" and "unsurveyed land" their ordinary and generally

accepted construction when used with reference to public land. For this reason authorities giving these words their ordinary signification lend very little, if any, aid or assistance in arriving at the intention of the Legislature.

Section 3 of Chapter 271 defines these terms as follows:

“Surveyed lands, within the terms of this Act, is defined to be all tracts or parts of tracts heretofore surveyed either on the ground or by protraction, and set apart for the public school funds and which is unsold, and for which field notes are on file in the General Land Office, or which may be delineated on the maps of said office as such; and unsurveyed land is defined to be all areas not included in surveys on file in the General Land Office or surveys delineated on the maps thereof.”

Since we are unable to give the words “surveyed” and “unsurveyed lands” their ordinary and generally accepted meaning except in so far as such a meaning may be authorized by the provisions of Section 3 of Chapter 271, supra, we will direct our attention primarily to the definition contained therein as applied to the facts contained in your letter, together with the statement of Mr. Stevenson that the land in question is delineated on the official map of the General Land Office.

Under the statement of facts submitted, the 34.3 acres here involved was included in the preemption surveys for which field notes were filed in your office on June 11, 1880, and January 24, 1887, respectively. In addition to this, this same acreage was included in the 1902 survey of 218.5 acres. This is true, even though the field notes on file in the Land Office were in each of the above instances in conflict with senior surveys. Therefore this acreage was part of a tract which has been heretofore surveyed and for which field notes are on file in the General Land Office.

That the land in question has been set apart for the public school fund by the Constitution and laws of this State, we do not believe is open to argument. *Eyl vs. State*, 84 S. W. 607 (writ of error denied).

Section 2, Article 7 of the Constitution of Texas, provides:

“All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatsoever; one-half of the public domain of the State; and all sums of money that may come to the State from the sale of any portion of the same shall constitute a perpetual public school fund.”

Section 4 of Article 7 of the Constitution provides that said lands shall be sold under such regulations at such times and on such terms as may be prescribed by law.

The 26th Legislature, Regular Session, 1899, Chapter 81, in Section 1 in part provided:

“That all of the lands heretofore or hereafter recovered from railway companies, firms, persons or other corporations by the State of Texas, by suit or otherwise, shall at once become a part of the permanent school fund of the State, and shall be disposed of as other school lands, except as herein provided.”

Shortly thereafter the Act of 1900 was passed at the First Called Session of the 26th Legislature, the same being Chapter 11 of that

session. This subsequent act was even broader in its terms than the Act of 1899, and Section 1 thereof in part provided:

*"For the purpose of adjusting and finally settling the controversy between the permanent school fund and the State of Texas growing out of the division of the public domain, there is hereby set apart and granted to said school fund four million four hundred and forty-four thousand and one hundred and ninety-five acres, or all of the unappropriated public domain remaining in the State of Texas of whatever character, and where-soever located, including any lands hereafter recovered by the State, except that included in lakes, bays and islands along the Gulf of Mexico within tidewater limits, whether the same be more or less than said four million four hundred forty-four thousand one hundred and ninety-five acres."* (Italic ours.)

The Legislature, by Section 3 of Chapter 271, supra, divided all unsold public school lands into two classes and the land in question must fall within either the one or the other. It cannot fall within the definition of unsurveyed land as the Legislature has defined that term in this section, because the same is included in surveys on file in the General Land Office and is delineated on the official maps of that office. For that reason we think that the land must fall within the legislative definition given to surveyed land, not only for the reasons which we have heretofore discussed, but also under that provision of Section 3, supra, which provides, "or which may be delineated on the maps of said office as such." The fact that the land is delineated on the official maps of the Land Office to our mind is conclusive of the question. While we have been unable to find any opinion by the appellate courts of this State passing upon this identical question, we submit that the decision of the Court of Civil Appeals of Texarkana in the case of Ashburn, et al vs. Vireca Corporation, 68 S. W. (2d) 343, supports the conclusion which we have reached and to which case we invite your attention.

It is therefore our opinion and you are so advised that the land about which you inquire is surveyed land within the meaning of Section 3 of Chapter 271, supra, and subject to be handled by you as such.

Very truly yours,

HOMER C. DEWOLFE,  
Assistant Attorney General.

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Op. No. 2947.

PUBLIC LANDS—OIL AND GAS—MINERAL PERMIT ACT OF 1913.

1. The Mineral Permit Act of 1913 (Chapter 173, Gen. Laws, Reg. Sess., 33rd Leg., 1913) required separate applications for oil and gas development permits for each whole surveyed tract, but authorized the issuance of a single oil and gas permit on several contiguous tracts embraced in several applications.

2. Oil and gas leases issued under the Mineral Permit Act of 1913 were only authorized to be issued upon single permits, and areas embraced in more than one permit could not be combined in one lease.

3. After an oil and gas lease is issued under the Act of 1913 it may be cancelled by the Land Commissioner, but the Land Commissioner is not authorized to cancel the lease as to a portion only of the area em-

braced therein. A like rule applies to voluntary relinquishment by the lessee.

4. The Act of 1913 requires payment of an annual lease rental of two dollars per acre on oil and gas leases after production, in addition to the stipulated royalty.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 3, 1934.

*Honorable J. H. Walker, Commissioner of the General Land Office,  
Austin, Texas.*

DEAR SIR: Your inquiry of February 27, 1934, addressed to the Honorable James V. Allred, Attorney General, has been referred to the writer for answer. The inquiry reads as follows:

"In 1913 this Department approved survey made for Meyer C. Wagner of 186.5 acres in San Jacinto Bay, in Harris County; likewise, in 1914 we approved survey for Christian Anderson of 200 acres and survey for M. Freeman of 27.2 acres, also situated in San Jacinto Bay, and issued oil and gas permit thereon under provisions of Chapter 173, Acts of April 9, 1913. This permit terminated without any development.

"On July 5, 1916, L. H. Bailey, of Houston, Texas, filed in this office a separate application for oil and gas permit on each of the three above tracts under the same Act, which had been made to the County Clerk of Harris County as surveyed areas by virtue of the approval of the field notes of the original applicants. These tracts all join.

"On July 31, 1916, this Department issued Oil and Gas Permits Nos. 1614, 1615 and 1616 to applicant, Bailey, but included all three in one instrument. Affidavits were filed in this office on April 9, 1919, showing production secured in paying quantities on the above Freeman tract, and on April 24, 1919, Lease No. 1614 was issued on all three tracts for a term of ten years by virtue of said production. It appears that all the production has been from this Freeman tract. Said Lease No. 1614 expired by its own terms on April 24, 1929, and on April 25, 1929, renewal thereof was issued for a term of ten years.

"No royalty has been paid the State since August 1929. We wrote Mr. H. L. Nicholson, Receiver, for the Southern Exploration Company, Houston, Texas, on February 1, 1934, to show cause why said Lease No. 1614 should not be cancelled for failure to put out the oil and pay royalty to the State under the terms of the lease.

"Some of the parties at interest are now requesting that we segregate, or cancel, the Wagner and Anderson tracts from this lease, which have never produced, and to allow the Freeman tract to remain in tact, with the assurance that further development will be immediately prosecuted on said survey.

"The question before us is, was the Department in error in combining the three applications in one permit to L. H. Bailey in the first place, or, to put it another way, embracing three permits in one instrument? Also, were we in error in subsequently issuing one lease on all three tracts? If so, can we cancel the two undeveloped tracts and allow the Freeman tract to remain, with the assurance of the owners that development will be prosecuted diligently on the remaining Freeman tract, with payment of all past due rentals of \$2.00 per acre thereon, or, is there any way by which this office would be permitted to get said two tracts, which are apparently of no value, out of the way, and let the owners put the Freeman survey in good standing, as they desire to do?"

Accompanying your letter of inquiry are certified copies of Oil and Gas Permit Nos. 1614, 1615 and 1616, bearing date of July 31, 1916, Oil and Gas Lease No. 1614 dated April 24, 1919, and Renewal Oil and Gas Lease No. 1614 dated April 25, 1929. The inquiry is also accompanied by certified copy of a letter dated February 9,

1934, submitted on behalf of the lessees, who request that the 200 acre and 186.5 acre tracts be eliminated from the lease and that they be permitted to pay up the past due rentals on the 27.2 acre tract, thereby placing the 27.2 acre tract in good standing. From the letter of the applicants it appears that they base their request for elimination of the two larger surveys from the lease upon the fact that L. H. Bailey in 1916 filed a separate application upon the three several surveys constituting the single leased area.

The applications were filed, and the permit, lease, and renewal of lease were issued under the authority of Chapter 173, General Laws, Regular Session, 33rd Legislature, 1913, and its amendment of 1913, being Chapter 18, General Laws, First Called Session, 33rd Legislature, 1913.

At the time the applications were filed by Bailey in 1916 these three tracts of submerged land in San Jacinto Bay had become surveyed land by virtue of the separate approval of the three separate surveys made for various parties in 1913 and 1914. *Sibley vs. Robinson*, 110 Tex. 1, 212 S. W. 932. The permit and the leases would therefore be governed by those provisions of Chapter 173, General Laws of 1913, applicable to surveyed lands. Section 3 of that act, as amended by Chapter 18, General Laws, First Called Session, 38th Legislature, 1913 (p. 26, Gen. Laws, 1st C. S. 33rd Leg., 1913) provided that one desiring to obtain the right to prospect for and develop petroleum oil and natural gas that may be in any of the surveyed lands mentioned in the act, shall file with the County Clerk of the county in which the *area desired* (as distinguished from a tract or survey) is located, "a separate application in writing for each tract applied for." Section Three of the act then provides that no individual or corporation shall be awarded more than 1280 acres of public lands for oil and gas development purposes, nor more than 1000 acres situated within ten miles of any producing oil or gas well, but provides that the 1280 acres in undeveloped territory, or the 1000 acres in developed territory, may be in as many different tracts as the applicant may desire.

Section 7 of that act contained the following provisions:

"A separate permit shall be issued for each non-contiguous area, but may contain an entire contiguous area of two or more adjacent tracts of land. An application may embrace contiguous portions of different tracts or surveys."

The above quoted portions of Section 7 clearly authorize the issuance of one permit upon one or more contiguous tracts. The certified copies of the permit and leases attached to your letter of inquiry recite that the three tracts of land included therein are contiguous. While the quoted portion of Section 7 provides that an application may embrace *contiguous portions of different tracts or surveys*, Section 3 of the Act provides that a *seperate application in writing* shall be filed *for each tract applied for*, forming a part of the "area desired." Since each surveyed tract of land has its separate file in the Land Office, the reason for the statutory requirement of a separate application for each surveyed tract is not difficult of ascertainment.

In our opinion, the applications filed in the present case are governed by Section 3 of the act because three separate whole tracts were applied for. These tracts were contiguous, but the authority to embrace contiguous lands in one application, contained in Section 7, only extends to "contiguous portions of different tracts or surveys." Since three entire tracts or surveys are dealt with in the instant case, a separate application was of necessity filed for each. However, after such separate applications were filed, Section 7 of the act expressly authorized the issuance of a permit containing "an entire contiguous area of two or more adjacent tracts of land." In our opinion the issuance of one permit containing three contiguous tracts of land upon which three separate applications had been filed was authorized by the act.

We are next concerned with whether or not one permit was issued or three separate permits were issued. If three separate permits were issued, then the issuance of one lease on three permits was unauthorized, as the law required that the lease embrace the area of land embraced in the permit. The law did not authorize the issuance of one lease to cover land embraced in two separate permits. Opinion of Hon. G. B. Smedley, Opinions of the Attorney General of Texas, 1912-1914, p. 520.

The oil and gas permit issued in this instance bears the caption "Oil and Gas Permit Nos. 1614, 1615 and 1616." Though the caption bears three numbers, the word "Permit" is singular in number. The instrument recites the filing by L. H. Bailey of three separate applications for permit, recites that the three areas applied for are subject to prospect and development under the Act of 1913 "and said areas are contiguous" and recites that L. H. Bailey had paid into the General Land Office the correct and lawful sums of money for the areas embraced, and then continues with the usual form of permit, the granting clause reciting that, "I, J. T. Robinson, Commissioner of the General Land Office of the State of Texas, do hereby issue this permit." In the succeeding ten numbered divisions of the permit it is referred to as "this permit," and the land included therein is referred to as "said area" and "the designated area." Though the permit carries three numbers on it, it is in form one permit and in fact is one single permit covering the three areas of land embraced in the three separate applications filed by Bailey. The lease thereafter issued on April 24, 1919, refers to "Permit Nos. 1614, 1615 and 1616." Though it refers to the three numbers, it uses the singular number in describing the permit and refer to the former instrument as "said permit."

You are therefore advised that the Land Department was not in error in combining the three applications in one permit to L. H. Bailey. We are of the opinion that only one permit was issued and that three permits were not embraced in one instrument. Since only one permit was issued, the action of the Commissioner of the General Land Office in issuing one lease on the contiguous tracts embraced in the one permit was legal and correct.

This brings us to your main inquiry concerning your authority to cancel or to permit the surrender of the two tracts out of the lease



upon payment by the lessees under the renewal lease of the sums due upon the remaining tract of 27.2 acres.

Section 8, Chapter 173, General Laws, Regular Session, 1913, provides that at any time within the life of the permit one developing petroleum oil or natural gas in commercial quantities, and being the owner of the permit, shall have the right "to lease all or part of the area included in the permit." Section 25 of the same act provides that the holder of a lease or permit may relinquish the same at any time by filing a relinquishment in the General Land Office after it is duly recorded by the clerk of the proper county.

Under these provisions of the statute the permittees could have surrendered their claims to the two larger tracts and could have obtained a lease in the first instance to the 27.2 acre survey alone. They did not choose to do so, but instead applied for and received a lease upon the three contiguous tracts containing a total of more than 400 acres. Having elected to receive one lease for the entire acreage, they could not thereafter relinquish a portion of the leased area under the terms of Section 25 of the act. If they thereafter desired to relinquish the lease they were required to relinquish the entire area, or no part of it.

The authority granted to the Commissioner of the General Land Office by Section 12 of the act to cancel leases for cause does not extend to cancellation of a portion of the lease. The lease must be canceled as a whole and not in part.

The papers submitted show that no annual lease rentals have been paid on the lease since the year 1924, and that there is due at the present time a sum in excess of eight thousand dollars as annual lease rentals. This total includes rentals due under the original lease and rentals due under the renewal lease. Section 8 of the act of 1913 provides that an annual advance rental of two dollars per acre on the entire area included in any lease shall be paid during the life of the lease, "and in addition thereto the owner of such lease shall pay a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum oil." Liability for rental payments did not cease with initial production of oil from the lease, but continued thereafter. By express terms the statute requires payment of royalty in addition to annual rentals.

The lease can be placed in good standing only by payment of all past due rentals. The 27.2 acre tract embraced with two other larger tracts in the single lease cannot be kept in good standing other than by payment of the accrued rentals on the entire areas leased. The lease forms an indivisible whole and there is no authority in the Land Commissioner, under the Mineral Permit Act of 1913, to cancel the lease as to a part only of the lands embraced therein.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

Op No. 2936.

ESCHEATED LANDS—PERMANENT SCHOOL FUND AUTHORITY OF LAND  
COMMISSIONER TO DISPOSE OF LANDS ESCHEATED PRIOR TO 1899.

1. Lands escheated to the State and recovered by the State by judgments entered in 1887, and not sold by the sheriff or Attorney General, were dedicated and appropriated to the Permanent School Fund by the Acts of 1899 and 1900.

2. Such escheated lands so recovered by final judgment entered prior to the passage of the Act of 1899, and not theretofore sold, became, by virtue of that Act, appropriated school lands, and are subject to disposition by the Land Commissioner under the laws governing the disposition of unsold surveyed public free school land.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, December 2, 1933.

*Hon. J. H. Walker, Commissioner of the General Land Office, Land  
Office Building, Austin, Texas.*

DEAR SIR: Your inquiry of recent date concerning the status of certain escheated lands situated in Polk County, addressed to Hon. James V. Allred, Attorney General, has been received and referred to the writer for answer. The pertinent portions of your inquiry read as follows:

“Under date of June 5th Mr Stuart R. Smith of Beaumont sent you a list of escheated lands situated in Polk County. The list shows thirteen tracts, all of which we were able to identify on our records except the last, John Alfon. I am inclined to think that if the court proceedings are regular in all respects, and the judgment effective as to the placing of title in the State, the Act of February 23, 1900, appropriated the lands to the Public Free School Fund, and that the several surveys would become surveyed school land subject to disposition under the laws regulating the sale of the same.”

“If in your judgment the land if escheated would be subject to the jurisdiction of this Department, kindly advise me, and I will make the earliest possible investigations of the records of Polk County.”

From a “Special Report to the Commissioner of the General Land Office on Investigation of Escheated Estates in Polk County,” made by the Assistant State Auditor in charge of Royalty Audits, dated July 20, 1933, it appears that these lands, containing several thousands of acres in the aggregate, and situated in the Andreas Morales, James W. Abbey, James Morgan, Thos. Wearing, T. A. Stanwood, Henry Schroeder, Heirs of Anthony Hampton, Wm. Drawbridge, William Nash, A. W. Desmuke and Seth Cary Surveys in Polk County, were escheated to the State of Texas by judgments of the District Court of Polk County, entered in the year 1887.

Upon escheat, the property was valued at \$2.00 per acre by the district judge and was advertised to be sold, but the orders of sale were returned by the sheriff with the notation that no bid of \$2.00 per acre was received and no sale was made. (Auditor's Report, supra). This action by the court and sheriff was as provided by the statutes then and now in force. Chapter 37, Gen. Laws, Reg. Session, 19th Legislature (1885), 9 Gammel's Laws 655; Art. 3281, Revised Civil Statutes of 1925. These statutes provide that upon the

return of the writ showing no sale, "thereafter said real estate may be sold by the Attorney General in the same manner that lands bid in are sold" (Art. 3281, R. C. S. 1925). As stated above, this land was escheated to the State in 1887. It has never been sold by the sheriff or the Attorney General (Auditor's Report, supra).

The Auditor's report further shows that none of these escheated lands were rendered for taxation between the years 1887 and 1932, but that in the latter year certain persons and corporations rendered most of these lands for taxation. We have been informed that various persons now claim these lands, some asserting that those under whom they claim were not parties to the escheat proceedings. Such claims come too late; the remedy of such claimants was by a suit against the State within two years of the date of the judgment for the State, the statutes expressly providing therefor. Art. 3283, Revised Civil Statutes, 1925. It is now too late to divest the State's title by such a claim, and neither is the State's title subject to divestiture through adverse possession, the statutes of limitation not being operative as to lands escheated to the State. *Ellis vs. State*, 21 S. W. 66.

Twelve years after these judgments of escheat in favor of the State of Texas were entered, the 26th Legislature at its regular session in 1899 passed an Act setting apart certain lands to the permanent school fund of the State of Texas, and provided a means for settling the then long standing dispute over the permanent school fund. Section 1 of that Act reads as follows:

"That all of the lands heretofore or hereafter recovered from railway companies, firms, persons or other corporations, by the State of Texas, by suit or otherwise, shall at once become a part of the permanent school fund of the State, and shall be disposed of as other school lands, except as herein provided. If it should hereafter develop that the State is indebted to the general school fund, for land appropriated or sold by it, this is construed as a transfer in part payment thereof." (Sec. 1, Chapter LXXXI, General Laws, Regular Session, 26th Legislature, p. 123).

Thereafter, at the first called session of the 26th Legislature, held in 1900, the account between the State and the public school fund was finally settled. The dedication of land made in the Act of 1899 was confirmed, and certain other donations of land were made in the Act of 1900. The pertinent provisions of the Act of February 23, 1900, read as follows:

"Whereas, by an act of the Twenty-sixth Legislature, approved April 18, 1899, there was set apart and appropriated to said fund all lands heretofore recovered from railway companies, other persons, firms or corporations, amounting in the aggregate to one million, four hundred and twenty-eight thousand, five hundred and forty-one and forty one-hundredths acres, which were transferred in part payment to the indebtedness of the State to the permanent school fund, making a grand total of twenty-three million, two hundred and ninety-four thousand, two hundred and fifty-five and thirty-one one-hundredths acres, against twenty-seven million seven hundred and sixty-seven thousand, seven hundred and ninety and seventy-eight one-hundredths acres to which it is entitled, or a deficiency of four million, four hundred and seventy-three thousand, five hundred and thirty-five and twenty-seven one-hundredths acres;"

"Section 1. For the purpose of adjusting and finally settling the controversy between the permanent school fund and the State of Texas, growing out of the division of the public domain, there is hereby set apart and granted to said school fund four million, four hundred and forty-four

thousand and one hundred and ninety-five acres or all of the unappropriated public domain remaining in the State of Texas of whatever character, and wheresoever located, including any lands hereafter recovered by the State, except that included in lakes, bays and islands along the Gulf of Mexico within tide water limits, whether the same be more or less than said four million, four hundred and forty-four thousand one hundred and ninety-five acres; provided, this act shall not have the effect to transfer to the school fund any of the lakes, bays and islands on the Gulf of Mexico within tide water limits whether surveyed or unsurveyed." (Chapter XI, General Laws, First Called Session, 26th Legislature, p. 29).

Article 5416, R. C. S. of 1925 reads as follows:

"All lands heretofore set apart under the constitution and laws of Texas and all of the unappropriated public domain remaining in this State of whatever character, and wheresoever located, including any lands hereafter recovered by the State, except that included in lakes, bays and islands along the Gulf of Mexico within tide-water limits, is set apart and granted to the permanent school fund of the State. All such lands heretofore or hereafter recovered from railway companies, firms, persons, or other corporation by the State, by suit or otherwise, and constituting a part of said school fund as herein provided, shall be disposed of as other school lands, except as otherwise provided by law. In all cases where said land, or any portion thereof, has been surveyed into tracts of six hundred and forty acres, more or less, and field notes thereof returned to and filed in the Land Office, the same is hereby declared a sufficient designation of said land; and the Commissioner shall dispose of the same by the survey and block numbers contained in said field notes."

These escheated lands were recovered by the State in 1887 and were therefore "lands heretofore . . . recovered from . . . persons . . . by suit" at the time of the passage of the Acts of 1899 and 1900 settling the controversy between the State of Texas and the Permanent School Fund. These lands were, therefore, dedicated to and became a part of the Permanent School Fund by the Acts of 1899 and 1900. Whether or not the Land Commissioner included these lands in arriving at the one million, four hundred twenty-eight thousand, five hundred forty-one and forty-one hundredths (1,428,541.41) acres of land recited in the Act of 1900 to have been recovered therefore from railway companies and other persons, firms or corporations, was immaterial. If the land was actually theretofore recovered by the State from any person, firm, railway company or corporation, it was by the Acts of 1899 and 1900 dedicated to the Permanent School Fund and the failure of the Land Commissioner to include that acreage in arriving at the figures set out in the preliminary paragraphs of the Act of 1900 was immaterial. *Eyl vs. State*, 84 S. W. 607, (W.E.R.).

Upon the passage of the Acts of 1899 and 1900, these lands became appropriated lands, having been theretofore recovered by the State, and by virtue of those Acts passed to the Permanent School Fund. *Main vs. Cartwright*, 200 S. W. 847. In the *Cartwright* case the El Paso Court of Civil Appeals (opinion by Justice Higgins) was dealing with lands recovered by the State from a railway company by judgment affirmed by the Supreme Court of this State on June 27, 1891. The same rule applies to the instant case. These lands were recovered by the State prior to the passage of the Acts of 1899 and 1900, and we regard the question of their dedication as foreclosed by those Acts and the cases construing the same.

We agree with you that the lands are appropriated public free school lands and that the lands became surveyed school land subject to disposition under the laws governing disposition of surveyed school lands.

Article 3281, R. C. S. 1925, provides for the sale of escheated lands by the Attorney General. Article 5416 provides that lands recovered by the State and constituting a part of the Permanent School Fund "shall be disposed of as other school lands, except as otherwise provided by law." The Act of 1899 provides that lands theretofore recovered "shall be disposed of as other school lands, except as herein provided." We find it unnecessary to determine whether or not lands escheated at the present time are subject to disposition by the Land Commissioner, or by the various sheriffs and the Attorney General. The fact that this land was escheated prior to the passage of the Acts of 1899 and 1900 is determinative of the question. The Act of 1899 says that it shall be disposed of as other school lands and there is no provision in that Act that provides that the lands theretofore recovered should be disposed of in any other manner than by the Commissioner of the General Land Office.

We are of the opinion, and you are so advised that these lands are appropriated surveyed public free school lands subject to listing and disposition by the Commissioner of the General Land Office under the laws governing the sale of other surveyed school lands.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

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Op. No. 2943.

PUBLIC LANDS—NAVIGABLE WATERS—MINES AND MINERALS—TREATIES—OIL AND GAS DEVELOPMENT OF RIO GRANDE BED.

1. The State of Texas owns that portion of the bed of the Rio Grande lying north of the center of the deepest channel, or Thalweg, of the stream.

2. The State may lease such land for oil and gas development without obtaining the consent of the United States or of Mexico, but the State's lessees must not violate any provision of the Treaties with Mexico respecting the Rio Grande, or of Acts of Congress governing navigable waters, in producing the oil and gas.

3. Where the Rio Grande has changed its channel by avulsion or accretion, the State now owns the north portion of the river bed, provided that in case of avulsion the banco formed by the avulsion has been eliminated.

4. Treaties with Mexico discussed.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 5, 1934.

*Board of Mineral Development, General Land Office, Austin, Texas.  
Attention Mr. H. C. Bishop, Secretary.*

GENTLEMEN: Your inquiry of December 11, 1933, addressed to the Honorable James V. Allred, Attorney General, has been referred to the writer for answer. Your inquiry reads as follows:

"The Board of Mineral Development has been called upon to offer for oil and gas development, under the provisions of Chapter 40, Acts of the

Second Called Session of the Forty-second Legislature, the parts or sections of the Rio Grande referred to in the attached letters and maps. The sections of river bed referred to are, according to the information furnished us, located within two miles of oil and gas wells producing, or capable of producing, oil or gas in paying quantities.

"In view of the fact that the Rio Grande is a part of the International Boundary between the United States and Mexico, we would like to be advised on the following questions:

"1. What is the extent of this State's ownership and control of the bed of the Rio Grande?

"2. Does the State have the right to lease or otherwise develop for oil and gas any part of the Rio Grande bed under the limitations prescribed in Chapter 40, *supra*.

"3. Is the above right subject to any character of control or limitations by the United States Government or the Mexican Government which would make it necessary for the State to get the consent of either or both of these Governments before making a contract for development and/or before actual drilling in the river bed is begun.

"4. If the State or its lessee should drill an oil or gas well in the State's part of the Rio Grande bed and the river should thereafter change its course either by avulsion or by some or all of the slower processes of change and the well should no longer be located in the bed of the stream, notwithstanding such change, would the State or its lessee retain ownership of such well?"

Accompanying your inquiry are copies of certain maps, letters, treaties, and other instruments, including correspondence between the Honorable Milton H. West, Congressman from Texas, and the Honorable Cordell Hull, Secretary of State of the United States, all relating to the matter inquired about.

We will answer the questions propounded by you in the order of their submission.

After Texas had declared and established its independence from the Republic of Mexico in 1836, its first Congress, by an act approved December 19, 1836, declared that its boundaries began at the mouth of the Sabine River, and "running West along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source. . . ." 1 Gammel's Laws 1193.

By Joint Resolution (5 U. S. Statutes at Large 797) the Congress of the United States on March 1, 1845, proposed to the Republic of Texas that it be admitted as a State of the Union, said Resolution providing, among other things, that "Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas," and further providing that Texas should "retain all vacant and unappropriated lands lying within its limits." In reply to that resolution, the Ninth Congress of the Republic of Texas, on June 23, 1845, passed a joint resolution agreeing to the terms proposed by the United States. 2 Gammel's Laws, 1200. This action of the Texas Congress was ratified by popular vote of the people of Texas. Texas was then admitted to the Union by Joint Resolution of Congress passed December 29, 1845, with its public lands retained and with all the guaranties provided for in the original offer of Congress. 9 U. S. Statutes at Large, 108.

By a Joint Resolution passed April 29, 1846, the First Legislature of the State of Texas declared, "That the exclusive right to the juris-

diction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of said Republic; that such *exclusive right* is now vested in and belongs to the state. . . ." Act of the 1st Legislature, 1846, p. 155.

The Mexican War was concluded by the Treaty of Guadalupe-Hidalgo proclaimed July 4, 1848, which fixed the boundary line between the United States and Mexico as follows:

"The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence westwardly, along the whole southern boundary of New Mexico, (which runs north of the town called Paso) to its western termination; thence northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not interest any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean." 9 U. S. Statutes at Large, 926.

Thereafter the dispute between Texas and the United States over the eastern part of New Mexico was settled by the Compact of 1850, said compact reaffirming the boundary between Texas and Mexico, from the point of interest coin of parallel 32° north latitude with the Rio Grande River to the Gulf of Mexico, in the channel of the Rio Bravo del Norte (Rio Grande). 9 U. S. Statutes at Large 446; 3 Gammel's Laws of Texas 832.

As an independent republic, Texas established her southern boundary in the center of the deepest channel of the Rio Grande River. The Republic came into the Union as a state with title to its public land reserved, with all of its proprietary rights in the north half of the bed of the Rio Grande River intact, and with its sovereign power and control over the north half of the Rio Grande River limited only by the Federal constitutional power of regulating interstate and foreign commerce and of protecting the navigable capacity and flow of navigable streams.

Even if we admitted that Texas had only those rights, privileges, and powers over its submerged lands that vest in a State which has been first created as a territory by the Federal Government and later erected into a state under an Act of Congress, our answer would be the same. The question of the extent of a state's title and right to lands lying under navigable waters is settled by the United States Supreme Court in the case of *Port of Seattle vs. Oregon & Washington R. R. Co.*, 255 U. S. 56, 41 Sup. Ct. 237, 65 L. E. 500. In discussing this question in that case, Mr. Justice Brandeis, in delivering the unanimous opinion of the court, stated the law as follows:

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State,

the owner of the navigable waters within its boundaries and of the land under the same. *Weber vs. Board of Harbor Commissioner*, 18 Wall. 57.  
\* \* \*

"The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively vs. Bowlby*, 152 U. S. 1. Upon such questions the provisions of the constitution and statutes of the State and the decisions of its highest court are accepted by us as conclusive. *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners*, 168 U. S. 349." 255 U. S. at 63.

The Rio Grande River, in so far as it forms the boundary line between Mexico and Texas, is in law a navigable stream, regardless of whether it be in fact navigable. It has been treated as a navigable stream in all of the treaties between Mexico and the United States dealing with this river. *United States vs. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690. And it is a navigable stream under both Texas and Mexican law, regardless of treaty provision and regardless of navigability in fact, because of its size, width from bank to bank, and importance. *Motl vs. Boyd*, 286 S. W. 458 Sup. Ct. of Texas).

The State of Texas has retained title to the beds of navigable streams lying within its borders, regardless of whether the adjacent riparian grants be civil law grants (made before 1840), or common law grants (made since 1840). *State vs. Grubstake Inv. Co.*, 117 Tex. 53, 297 S. W. 202. This rule applies to such portions of interstate or international boundary streams as lie within the boundaries of Texas. The ownership and control of the State over the bed of the Rio Grande River extends from the north bank of the river to the middle of its deepest channel, as fixed in the Treaty of Guadalupe Hidalgo. This "middle" does not mean a point half way between the banks of the river, or the geographical center of the channel, but the middle of the main flowing water stream, or the Thalweg of the stream. *State of New Jersey vs. State of Delaware*, 54 S. Ct. 407 (Opinion by Mr. Justice Cardozo, Feb. 5, 1934).

Since the Rio Grande River is treated as a navigable stream (regardless of navigability in fact) both under State, Federal and Mexican law (from which latter law the present Texas law of navigable waters was derived), the extent of the State's ownership of the bed of the Rio Grande River north of the center of the deepest channel is defined to be, in the language of Mr. Justice Brandeis, "the full proprietary right."

The State of Texas, being the owner of the lands north of the center of the deepest channel of the Rio Grande River and lying in the bed of the river, is free to either grant or lease said lands, or to refuse to grant or lease said lands, as it may see fit. While the State holds in trust lands lying under navigable waters, it has the power to legislate concerning their disposition and use, subject only to that trust, and the paramount authority of Congress over interstate commerce and navigable waters. *Port of Seattle vs. Oregon & Washington R. R. Co.*, 255 U. S. 56, 41 Sup. Ct. 237, 65 L. Ed. 500; *State vs.*



Bradford, 121 Tex. 515, 50 S. W. (2d) 1065; Pembroke vs. Peninsular Terminal Co., 146 So. 249 Sup. Ct. of Florida).

Chapter 40, General and Special Laws of the Second Called Session of the Forty-second Legislature, 1931, (p. 64) declares in Section 1 thereof that:

"The beds of rivers and channels belonging to the State shall be subject to development by the State and to lease or contract for recovery of petroleum oil and/or natural gas, in tracts of such size as may from time to time be determined by the hereinafter created board, subject to the conditions contained in this section...".

One of the conditions stated in that section is that the Board of Mineral Development is only authorized to contract for the development of the oil and gas in such portion of State owned river beds or channels as lie within two miles of a well producing or capable of producing oil or gas in paying quantities. The act includes within its scope those portions of the beds of rivers forming interstate or international boundaries owned by the State of Texas.

What has been said answers your first and second inquiries. The extent of the State's ownership and control of that portion of the bed of the Rio Grande River lying north of the center line of its deepest channel is "the full proprietary right," and that right includes the right to contract for the recovery of the petroleum oil and/or natural gas lying under the same in accordance with the provisions of Chapter 40, Laws of the Second Called Session of the Forty-second Legislature, subject to any applicable restrictions contained in the treaties and the acts of Congress hereinafter discussed.

By the Treaty of Guadalupe Hidalgo (1848) the boundary line between the United States and Mexico, in that portion with which we are now concerned, was declared to be in the middle of the deepest channel of the Rio Grande. 9 U. S. Statutes at Large, 926; p. 4 *supra*.

Article 7 of that treaty provides that that part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being "divided in the middle between the two republics" shall "be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation."

Article 7 of the treaty then provides that neither nation shall levy a tax or contribution upon vessels or persons navigating the Rio Bravo del Norte, or upon merchandise transported thereon except in case of landing upon one of their shores, and further provides that any tax or contribution levied shall only be levied with the consent of both governments. The last paragraph and sentence of Article 7 of that treaty reads as follows:

"The stipulations contained in the *present article* shall not impair the territorial rights of either republic within its established limits." (*Italics ours*). 9 U. S. Statutes at Large, 928, 929.

It will be noted that Article 7 of the Treaty of Guadalupe Hidalgo prohibits the construction of any work that will impede or interrupt the exercise of the right of free navigation by the "vessels and citizens of both countries" of the Rio Grande, but the treaty expressly

provides that the stipulations concerning free and common navigation and prohibiting obstructions to free and common navigation shall not impair the territorial rights of either republic within its established limits.

The Gadsden Purchase Treaty of 1853 reaffirmed the boundary line in the middle of the Rio Grande River as fixed in the Fifth Article of the Treaty of Guadalupe Hidalgo. 10 U. S. Statutes at Large 1032. The Gadsden Purchase Treaty also reaffirms the several provisions, stipulations, and restrictions contained in the Seventh Article of the Treaty of Guadalupe Hidalgo in so far as the Rio Grande River forms the boundary between the two republics. 10 U. S. Statutes at Large 1034.

In the Treaty with Mexico of 1884, Article 1 declares that the dividing line between the two republics shall forever be that described in the Treaty of Guadalupe Hidalgo and the Gadsden Purchase and shall follow the center of the normal channel of the Rio Grande River. 24 U. S. Statutes at Large 1012.

Article 3 of the Treaty of 1884 reads as follows:

"No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting waterways to shorten the distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid Commissions in 1852 or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not *unduly projecting into the current of the river* shall not be deemed an artificial change." 24 U. S. Statutes at Large, 1012.

The Treaty of 1889 between the United States and Mexico vests jurisdiction in the International Boundary Commission of all differences or questions that may arise between the two republics where the Rio Grande forms the boundary line, where the differences grow out of "works that may be constructed in said river." 26 U. S. Statutes at Large 1513.

Article 5 of the Treaty of 1889 gives the International Boundary Commission power under certain circumstances to provisionally suspend the construction of works being constructed in the Rio Grande "such as are prohibited by Article III of the Convention of November 12, 1884, or by Article VII of the Treaty of Guadalupe Hidalgo of February 2, 1848." 26 U. S. Statutes at Large 1513.

The Treaty of 1905 between the United States and Mexico (35 U. S. Statutes at Large 1863) deals solely with the elimination of bancos. It contains no provisions dealing with obstructions in the channel of the Rio Grande River and contains no enlargement of the International Boundary Commission's powers with respect to obstructions to navigation.

In Article 7 of the Treaty of Guadalupe Hidalgo both nations agree that neither shall, without the consent of the other, construct any work that may interrupt or impede in whole or in part the exercise of the right of navigation. That treaty does not prohibit the construction of works of whatsoever character in the bed or banks of the

Rio Grande River. It only prohibits the construction of those works which "may impede or interrupt, in whole or in part, the exercise of this right"—the right of navigation.

The Treaty of 1884 provided that no artificial change in the navigable course of the river by building jetties, piers or obstructions which may tend to deflect the current or produce deposits of alluvium shall be permitted to alter or affect the dividing line between the two countries, but such treaty expressly recognizes the right of either country to protect the banks on either side from erosion by revetments of stone or other material "not unduly projecting into the current of the river," even though such protecting revetments work a change in the boundary line. This treaty also recognizes that there may be other necessary structures which may slightly deflect the current, while not impeding navigation, and provides that such structures shall not be permitted to work a change in the boundary line.

The International Boundary Commission, by the Treaty of 1889, is only given the power to suspend construction of works in the Rio Grande River "such as are prohibited by Article 3 of the Convention of November 12, 1884 or by Article 7 of the Treaty of Guadalupe Hidalgo of February 2, 1848." It appears from the express provisions of the various treaties with Mexico that it is not every work in the bed or bank of the Rio Grande River which is prohibited, but it is only those certain classes of works set out, enumerated, and defined in the various treaties which fall under the ban thereof. The various treaties did not attempt to bring about commercial and industrial stagnation along this great boundary stream by an absolute prohibition against construction of any work of any character. Treaties, like laws, are given a reasonable construction to effectuate their purposes. *Factor vs. Laubenheimer*, 54 S. Ct. 191 (Mr. Justice Stone, Dec. 4, 1933). So construed, the several treaties with Mexico do not necessarily prohibit the drilling of the Rio Grande River bed for oil and gas.

In discussing these treaties with Mexico, the United States Supreme Court in the case of *United States vs. Rio Grande Dam & Navigation Co.*, 174 U. S. 690, at p. 700, in an opinion by Mr. Justice Brewer, held that the obligation of the United States to preserve for the use of its own citizens the navigability of its navigable waters was as great as any arising by treaty or international law to other nations or their citizens, the opinion of Mr. Justice Brewer having specific reference to the treaties with Mexico and their applicability to the Rio Grande River. In preserving the navigability of the Rio Grande, the United States and Texas owe no higher duty under the treaties than they owe to their own citizens.

In answering your inquiries, we are disadvantaged by the lack of judicial decisions construing the obstruction to navigation provisions of the treaties with Mexico. However, as Mr. Justice Brewer has said, the obligations which the United States owes to its own citizens to preserve the navigability of its navigable waters is as great as any arising by treaty or international law, and we may look to the Acts of Congress, both to determine what obligations the Federal Govern-

ment has recognized as owed to citizens of the United States, and to determine the manner of discharge of those obligations.

Acting under the authority granted it "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," the Congress of the United States has enacted legislation prohibiting obstructions to navigable waters. Section 401, Title 33, U.S.C.A., makes it unlawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any navigable river or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained in the manner set forth in said section. The prohibition of this section is specifically limited to bridges, dams, dikes and causeways, and therefore has no application to an oil well drilled in the bed or bank of a navigable river.

Section 403, Title 33, U.S.C.A., prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States "not affirmatively authorized by Congress." This statute then specifically provides that it shall not be lawful to build or commence the building of any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure" in any *navigable river* except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

These statutes have often been before the courts for construction. In general, it is held that the State's grant of lands under that portion of the waters of a navigable international boundary stream owned by the State is subordinate to and cannot impair the right of the Federal Government to control navigation. *White, Gratwick & Mitchell vs. Empire Engineering Co.*, 210 N. Y. S. 563, Aff. 206 N. Y. S. 973, Aff. 148N. E. 743. However, this rule does not prohibit the use by the State for all purposes of the submerged lands lying under that portion of the international navigable water course owned by it. *Pigeon River Improvement Slide & Boom Co. vs. Cox*, 54 S. Ct. 361, (January 15, 1934). In the latter case, Chief Justice Hughes, in delivering the opinion of the court, held that the fact that Pigeon River forms part of the international boundary between the United States and Canada did not prohibit the State from erecting improvements in the river and charging reasonable tolls for the use thereof where no treaty provision or Federal statute was violated. We are now called upon to determine a new question, whether or not the State has the right to develop its oil and gas resources in that portion of an international boundary stream owned by it, and whether that development would violate any Federal statute, or treaty provision.

In determining whether or not oil wells drilled on the State's portion of the Rio Grande River bed constitute such obstruction as violate the laws of Congress, or the provisions of the treaties with Mexico, we must consider the method of drilling oil wells in river bed and the extent of the obstruction caused thereby. Under Section 403, Title 33, U.S.C.A., the Secretary of War may issue permits to erect certain structures in *navigable waters*, even though they affect the navigability of the stream. Under the treaties with Mexico no

structure is prohibited unless it impedes or interrupts the exercise of the right of navigation, but no change of the boundary by obstructions that deflect the current or produce deposits of alluvium, is permitted. We are dealing with two characters of restraint: one is an absolute prohibition in the treaties against works which impede the navigability of the stream, while the other, contained in the United States Statutes, prohibits the construction of any work in a *navigable river* (navigable in fact) except by permit, but would permit construction of certain works even though they impair navigability, if the public interest is otherwise subserved.

Oil wells have been drilled under permit from the State of Texas in various rivers of the State, including the Canadian (an interstate stream), the Red River (an interstate boundary stream), the Sabine (a stream navigable in fact and also an interstate boundary stream), and the Pecos (a tributary of the Rio Grande). There are now more than a hundred producing oil wells drilled by the State's lessees and permittees in the bed of the Sabine River in East Texas. Experience shows that most of the State's lessees and permittees who have drilled oil wells in the Sabine River bed in East Texas have not drilled these wells in the flowing current but have drilled them in the edge of the stream, in many cases in the banks. Since the State's title to the bed, where riparian grants are common law grants, extends to the cut bank (*Motl vs. Boyd*, 286 S. W. 458, Texas Supreme Court), most of the State's lessee and permittees in East Texas have chosen to drill their wells into the cut banks rather than take the more hazardous task of drilling the well out in the flowing current of the stream. Such wells do not as a practical matter impair the navigability, lessen the navigable capacity or obstruct the navigation of the stream. Oil wells have been drilled under license and permit from the State of Texas in the navigable waters of this State for more than twenty years. The records show that many oil wells were drilled in Galveston Bay, including its arms and inlets, and other wells have been drilled on other portions of the Gulf Coast of Texas. The mere drilling of an oil well in some portion of a navigable bay or navigable river does not, per se, obstruct the navigation or impair the navigable capacity of the bay or river. Neither, in case of a river, does it necessarily deflect the current or cause deposits of alluvium. Common sense and the history of development of oil and gas in submerged lands in the United States establish facts to the contrary. Many of the wells drilled in the Sabine River bed in East Texas are operated from platforms constructed higher than the highest recorded high water mark, and supported by four concrete pillars (one at each corner), each twenty-four inches in diameter. These pillars, constructed in the edge of the stream, or in the banks, are in the flowing stream only in case of high water, and they have no important effect on a temporarily wide flood stage stream.

It is a matter of common knowledge that oil wells have been drilled by other states in submerged lands lying under navigable waters. Outstanding among areas of development in other states is California, where producing oil wells are located in the Pacific Ocean. It is also a matter of common knowledge that oil wells have been drilled in navigable waters in foreign nations. Many wells have

been drilled in Venezuela, in Lake Maracaibo, an important navigable lake, more than one hundred miles in length.

So far as the writer has been able to ascertain, no case has ever been reported from the United States courts involving a protest against the drilling of an oil well in the edge of a navigable stream upon the ground that it impairs the navigability of navigable waters under the Acts of Congress. Common experience teaches that the oil and gas can be extracted from under navigable waters without necessary impairment of the navigability of the water.

Article 783, 1925 Penal Code of the State of Texas, reads as follows:

"Whoever obstructs the navigation of any stream which can be navigated by steam, keel, or flatboats, by cutting and felling trees or by building on or across the same any dyke, mill dam, bridge, or other obstruction, shall be fined not less than fifty nor more than five hundred dollars."

Although many oil wells have been drilled in various navigable streams of Texas, no reported case involving a complaint under this article leveled at the drilling of an oil well in navigable waters can be found.

The Penal Code of Texas further specifically prohibits the pollution of any water course by crude petroleum or oil. Article 698, 1925 Penal Code of Texas; Chapter 42, Acts First Called Session, 42nd Legislature 1931. The development of the oil industry and modern methods of drilling have reduced the hazards and rendered unnecessary pollution of waters because of oil and gas development.

Article 403, Title 33, U.S.C.A., applies only to navigable rivers. The Congress has required that permits be obtained from the Secretary of War only in event the river be one *navigable in fact*. Opinion Hon. G. B. Smedley, Opinions of the Attorney General of Texas, 1912-1914, p. 562. A river may be navigable under the laws of the State of Texas, though not navigable in fact, so as to come within the classification made by the aforementioned Act of Congress. Whether the river be navigable in fact under the Acts of Congress is a question of fact, and whether any particular structure tends to impede navigation is also a question of fact. Opinion of Hon. G. B. Smedley, Opinions of the Attorney General of Texas, 1912-1914, p. 562, at 568 and 569. This opinion by Judge Smedley, now a member of the Commission of Appeals of Texas, had specific reference to the Rio Grande River.

Conflicting claims of sovereignty in the Rio Grande River between the United States and Texas will be reconciled by the courts, if possible, without striking down the power of either sovereignty. The paramount right of the United States to preserve intact the navigable character and capacity of navigable rivers will be upheld, and the right of the State to use its submerged lands lying under its navigable waters in such a way as not to obstruct navigation should likewise be sustained. *United States vs. Brazoria County Drainage District No. 3*, 2 Fed. (2d) 861 (Judge Hutcheson).

It appears from the correspondence and instruments submitted with your letter of inquiry that the matter of leasing this river bed was taken up with the United States authorities before Texas was

asked to put the river bed upon the market. Attached to your letter of inquiry is a copy of a letter of September 26, 1933, addressed to the Honorable Milton H. West, Member of the House of Representatives of the Congress of the United States, written by the Honorable Cordell Hull, Secretary of State of the United States. The letter of the Honorable Secretary of State, in discussing the power of the International Boundary Commission and the ownership of the bed of the Rio Grande River, contains this statement:

"The Commission also has power to suspend the construction of works of any character along the Rio Grande or the Colorado River which may tend to change the navigable course of either of these streams. \* \* \*

"Except as may be above indicated, the International Boundary Commission does not exercise any authority in connection with petroleum, gas, or sulphur properties which may be situated along the American side of the Rio Grande in the State of Texas. It is believed that the appropriate authority with which Mr. Scanlen should communicate concerning the lease in which he is interested, is the State Land Board at Austin, Texas."

The instruments submitted with your letter of inquiry also show that the lands which you have been requested to offer for lease are situated adjacent to Porciones Nos. 73 and 74, Ancient Jurisdiction of Camargo, and adjacent to Porciones 65, 66 and 67, Ancient Jurisdiction of Mier, all in Starr County, Texas. These grants of land were made by the Kingdom of Spain in 1767. The lands were granted on both sides of the Rio Grande River at approximately the same time, part of the grants lying within the municipality of Camargo and part within the municipality of Mier. The jurisdiction of each municipality embraced lands lying north of the Rio Grande, and both municipalities granted lands upon both the north bank and the south bank of the Rio Grande. The grants were civil law grants. The grants upon the south bank of the Rio Grande carried the sovereign's title as far toward the river as did the grants upon the north bank of the river. The character and extent of the title reserved in the Crown at the time of the grants was the same upon both banks. The extent and character of the title is measured by the laws in force over this area in 1767. *Manry vs. Robison*, 56 S. W. (2d) 438.

Chief Justice Roberts, in *City of Galveston vs. Menard*, 23 Tex. 349, at 392, said that in the civil law the seas, bays, and rivers with their shores were common and deemed to belong to no one. Again (23 Tex. at 395) the same learned Justice said:

"By the civil law, the shores of the sea, of bays, and navigable streams generally, as well as the tidewaters, were jealously guarded from private appropriation, and reserved to the common use."

The sketches and maps submitted show that privately owned wells have been drilled upon the Mexican side of the river and privately owned wells have been drilled upon the Texas side of the river. The sketches also show that the "Control," a Mexican government corporation, has made locations upon the south side of the Rio Grande River for the drilling of wells. These locations have been made in what is called the "Federal Zone," a strip of land extending ten meters in width from the top of the river bank. Since wells are being drilled upon both sides of the Rio Grande River in titled lands

by private parties, and wells are being drilled upon the top of the south bank of the river by a Mexican government corporation, we think it would be an unreasonable construction of the treaties with Mexico, and of the Federal Statutes, to hold that the State of Texas cannot obtain the oil and gas from under that portion of the river bed owned by it. If we so hold, we admit the right of every other proprietor, private and sovereign, to obtain its share of the oil and gas in the Rio Grande River bed and adjacent lands, and deny the right of the State of Texas to obtain the share to which it is entitled by virtue of its ownership of the bed and banks of the Rio Grande River north of the center of the deepest channel. Treaty obligations are liberally construed in favor of quality and reciprocity between the contracting countries. *Factor vs. Laubenheimer*, 54 S. Ct. 191 (Mr. Justice Stone, Dec. 4, 1933).

In response to your third inquiry, you are advised that the State is not required to obtain the consent of either the United States or Mexico before entering into contracts for the development of the oil and gas in that portion of the bed of the Rio Grande River owned by it. Once contracts are made, it becomes the duty of the State's lessees, permittees, or contracting parties to produce the oil in such a manner as to violate no provision of the treaties with Mexico, or the Act of Congress. Development must be carried on in such manner as will prevent obstructions to navigation (if any), and pollution of the waters. This is the same obligation imposed upon other lessees, permittees, or contractors on other rivers in Texas by positive provisions of the Penal Code of this State, independent of any obligation imposed by treaty or national law.

In your fourth inquiry you ask whether or not the rules of avulsion and accretion apply to the Rio Grande River and to the State's leases. We answer this question in the affirmative. In *Manry vs. Robison*, 56 S. W. (2d) 438 (S. Ct.), it was held that in case a river should change its course by avulsion, the State's title would follow the new channel and the State lose the title to the old channel through which the river formerly ran. This opinion was based upon the provisions of the Partidas and the Mexican law which were held to apply to the civil law grants of land involved in that case. The fact that the Rio Grande River is a navigable stream and the international boundary line between the United States and Mexico does not destroy the applicability of the doctrine of accretion. *Denny vs. Cotton*, 22 S. W. 122 (W.E.R.).

Since the successive treaties with Mexico of 1884, 1889 and 1905 provided for the elimination of bancos (*Willis vs. First Real Estate & Investment Co.*, Fifth U. S. Circuit Court of Appeals, January 24, 1934, opinion not yet reported; *San Lorenzo Title and Improvement Co. vs. City Mortgage Co.*, 48 S. W. (2d) 310; *Id. vs. Clardy*, 48 S. W. (2d) 315; *Id. vs. Caples*, 48 S. W. (2d) 329, where there has been a change by avulsion and the banco has been eliminated under the provisions of the treaties, the title to the bed of the present flowing stream north of the center of the deepest channel is in the State of Texas, the State not having lost title to the river bed by virtue of such avulsion. *Manry vs. Robison*, 56 S. W. (2d) 438. By Chapter 101, General Laws, Regular Session, 38th Legislature, 1923,



the Legislature of Texas ratified the adjustment and settlement of the disputed boundary between the United States and Mexico made by virtue of the Treaty of 1905, and approved the elimination of bancos under that treaty. Since the passage of that act there can be no question of the State's title to that portion of the river bed north of the center of the deepest channel, where that center of the deepest channel now forms the boundary line because of the elimination of bancos.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

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Op. No. 2935.

UNIVERSITY LANDS—MINERAL LEASES—PERMANENT UNIVERSITY FUND  
—BONUS AND RENTALS.

1. Bonuses and rentals paid on oil and gas leases on University lands are "proceeds" of those lands within the meaning of the Constitution, and constitute part of the Permanent Fund of the University of Texas.

2. Construing: Constitution, Art. VII, Sec. 11; Sec. 14, Chap 282, Gen Laws, Regular Session, 41st Legislature.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, November 20, 1933.

*Hon. J. H. Walker, Commissioner General Land Office, Land Office Building, Austin, Texas.*

DEAR MR. WALKER: Your letter of recent date, addressed to the Hon. James V. Allred, Attorney General, and making inquiry relative to the proper fund in which to deposit certain income from University oil and gas leases, has been received and referred to the writer for answer. Your inquiry reads as follows:

"A question has arisen as to the proper disposition of one class of payments made through this office for leases executed on bids accepted by the Board for lease of University lands.

"You will note that Section 14 of Chapter 282, approved March 29, 1929, provides that the Commissioner of the Land Office 'shall transmit to the State Treasurer all royalty for deposit to the credit of the Permanent University Fund, and all rentals for delay in drilling, and all other payments including all filing assignments and relinquishment fees hereunder to the credit of the Available University Fund'.

"The Department has been passing all rentals to the credit of the Available University Fund, and all royalty payments to the credit of the Permanent Fund. It has also been passing to the credit of the Permanent Fund all payments made 'in addition to the royalty and the annual payment therein provided for', quoting from Section 6 of the same Act. Section 6 was amended by an Act approved May 21, 1931. The amended section also provides for three classes of payment. The theory of the Land Office appears to have been that the payments in addition to the royalty and rental was a payment for the oil and gas in place, and for that reason should go to the Permanent Fund.

"The Land Office appears to have been following the Leasing Board as to the disposition of the payments. Enclosed is a form prepared for the Board. It will be noted that it calls for the remittances to be in separate checks for the reason the money would go into different funds. Under

the present law, however, one check can be used, as the system of handling moneys has been changed.

"My inquiry is whether the direction for the application of money given in Section 14, Chapter 282, as to 'all other payments' includes the bonus or the money paid in addition to royalties and rentals."

Section 14 of the Act of 1929 reads in part as follows:

"Payments hereunder shall be made to the Commissioner of the General Land Office at Austin, Texas, who shall transmit to the State Treasurer all royalty for deposit to the credit of the Permanent University Fund and all rentals for delay in drilling and all other payments, including all filing assignments and relinquishment fees hereunder to the credit of the Available University Fund." (Sec. 14, Chap. 282, General Laws, Reg. Sess, 41st Leg.).

The statute specifying the use to which land revenues are to be devoted is valid only to the extent that it does not conflict with the Constitution. A proper answer to your inquiry necessarily requires the construction of Section 11, of Article VII, Constitution of this State. Said section of the Constitution provides, with reference to the land set apart and appropriated for the establishment and maintenance of the University of Texas, that: "All the proceeds of sales of the same, heretofore made or hereafter to be made \* \* \* shall constitute and become a Permanent University Fund." Said section of the Constitution further provides that said proceeds of sales of the land, as realized and received into the Treasury of the State, shall be invested in certain types of bonds. It is further provided that the interest accruing on said bonds shall be subject to appropriation by the Legislature for the benefit of the University.

In order to determine whether the Legislature may provide for the deposit of bonus or rentals on oil and gas leases into the Available University Fund for current use for maintenance of the University, it becomes necessary to determine whether either the bonus and rental, or bonus or rental, received from oil and gas leases on University lands, constitute a part of the proceeds from the sale of University lands within the meaning of the Constitution.

The oil and gas leases on University lands executed by the proper officials of the State of Texas under statutes heretofore and now in force operate as conveyances of the oil and gas in place and constitute sales of the oil and gas in place within the meaning of Section 11 of Article VII of the State Constitution. *Theisen vs Robison*, 117 Tex. 489, 8 S. W. (2d) 646.

Royalties received by virtue of the development carried on on University lands under these oil and gas leases constitute proceeds from the sale of land and can only be placed in the Permanent University Fund. *State vs. Hatcher*, 115 Tex. 332, 281 S. W. 192. Any legislative attempt to place these royalties from University oil and gas leases in the Available University Fund is void because of conflict with the above quoted constitutional provision. *State vs. Hatcher*, *supra*.

Section 6 of Article VII, State Constitution, provides that the proceeds of sales of the land set apart to the various counties in the State for county school purposes, when sold, shall be held by the respective counties as trust funds for the benefit of public schools therein. It was held by the Supreme Court of this State that a bonus

paid on the execution of an oil and gas lease was a part of the proceeds from the sale of county school land within the meaning of that Section of the Constitution. *Ehlinger vs. Clark*, 117 Tex. 547, 8 S. W. (2d) 666. The reasoning in this case is equally applicable to bonuses received from the sale of oil and gas leases on University lands. In answer to that portion of your inquiry which deals with bonuses, you are advised that any bonus payments received on the execution of oil and gas leases on University lands become a part of, and must be deposited in, the Permanent Fund of the University of Texas, irrespective of the wording of an ambiguous Statute. *State vs. Hatcher*, supra; *Ehlinger vs. Clark*, supra.

Section 8 of the Act of 1929, for lease of University lands, in stipulating the amount of delay rentals to be paid on University oil and gas leases, reads in part as follows:

"Whenever the royalties shall amount to as much as the yearly payment as fixed by the Board, the yearly payment may be discontinued." (Sec. 8, Chap. 282, Gen. Laws, Regular Session, 41st Legislature.)

This statute makes the amount due as rental payments directly dependent upon the amount of royalties payable. It illustrates the legislative ease with which payments on oil and gas leases might be designated either as "rental" or "royalty." Place of deposit is governed by the Constitution, not by mere name of the payment.

The whole sums paid on University oil and gas leases, whether paid as royalty, bonus, or rentals, are paid for the oil and gas in place conveyed by the lease, *and for certain incidental privileges, ordinarily attaching to the lease, and not granted separately and apart from an oil and gas lease.*

The rentals received from grazing leases bear no factual analogy to the delay rentals on oil and gas leases. Grazing rentals are derived from natural annual grass crops, which replace themselves naturally and without the aid of man, their growth being dependent almost solely upon the amount of rainfall. Grazing entails no appreciable depletion or wearing out of the soil; in permanent effect grazing leases might be likened to hunting rights, the holder obtains valuable temporary uses without depletion or decrease of, or permanent injury to, the value of the corpus of the land. While payment of delay rentals on oil and gas leases are in lieu of drilling operations, their payment often deprives the lessor of an opportunity to obtain valuable bonuses. Often the drilling of a dry hole on adjacent property, while delay rentals are being paid, destroys the oil and gas value of land. It will not suffice to answer that, in such cases, the corpus of the oil and gas estate was not destroyed because there was no corpus; the fact remains that the oil and gas estate value, based upon real or fancied deposits beneath the surface, is in the hands of the lessee after execution of the lease, and by payment by the lessee of one single delay rental the lessor may lose forever the opportunity of obtaining a large sum of money as a bonus for the oil and gas estate, which may or may not exist. Obviously, more is involved in the payment of a delay rental than a mere privilege of drilling. While payment of a delay rental relieves of the necessity of drilling, it also has a greater effect, it prevents the determination of a fee determinable

estate and averts the reversion of the oil and gas estate that would otherwise occur. The payment of grazing lease rentals into the Available University Fund furnishes no true precedent for like disposition of delay rentals on oil and gas leases.

The respective rights of the Available University Fund and the Permanent University Fund to share in the income from an oil and gas lease on University lands are somewhat analogous to the rights of a life tenant and a remainderman. There is eminent authority for the conclusion that a remainderman is entitled to have both the rents and royalties from an oil and gas lease held intact, and that the life tenant is entitled to only to the interest thereon during his lifetime. The rule is stated as follows by Summers:

"Since the oil and gas form a part of the corpus of the estate, the courts usually hold that the life tenant is entitled only to the interest upon the rents or royalties for the period of his life, and the remainderman or reversioner is entitled to the principal of such sum (citing cases)." (Summers, *Oil & Gas*, p. 618).

The similarity of the constitutional provision concerning disposition of proceeds of county school lands to the constitutional provision concerning disposition of the proceeds of University lands has been heretofore pointed out. This department had occasion to construe the word "proceeds" as used in Section 6 of Article VII of the State Constitution in departmental opinion No. 2813, dated July 10, 1930. In that opinion the following statement is made:

"Based upon these, it is our view that a lease by a county of its permanent school fund lands for oil and gas development purposes, using the usual lease form such as is set out and considered in certain of the cases herein cited, constitutes a sale by the county of such oil and gas as a part of the land, and that the money accruing and paid to the county thereunder, whether denominated bonus, royalty, rental or otherwise, belong to and must be preserved as a part of the permanent school fund of the county, and does not constitute and may not be apportioned or otherwise expended as county available school funds." (Report of the Attorney General, 1928-1930, p. 194 at p. 197).

Following this opinion by the Attorney General in 1930, which held that the rentals from oil and gas leases on county school lands were part of the Permanent County School Funds, the Legislature in 1931 provided that the rentals on all mineral leases on State Permanent School Fund lands should be credited to the Permanent School Fund. That Act specifically provided that rentals other than those on mineral leases should be credited to the Available School Fund but in two different places provided that the rentals on mineral leases should be credited to the Permanent School Fund. The pertinent provision of this Act of 1931, relating to the Permanent School Fund, reads as follows:

"All payments for land and for mineral leases and rental thereon, and for royalties on minerals produced, shall be credited to the permanent school fund, and all interest collected hereunder shall be credited to the available school fund. Payments received on purchase price of a tract of land shall be credited to the permanent school fund, and all payments of interest and rentals shall be credited to the available school fund; and all payments constituting the purchase price of a lease for minerals shall be transmitted to the State Treasurer to the credit of the permanent

school fund, and likewise all payments of royalty received from minerals sold under leases, as well as all rentals, shall be credited to the permanent school fund." ((Section 11, Chapter 271, Gen. Laws, 42nd Legislature, Regular Session, 1931).

While the earlier legislative acts attempted to place University royalties in the Available University Fund, and even attempted to place the Permanent School Fund royalties in the general revenue, there has been a growing recognition in recent years of the true nature of all mineral income by the courts, the executive departments, and the Legislature.

We are constrained to believe that, as used in the Constitution, the term "proceeds" was meant to include whatever sums are mentioned in, and are received from, the sale of the oil and gas in place, including whatever incidental privileges the form of conveyance grants. We find it unnecessary to enter into technical common law distinctions between rent and purchase money. Bonus, rental or royalty on an oil and gas lease is paid because of the rights granted in the lease, and since the lease operates as a conveyance of the oil and gas in place, the sums received represent payment for the taking of the corpus of the property, and for other incidental rights contained in the instrument of conveyance. The payments received for the oil and gas lease, whether called bonus, rent or royalty, are required by the Constitution to be placed to the credit of the University Permanent Fund and to be invested in the manner prescribed by the Constitution and the laws enacted pursuant thereto.

What is here said has no application to payments made for interest, filing fees, or other payments of like nature, which are to be deposited in the manner provided by the statute.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

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Op. No. 2939.

PUBLIC LANDS—LANDS RECOVERED FROM NEW MEXICO—MINERAL  
RESERVATION IN SALES UNDER ACT OF 1933.

1. Patents issued on lands recovered by Texas from New Mexico in the case of New Mexico vs. Texas, and sold under Chapter 212, General Laws, Regular Session, 43rd Legislature, 1933, should contain a reservation of the minerals to the State.

2. The statutes governing sales of school land are statutes in pari materia, and should be construed together.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 6, 1934.

*Hon. J. H. Walker, Commissioner of the General Land Office, Land  
Office Building, Austin, Texas.*

DEAR SIR: Your inquiry of October 18, 1933, addressed to the Hon. James V Allred, Attorney General, has been received and referred to the writer for answer. Your inquiry reads as follows:

"In view of applications or claims of former owners in the strip of land recovered by Texas from the State of New Mexico by decree of the U. S.

Supreme Court entered April 9, 1928, (276 U. S. 556) now pending in this office under Chapter 212, page 634 of General Laws, 43rd Legislature Regular Session approved June 6, 1933, I would thank you to advise this office as to your opinion on the mineral status of said recovered land.

"The Act of the 43rd Legislature, above referred to, is silent as to minerals and I am therefore asking for advice as to whether or not patents issued under said act should contain a reservation of minerals to the State."

Chapter 212, General Laws, Regular Session, 43rd Legislature, reads as follows:

"An Act providing for the issuance of patents under certain conditions to lands and accretions thereto, heretofore claimed by New Mexico to be in that State, but determined by the Supreme Court of the United States in its Decree of April 9, 1928, to be within the State of Texas, and prescribing the considerations and the conditions necessary for the issuance of such patents and the manner of such issuance and the provisions to be contained in such patents; defining the word 'person' as used herein, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. That Commissioner of the General Land Office is authorized and requested to prepare and issue, and the Governor is authorized to execute and deliver, patents for the lands and accretions thereto, heretofore claimed by New Mexico to be in that State, but determined by the Supreme Court of the United States by Decree entered April 9, 1928 (New Mexico against Texas, 276 U. S. 556) to be in Texas, to the persons who, on April 9, 1928, were in actual bona fide possession of said lands and claiming title to such lands under patent from the United States.

"Sec. 2. In order to receive a patent under this Act, the person desiring such patent shall first make written application to the Commissioner of the General Land Office, describing the land for which a patent is sought and shall show in such application the facts necessary under this Act to entitle applicant to a patent hereunder, and the applicant shall verify the allegations in the application by any accompanying affidavit, stating that such allegations are true to the best of the knowledge and belief of the applicant, and it shall be necessary that any such application be filed in the office of the Commissioner of the General Land Office within five (5) years from the date upon which this Act goes into effect, and the applicant shall, upon filing said application, deposit with the Commissioner of the General Land Office One Dollar (\$1.00) for each acre or fractional part of an acre, in the land covered by the application, which shall constitute the purchase price for said land, and upon the delivery of any patent to any person under this Act, the purchase price shall be applied to the Public School Fund of the State of Texas.

"Sec. 3. It is further provided that any land acquired by patent issued under this Act shall be subject to the same liens other than liens for taxes and water and like quasi public charges that would have been against such land had it been in New Mexico.

"Sec. 4. It is provided that patents issued under this Act shall be merely quit claims, and the title conveyed by such patents shall be subject to any prior conveyances by this State, and the patents shall so read.

"Sec. 5. As used in this Act, the term 'person' applies to and includes an individual, corporation, partnership, or association.

"Sec. 6. The fact that it is necessary to promptly perfect questionable titles which were affected by the decision of the Supreme Court in the case of New Mexico against Texas, referred to in this Act, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House 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."

This Act was approved and became effective June 6, 1933.

The full history of the boundary controversy between Texas and New Mexico is stated in the decision of the United States Supreme Court in *New Mexico vs. Texas*, 275 U. S. 279, 48 S. Ct. 126, 72 L. Ed. 280. That decision binds the two States participating in that controversy and all persons claiming land under grants from either of said States. *Coffee vs. Groover*, 123 U. S. 1, 31 L. Ed. 51; *Poole vs. Lessee of Fleegeer*, 11 Pet. 185, 9 L. Ed. 680; *Crawford vs. White*, 25 S. W. (2d) 629, writ of error refused 121 Tex. 639, writ of certiorari denied, 283 U. S. 823, 51 S. Ct. 346, 75 L. Ed. 1437. All grants of land made by the United States in that part of the formerly disputed territory which is now established to be a part of Texas are void. *Coffee vs. Groover*, 123 U. S. 1, 31 L. Ed. 51.

According to the report of July 17, 1930, of the Hon. Samuel S. Gannett, Boundary Commissioner appointed by the Supreme Court to run the boundary line in the case of *State of New Mexico vs. State of Texas*, Texas gained from New Mexico, as a result of this boundary controversy, 374 acres of land which had not been theretofore regarded as a part of Texas. Report, Boundary Commissioner, p. 8. What portion of this 374 acres, if any, is covered by Texas patents was not shown by the report of the Boundary Commissioner. When recovered, such portion of this 374 acres as is not covered by Texas patents becomes unpatented public domain of the State of Texas. *Coffee vs. Groover*, 123 U. S. 1, 31 L. Ed. 51.

By the Act of February 23, 1900, settling the account between the State and the Permanent School Fund, any lands thereafter recovered by the State were set apart and granted to the Permanent School Fund. (Section One, Chapter XI, General Laws, First Called Session, 26th Legislature, 1900, p. 29, at page 31). This provision concerning lands thereafter recovered was carried forward in various codifications of the statutes, Article 5416, R. C. S. 1925, reading as follows:

"All lands heretofore set apart under the constitution and laws of Texas, and all of the unappropriated public domain remaining in this State of whatever character, and wheresoever located, including any lands hereafter recovered by the State, except that included in lakes, bays and islands along the Gulf of Mexico within tidewater limits, is set apart and granted to the permanent school fund of the State. All such lands heretofore or hereafter recovered from railway companies, firms, persons, or other corporations by the State, by suit or otherwise, and constituting a part of said school fund as herein provided, shall be disposed of as other school lands, except as otherwise provided by law. In all cases where said land, or any portion thereof, has been surveyed into tracts of six hundred and forty acres, more or less, and field notes thereof returned to and filed in the Land Office, the same is hereby declared a sufficient designation of said land; and the Commissioner shall dispose of the same by the survey and block numbers contained in said field notes."

Such lands as have been recovered from the State of New Mexico, and which are not covered by Texas patents heretofore issued, have become the property of the Permanent School Fund of Texas by virtue of the aforementioned Acts. It will be noted that Article 5416, R. C. S. 1925, provides (as did the aforementioned Act of 1900,

Section Three) that lands thereafter recovered by the State," shall be disposed of as other school lands, except as otherwise provided by law."

When the lands mentioned in Chapter 212, General Laws, Regular Session, 43rd Legislature, were adjudicated to be in the State of Texas and not in the State of New Mexico, they became public free school fund lands and could have been sold under existing laws as other school lands are sold. However, the Legislature, in the exercise of a wise discretion, and in order to save possessors of lands newly acquired by Texas from dispossession of that which they formerly thought to have been theirs, enacted the law of June 6, 1933, giving to those persons in actual bona fide possession of the newly acquired lands, and claiming title to such lands under patents from the United States, a preference right for a limited period of time to purchase said lands so possessed and claimed by them at a price of one dollar per acre.

The Act of June 6, 1933, provides for the manner of issuance and delivery of patents, the method of proof of a preference right to purchase, the price for which the land is to be sold, and certain other incidents of the sale, but makes no mention of the minerals.

It is a well settled rule of statutory construction that all consistent statutes relating to the same subject which can stand together, though enacted at different times, are treated prospectively and construed together as though they constituted one act, said statutes being called statutes in *pari materia*. Lewis, Sutherland Statutory Construction, Volume 2, Second Edition, page 844; City of Dallas vs. Wright, 120 Tex. 190, 36 S. W. (2d) 973; Love vs City of Dallas, 120 Tex. 351, 40 S. W. (2d) 20. The public land laws of the United States, or of a state, are statutes in *pari materia*, though enacted at different times, and should be construed together. 25 R. C. L., page 1067; Preston vs. Browder, 1 Wheat. 115, 4 L. Ed. 50; Ryan vs. Carter, 93 U. S. 78, at 84; Patterson vs. Winn, 11 Wheat. 380, 6 L. Ed. 500; Reynolds vs. McArthur, 2 Pet. 417 at 430, 7 U. S. (L. Ed.) 470, (C. J. Marshall).

Both the Act of 1900 (Section 3, Chap. XI, Gen. Laws, First Called Session, 26th Legislature) and Article 5416, R. C. S. 1925, provide for the sale of lands acquired by the school fund, as a result of litigation, under the general school land sales acts, *except as otherwise provided by law*. While the Act of June 6, 1933, provides for sale of the lands covered thereby in a special manner, it contains no provision relating to minerals that may be found in the land, and no directions concerning their reservation or sale. Since the land dealt with is school land, we are required both by general rules of statutory construction, and by the terms of Art. 5416, R. C. S. 1925, to construe this law in connection with Article 5310, R. C. S. 1925, and Chapter 271, General Laws, Regular Session, 42nd Legislature, (1931), both of which statutes require a reservation of minerals in all sales of school lands.

Construing the above quoted Act of June 6, 1933, in connection with the general laws regulating sales of school lands in Texas, we



are of the opinion that patents issued under Chapter 212, General Laws, Regular Session, 43rd Legislature, 1933, should contain a reservation of minerals to the State.

Suggestion has been made that, under legislation recently enacted by the Congress of the United States for the relief of Texas patentees who find themselves on public domain of the United States in the State of New Mexico, because of the decision in *New Mexico vs. Texas*, and without patents from the United States, patents are being issued by the United States to such claimants without mineral reservation. We have examined the United States statutes and find no remedial legislation giving to Texans a preference right to buy the lands held in actual occupancy by them and now determined to be on the New Mexico side of the border, under the decision in *New Mexico vs. Texas*. We are informed by attorneys for applicants for patents under Chapter 212, Acts 1933, that Congress has not yet passed an Act extending like relief to Texans. Since no Act has been passed by Congress, we do not have the benefit of any reciprocal legislation in construing the Act of June 6, 1933.

Those applicants for patents under the Act of June 6, 1933, with whom we have had correspondence have expressed a willingness to accept patents under this Act with a mineral reservation.

Very truly yours,

R. W. YARBOROUGH,  
Assistant Attorney General.

## OPINIONS RELATING TO PUBLIC OFFICERS

Op. No. 2913.

### PUBLIC OFFICERS—TERM—STATE RECLAMATION ENGINEER.

1. 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, unless a different time for ending of the term is prescribed by the appointive power at the date of making the first appointment.

2. The first appointment to the office of State Reclamation Engineer on July 1, 1913, fixed the beginning of the two year term, and all subsequent terms begin on that date.

3. An appointment made on February 6, 1931, entitled the appointee to hold office for the unexpired term only, which term expired on July 1, 1931.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, February 24, 1933.

*Hon. W. W. Heath, Secretary of State, Capitol Building, Austin, Texas.*

DEAR MR. HEATH: Receipt is acknowledged of your recent letter reading in part as follows:

“Article 7960 of the Revised Civil Statutes of 1925 reads as follows:

“The Governor shall biennially appoint a State Reclamation Engineer, with the advice and consent of the Senate.”

“This seems to be the only Statutory provision as to the term of office of said engineer.

“It appears that this act was passed in 1913. From an examination of the records in the office of the Secretary of State, I find that the first State Reclamation Engineer was appointed on July 1st, 1913; qualified July 2nd, 1913, and was confirmed by the Senate on August 13th, 1913.

“The present State Reclamation Engineer was appointed first on January 28th, 1929, and was confirmed by the Senate on the same day, and qualified as such.

“This man was re-appointed by former Governor Sterling on February 6th, 1931, confirmed by the Senate on February 11th, 1931, but, it appears from the records that he has never taken the oath of office or qualified upon the last named appointment and confirmation, but, has merely been holding over without taking the oath of office. I desire to submit to you the following question:

“WHEN DOES, OR WHEN DID, THE TERM OF OFFICE OF THE PRESENT STATE RECLAMATION ENGINEER EXPIRE?”

“It is my opinion that in view of the fact the Statute does not state the beginning date of the term, but, makes a term for two years, that the term would begin with the appointment of the first State Reclamation Engineer, which was on July 1st, 1913, and would end on July 1st, of every second year thereafter.

“Therefore, when the present Reclamation Engineer’s appointment was sent to the Senate for confirmation on January 28th, 1929, that it was for the un-expired term ending July 1st. of that same year; and, that he held over from July 1st, of that same year until February 6th, 1931, by reason of the Constitutional provision saying that all officers shall continue to discharge their duties of office until their successors are duly qualified.

"In the event that you hold that the term does not begin on July 1st, but, at some other date, I would like to know what date the term of the present incumbent expires.

"You will note that he was appointed the first time January 28th, 1929, and the second time, February 6th, 1931, and has served more than four years in all."

The office of State Reclamation Engineer was created by the Thirty-Third Legislature in 1913, the Act creating such office taking effect on June 30, 1913. The provision for the appointment of the State Reclamation Engineer made in said Act reads as follows:

"The said State Reclamation Engineer shall be appointed by the Governor with the advice and consent of the Senate, and shall serve for a term of two years and until his successor is appointed and qualified." Section 5, Chapter 145, General Laws, 33rd Legislature, 1913.

Following the submission of your request for an opinion I requested and received from you statement from the records of your office showing the dates of the appointments, confirmations, qualifications and commissions of the various State Reclamation Engineers who have been appointed since the effective date of the Act creating said office. The list furnished by you is as follows:

Name	Appointment	Confirmation	Qualification	Com.
Arthur A. Stiles	7-1 -13	8-13-13	7-2 -13	8-21-13
Arthur A. Stiles	1-21-15	1-16-17	2-15-15	2-15-15
Arthur A. Stiles	1-17-17	2-10-17	2-14-17	2-23-17
Arthur A. Stiles	1-21-19	1-17-19	1-23-19	1-8 -19
Arthur A. Stiles	1-18-21	1-20-21	-----	1-31-21
Arthur A. Stiles	2-20-23	3-12-23	2-27-23	2-27-23
B. F. Williams	2- 9-25	2-14-25	2-13-25	2-13-25
B. F. Williams	6-7 -27	6-7 -27	7-6 -27	7-6 -27
B. F. Williams	1-7 -29	1-17-29	1-28-29	1-28-29
B. F. Williams	2-6 -31	2-11-31	-----	-----

It will be noted that the first appointment under this Act was made on the first day of July, 1913. All subsequent appointments were made either in January or February, with the exception of the second appointment of Mr. Williams, present State Reclamation Engineer, which appointment was made on the 7th day of June, 1927. The 1925 revision of the Statutes made no essential change in the Act of 1913, but carried forward in condensed form the provision of the original act. The present statutory regulation concerning this office is found in Article 7960 of the Revised Civil Statutes of Texas, 1925, which is quoted above in your letter.

Since this department has heretofore, in two separate conference opinion, passed upon the question of law presented by you in your inquiry, I do not deem it necessary to enter into an extensive quotation of authorities. Reference is here made to the Report of the Attorney General, 1914-1916, page 736, and to Opinion No. 2572, dated November 19, 1924, appearing at page 344 of the Report of the Attorney General, 1924-26. The former opinion was written by Hon. W. A. Keeling, Assistant Attorney General, during the administration of Judge B. F. Looney, while the latter opinion was written by Assistant Attorney General L. C. Sutton during the administration of Hon. W. A. Keeling as Attorney General. The first opinion dealt with the appointment of a county health officer

by the county commissioners' court, while the second opinion defined the term of office of the State Game, Fish and Oyster Commissioner. It was held in both opinions that the term of office of an appointee begin to run from the date of the appointment where the Statute fixes the length of the term but does not fix the date of beginning or the date of termination of the term. In case an office be created for a certain term of years but the Act creating same fixes no date of beginning or ending of the term, the term is fixed by the date of the first appointment. The date of qualification is immaterial in fixing the term, because should the date of qualification control it would be within the power of the officer appointed to prolong his term by failure to qualify with diligence.

From a study of the cases it seems that there is an exception to the well settled rule in cases where the appointive power in making the first appointment designates the date of the beginning and the date of the ending of the term. I have examined the Senate Journals of the Thirty-third Legislature and find that neither the Governor's message submitting the name of Arthur A. Stiles as first State Reclamation Engineer, nor the Senate's action in confirming the same, attempted to fix any date for the beginning or expiration of the term of office. That being the case, the general rule of law would control, and the term of office of the State Reclamation Engineer would be fixed for a period of two years, beginning July 1st, 1913. Each succeeding term would begin on July 1st of odd numbered years.

Mr. Williams' appointment on the 6th day of February, 1931, was for the unexpired portion of the term ending July 1, 1931. Since July 1, 1931, Mr. Williams has been holding over and will be entitled to hold the office only until his successor is appointed and has qualified.

Since the numerous authorities applicable to this situation have been carefully reviewed in the two former opinions of this department, I deem it to be unnecessary to repeat them here, and will not unnecessarily prolong this opinion with a quotation of that which has been heretofore settled by long continued construction.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2903.

CONSTITUTIONAL LAW—SECTIONS 14 AND 16 OF ARTICLE 8 AS AMENDED  
—AMENDMENTS TO CONSTITUTION—ASSESSOR AND COLLECTOR OF  
TAXES—SHERIFF AS ASSESSOR AND COLLECTOR OF TAXES.

1. The amendments to Sections 14 and 16 of Article 8 which abolish the offices of "tax assessor" and "Tax collector", and which create the office of "Assessor and Collector of Taxes" and make the sheriff in counties of less than ten thousand inhabitants according to the last preceding Federal Census, the assessor and collector of taxes therefor, were intended to become operative when the officers elected at the next regular biennial election to fill the new office, qualify under the law.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, December 21, 1932.

*Honorable Moore Lynn, State Auditor and Efficiency Expert, Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your request for the opinion of this department as to the time at which the amendments to Sections 14 and 16 of Article 8 of the Constitution of Texas adopted at the recent general election, become operative and in force.

The amendments in question have the effect of creating a new office into which are merged the offices of Tax Assessor and Tax Collector. Section 14 of Article 8 was amended to hereafter read as follows:

"There shall be elected by the qualified electors of each county at the same time and under the same law regulating the election of State and County officers, an Assessor and Collector of Taxes, who shall hold his office for two (2) years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes as may be prescribed by the Legislature."

Section 16 of Article 8 was amended to read as follows:

"The sheriff of each county in addition to his other duties shall be the Assessor and Collector of Taxes therefor; but, in counties having ten thousand (10,000) or more inhabitants, to be determined by the last preceding census of the United States, an Assessor and Collector of Taxes shall be elected to hold office for two (2) years and until his successor shall be elected and qualified."

The time at which a constitutional amendment becomes operative depends largely upon the intention of the people in adopting the amendment, and that intention is to be ascertained by considering the language used in the amendment, the objects to be accomplished by the making of the provision and the circumstances surrounding its adoption. 12 Corpus Juris, p. 731, Sec. 108.

Considering the two amendments above quoted in conjunction with each other, we find that it is provided that in counties having ten thousand inhabitants or more, according to the last preceding Federal census, there is to be elected an Assessor and Collector of Taxes—one officer, whereas in counties having less than ten thousand inhabitants as determined by the last preceding Federal Census, the sheriff is made the Assessor and Collector of Taxes therefor, in addition to his other duties.

An examination of the language used in the amendment to Section 14 of Article 8 above quoted, discloses that it was not the intention of the people in adopting the amendment to immediately supplant the offices of Tax Assessor and Tax Collector in counties having ten thousand inhabitants or more, according to the last preceding Federal census. You will observe that the amendment provides that "there shall be elected by the qualified voters of each county *at the same time and under the same law regulating the election of State and county officers*, an Assessor and Collector of Texas \* \* \* ." The language used in the amendment, therefore, shows that it was intended that where an Assessor and Collector of Taxes should be

elected, he should be elected at a regular biennial election along with other State and county officers.

You are, therefore, advised that the amendments under consideration would not affect the offices of Tax Assessor or Tax Collector in counties having ten thousand inhabitants or more until an "Assessor and Collector of Taxes" is elected at the next regular biennial election and thereafter qualifies for the new office. *Linthicum vs School District No. 4 of Choctaw County*, 149 Pac. (Okla.) 898.

We will now consider whether that portion of the amendment to Section 16 of Article 8 which provides that the sheriff, in addition to his other duties, shall be the Assessor and Collector of Taxes for his county, in counties having less than ten thousand inhabitants (as determinable by the last preceding Federal census) was intended to become operative immediately upon its adoption.

Since the amendments to these two sections of the Constitution were submitted together to accomplish a single purpose, they are in *pari materia* and must be considered together in determining the time it was intended that the sheriff in "under" counties should assume the duties of the newly created office. As we have heretofore observed, it was certainly not intended in the adoption of the constitutional amendment to supplant in "over" counties the tax assessor and tax collector, or their successors in office, until an "assessor and collector of taxes" could be elected at the next regular biennial election and until the person so elected qualified under the law. We believe the language in Section 14, as amended, should be construed as controlling and as expressing the legislative intent, and the intention of the people in adopting this amendment in that, if these sections be not construed together, there would be a conflict as to when an "assessor and collector of taxes" should be elected even in "over" counties, in that the latter part of Section 16 reads:

"In counties having ten thousand (10,000) or more inhabitants, to be determined by the last preceding census of the United States, an assessor and collector of taxes shall be elected to hold office for two years, and until his successor shall be elected and qualified."

This language is sufficient if considered alone to require the election of an assessor and collector of taxes in "over" counties immediately upon the effective date of this amendment. We mention this to illustrate that the intention expressed in Section 14 of Article 8, as amended, was evidently intended to control the effective date of all of Section 16, as amended.

These amendments in view of this fact, must mean that at the next regular biennial election, no tax assessor or collector shall be elected, but there shall be elected an "assessor and collector of taxes", who shall discharge such duties with reference to the assessment and collection of taxes as may be prescribed by the Legislature; provided that in "under" counties no assessor and collector of taxes shall be elected, but the sheriff shall in addition to his other duties be such assessor and collector.

There is also doubt as to whether existing statutes are sufficient, if this amendment be immediately operative, to adequately protect the interests of the State. In other words, such provisions in the sta-

tutes, as Article 7178 (providing that the tax assessor shall give bond), Article 7183 (that he may administer oaths), Article 7186 (that he shall be subject to the forfeiture of \$50.00 as a penalty for failure to administer oaths, etc.), are incident only to the offices of "tax assessor", and would not be applicable to the office of "assessor and collector of taxes". Before the Legislature could remedy these defects, if such they be, the tax assessor in "under" counties elected at the last general election, would have already qualified and entered upon his duties as tax assessor. In this last particular, it has been held by the courts of this State, that the compensation of the tax assessor for his services is intended to apply to services rendered within a given year as a whole, and that he is entitled to compensation for the entire services performed, and that the same is not divisible.

In *Freeman vs. Terrell*, Comptroller, 284 S. W. 946, in an opinion by the Commission of Appeals, in passing on an Act of the Legislature, changing the rate of compensation due the assessor, which became effective near the middle of the year, Judge Powell said:

"The fee statute provides a certain per cent of the assessed valuation as pay for the assessor's 'services'. The compensation is not for taking renditions only. The statute does not say, he shall receive so much for part of his work and something else for other official duties. If the compensation was divisible, it would be possible to apply the 1920 fee statute to part of relator's accounts and the 1925 law to other portions thereof. But since it is impossible to place a value upon his several services, it must be assumed that the Legislature intended to apply the new rate to his 1925 services as a whole. This is all the more reasonable a conclusion in view of the fact that the Legislature knew he could not present his bill for services until the fall of 1925. At the time his account became due, the new rate was effective. If the Legislature had intended to apply one rate to a part of the account and another to the other, then it should have provided a method for doing so. It should have placed a value on each part of the work. Not having done so, we hold there was no such intention on the part of the law makers."

In view of the above facts, it can be readily seen that to supplant the tax assessor, after he had entered upon the discharge of his duties and place such duties upon the sheriff, could only cause confusion and, since the Legislature is presumed to have had knowledge of these statutes and the facts herein mentioned, it is believed that such things may be taken into consideration in determining the time at which it was intended that this provision of the Constitution should go into effect.

The effect of these amendments taken together was to abolish the offices of tax assessor and tax collector, and to create a new office, to-wit, that of "assessor and collector of taxes". Therefore, Section 16, as amended, imposes upon the sheriff of the counties of less than ten thousand (10,000) inhabitants, the duties of a new office, an office which he or the people did not know would exist at the time of his election. The writer sees no reason to presume, in the absence of an expressed intention to the contrary that that portion of the amendment making the sheriff the assessor and collector of taxes in "under" counties was intended to go into operation on a date other than that upon which the remainder of the amendment is to become operative.

For reasons herein pointed out and in view of the fact that the

effect of the amendment under consideration was to create a new office and to abolish two existing offices, thus imposing upon the sheriff in "under" counties the duties of a new office and not those of an existing office, it is our opinion and you are so advised that it was not intended that the amendment, Sections 14 and 16 of Article 8 should become operative until after the next regular biennial election in 1934, and the qualification of the "assessor and collector of taxes", or "the sheriff and assessor and collector of taxes" in the method prescribed by law.

Very truly yours,  
 HOMER C. DEWOLFE,  
 Assistant Attorney General.

Op. No. 2942.

COUNTY SUPERINTENDENT—CREATION AND ABOLITION OF OFFICE—  
 ARTICLE 2688, REVISED CIVIL STATUTES AND AMENDMENTS.

1. The power to create the office of county superintendent, and likewise the power to abolish that office, are legislative powers vested in the Legislature; the people of a county have no inherent power to create offices, nor to abolish offices already created.

2. Under the present statutes, provision is made for the creation of the office of county superintendent in counties having less than three thousand scholastic population, after favorable vote of a majority of the qualified voters of the county thereon; no provision being made by statute for the abolition of the office, neither the commissioners' court of the county nor the qualified voters thereof have the power to discontinue the office once it has been legally established.

3. The Legislature alone has the power under the present Constitution and Statutes to abolish or provide for the discontinuance of the office of county superintendent in counties of less than three thousand scholastic population, where the office has once been legally established after vote of the people.

OFFICES OF THE ATTORNEY GENERAL,  
 Austin, Texas, February 21, 1934.

*Hon. L. A. Woods, State Superintendent of Public Instruction,  
 Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your communication of recent date wherein you request of this department an opinion on the following question:

Where the office of county superintendent has been created by a vote of the people in counties having less than three thousand scholastic population, can said office be discontinued upon vote of the people to that effect.

In connection with the above inquiry, it is necessary to consider the provisions of Article 2688, Revised Civil Statutes, as amended by Chapter 21, Acts, Third Called Session, Forty-second Legislature; that statute reads:

"The Commissioners' Court of every county having three thousand (3,000) scholastic population or more as shown by the preceding scholastic census, shall at a General Election provide for the election of a County Superintendent to serve for a term of four (4) years, who shall be a person of educational attainments, good moral character, and executive ability,



and who shall be provided by the Commissioners' Court with an office in the courthouse, and with necessary office furniture and fixtures. He shall be the holder of a teacher's first grade certificate or teacher's permanent certificate. In every county that shall attain three thousand (3,000) scholastic population or more the Commissioners' Court shall appoint such Superintendent who shall perform the duties of such office until the election and qualification of his successor. In counties having less than three thousand (3,000) scholastic population whenever more than twenty-five per cent (25%) of the qualified voters of said county as shown by the vote for Governor at the preceding General Election shall petition the Commissioners' Court therefor, said Court shall order an election for said county to determine whether or not the office of County Superintendent shall be created in said county; and, if a majority of the qualified property taxpaying voters voting at said election shall vote for the creation of the office of County Superintendent in said county, the Commissioners' Court, at its next regular term after the holding of said election, shall create the office of County Superintendent, and name a County Superintendent who shall qualify under this Chapter and hold such office until the next General Election. Provided, that, in all counties having a population in excess of three hundred and fifty thousand (350,000) inhabitants according to the last available Federal Census the County Superintendent shall be appointed by the County Board of Education and shall hold office for two (2) years, provided further, that this provision shall not operate so as to deprive any elected Superintendent of his office prior to the expiration of the term for which he has been elected; provided further that in counties having a scholastic population of between three thousand (3 000) and five thousand (5,000) scholastics, wherein the office of County Superintendent has not been created and a Superintendent elected, then in such counties the question of whether or not such office is established shall be determined by the qualified voters of said county in a special election called therefor by the Commissioners' Court of said county, upon petition therefor as herein above specified."

We have found two opinions of this department passing upon the question which you have presented. One, a letter opinion written to Honorable Thos. H. Ward of Pearsall, Texas, under date of March 7, 1918, answers the above question in the negative; the other, an opinion written to Honorable K. C. Miller of Marfa, Texas, under date of December 20, 1918, answers the above question in the affirmative, upon the theory that the people of the county, having the power to create the office, have implied power to abolish the same. These opinions are, therefore of little value as precedents and hence it becomes necessary to determine the question under consideration as an original matter.

Examination of the statute discloses that provision is made for the *creation* of the office of county superintendent in counties of less than three thousand population, but that no method is provided by the statutes for the *abolition* of the office, where it has once been created upon favorable vote of the qualified electors of the county. The foregoing being true, it seemingly would logically follow that the office could not be abolished without action taken by the Legislature to effect that result.

In one of the opinions referred to above, the conclusion stated therein was based upon the proposition that the people of the county having the power to create the office, they would likewise have the power to abolish it in a manner alike unto its creation.

It is well established in the law that the body which has the power to create an office, in the absence of a contrary provision, would have

the power to abolish same. But the people of a county do not have the power to create county offices nor to abolish offices already in existence. In the absence of constitutional provision to the contrary, those powers are lodged in the legislature and are legislative powers. Section 1, Article 2, Constitution of Texas; Section 1, Article 3, Id; *Stanfield vs. State*, 83 Tex. 317. The courts have held that the power to create the office of county superintendent as well as the power to abolish or discontinue that office are legislative powers. *Stainfield vs. State*, supra. The latter is a salient point which was not expressly considered in either of the opinions hereinabove referred to.

It is our opinion, therefore, that under present laws, the office of county superintendent, where once established in counties of less than three thousand scholastic population after a vote of the people on the question, cannot be discontinued or abolished except by action of the Legislature.

In this conclusion, we think that we are sustained by the fact that, at one time, the statute provided for the creation of the office of county superintendent in counties having less than three thousand scholastic population, after submission of the question to vote of the people of the county, and likewise provides for the discontinuance of the office in a similar manner (Section 36, Chapter 124, Acts, Regular Session, Twenty-ninth Legislature). Upon amendment of Section 36, supra, the statutory provision for the discontinuance of the office was omitted (Chapter 111, Acts, Regular Session, Thirtieth Legislature). We cannot presume that the Legislature did not intend to repeal that portion of the statute omitted in the amendment.

For the reasons above stated, we are constrained to answer your question in the negative.

Any opinions in conflict herewith are hereby withdrawn.

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

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Op. No. 2934.

DISTRICT JUDGES — DISTRICT ATTORNEYS — EXPENSE ACCOUNTS —  
MILEAGE—STATUTES, ARTICLES 6820 AND 6823, CONSTRUED.

1. A district judge or district attorney is not limited to the collection of mileage for one trip from his home to the place where court is in session each term, but may receive payment for as many trips as are reasonably necessary to discharge his duties; subject to the limitation of not exceeding \$100.00 for each county in his district, exclusive of the county of his residence.

2. District judges and district attorneys are entitled to collect 5c per mile for the use of privately owned vehicles for each mile actually and necessarily traveled by private conveyance in the discharge of their official duties outside the county of their residence

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, November 14, 1933.

*Hon. George H. Sheppard, State Comptroller of Public Accounts,  
Austin, Texas.*

DEAR SIR: On September 8th, in a letter addressed to the Attorney General's Department, you requested an opinion upon the following, among other questions:

"1. Can a district attorney or district judge make more than one trip from his home to the place where the court is in session and return home during any one term of the court and charge mileage for each such case?"

"2. Is a district judge or district attorney entitled to 20c per mile for each mile actually and necessarily traveled in the discharge of his official duties?"

In a letter opinion, dated September 13, 1933, by Assistant Attorney General R. B. Anderson, it was held that, "in the opinion of the writer", a district judge or district attorney could receive compensation for only one trip each term from his home to the place where court is in session and return. The opinion of Mr. Anderson was based upon a previous letter opinion written by Assistant Attorney General Paul D. Page, dated November 23, 1929.

Since the letter opinion of Mr. Anderson was written, the Attorney General's Department has received a number of letters from various District Judges over the State, who ask for a conference opinion of the department on the question in the nature of a rehearing. Because of the importance of the question, the writer has personally reviewed these opinions, and the present communication is addressed to you as conference opinion of the Attorney General's Department.

Article 6820, R. C. S., 1925, dealing with the expenses of district judges and district attorneys, reads as follows:

"All district judges and district attorneys when engaged in the discharge of their official duties in any county in this State other than the county of their residence shall be allowed their actual and necessary expenses while actually engaged in the discharge of such duties, not to exceed four dollars per day for hotel bills, and not to exceed four cent a mile when traveling by railroad, and not to exceed twenty cents a mile when traveling by private conveyance, in going to and returning from the place where such duties are discharged, traveling by the nearest practical route. Such officers shall also receive the actual and necessary postage, telegraph and telephone expenses incurred by them in the actual discharge of their duties. Such expenses shall be paid by the State upon the sworn and itemized account of each district judge or attorney entitled thereto, showing such expense. In districts containing more than one county, such expenses shall never exceed in any one year \$100.00 for each county in the district; provided that no district judge or attorney shall receive more than \$600.00 in any one year under the provisions of this article. The account for said services shall be recorded in the official minutes of the district court of the county in which such judge or attorney resides, respectively."

It will be observed that the *statute* does not limit the allowance of traveling expenses for district judges or district attorneys to one trip each term. The statute does allow "actual and necessary expenses while actually engaged in the discharge of such duties. . . and not to exceed four cents a mile when traveling by railroad, and not to exceed twenty cents a mile when traveling by private conveyance, in going to and returning from the place where such duties are discharged, traveling by the nearest practical route." There is, therefore, nothing *in the law* limiting the number of trips reasonably necessary for the transaction of the business of the court or the discharge of the duties of district judge or district attorney in any county other than the county of their residence.

The law must be read and reasonably construed in the light of existing conditions. This particular act was passed in 1923, at a

time when the automobile had supplanted the buggy, when a great system of improved connected highways had made it possible for busses to compete with railroads; at a time when a large majority of our citizenship had begun to utilize the automobile. Our system of State highways is constantly improving. Most of our county seats are now accessible over concrete highways.

It is but natural that any citizen or officer should desire to return from his work to his family as often as possible. If the Legislature had intended to require a district judge or district attorney to remain over in some county seat town when there was no business for him to attend to, or when it would be more convenient or more desirable, and perhaps no more expensive, for him to return to his home and family, then the Legislature should have so provided. This it failed to do even by implication.

In many cases the cost to the State may be less where a district judge goes to and returns from the place of holding court each day. For instance, one District Judge states that he leaves his home each morning and travels by bus to an adjoining county seat, paying 75c each way, and usually paying about 50c for his lunch in the county seat where court is being held, thus making a total cost of \$2.00 per day by returning to his home; whereas he would be entitled to spend as much as \$4.00 per day if he remained over in the county where court was in session. Another Judge, in a West Texas district, drives his own automobile a distance of thirty miles to an adjoining county seat, going and returning each day. By making a charge of 5c a mile for the use of his automobile (as discussed hereafter) and a charge of 50c or 75c for lunch, the cost to the State is less than a day's hotel bill.

The opinion of Hon. Paul D. Page, Assistant Attorney General under a previous administration (upon which Mr. Anderson's opinion was based), was in answer to an inquiry from a district judge as to whether a court reporter could collect expenses for one trip each week during a term. In this opinion, Mr. Page held that a court reporter could only collect for one trip each term of court; and said that "if the court reporter could go home each week and charge for it, there is nothing to prevent him from going home each day." This argumentative statement is but an argument against the policy of the law. It does not, in our judgment, constitute a legal predicate for holding that a district judge or a district attorney could not collect for more than one trip each term. As stated above, if the Legislature had so intended, then it should have incorporated such a proviso in the statute itself.

The argument that charges might be made for unreasonable number of trips (if it should be held that officers of the court could go back and forth from their homes to the places of holding court), thus giving opportunity for abuse, is fully met by the proposition that the statute limits the amount of expenses to not exceeding \$100.00 per county; and in no instance to exceed more than \$600.00 per year. As a matter of common knowledge, this department recognizes the fact that most district judges and district attorneys are actually out considerably more per year for holding court outside the counties of their residence than the statute allows them.

You are therefore advised in response to inquiry No. 1, in your letter of September 8th, that a district judge or district attorney is not limited to the collection of mileage for only one trip for each term, but may be paid for the number of trips reasonably necessary in going to and returning from the place where their official duties are discharged, traveling by the nearest practical route, the only limitation being that such officers cannot, in any event, draw more than \$100.00 per county per year.

A more serious proposition is presented in the second question; that is, as to whether a district judge or attorney is entitled to the full 20c per mile for each mile actually and necessarily traveled in the discharge of his official duties. No criterion is given as to how the "actual and necessary expenses" incurred in traveling in a privately owned vehicle shall be determined. The stipulation in Art. 6820, supra, "not to exceed 20c a mile when traveling by private conveyance" is a limitation upon the total that might be allowed, and is not a legislative determination of the "actual and necessary expenses" True, gasoline and oil purchased for the use of the privately owned automobile would be part of the actual and necessary expense, but no yardstick is given by the Legislature as to how the reasonable wear and tear upon the machine shall be determined.

It is our opinion, however, that House bill 518, Ch. 218, Acts of the 42nd Leg., 1931, p. 373 (now Art. 6823, R. S.), operates as a legislative determination of the amount to be allowed employees and officers, in all departments of the government (including the Judiciary), for the use of privately owned vehicles. This act of 1931 reads as follows:

"The traveling and other necessary expenses incurred by the various officers, assistants, deputies, clerks and other employees in the various departments, institutions, boards, commissions, or other subdivisions of the State Government, in the active discharge of their duties shall be such as are specifically fixed and appropriated by the Legislature in the general appropriation bills providing for the expenses of the State Government from year to year. When appropriations for traveling expenses are made, any allowances or payments to officials or employees for the use of privately owned automobiles shall be on a basis of actual mileage traveled for each trip or all trips covered by the expense accounts submitted for payment or allowance from such appropriations, and such payment or allowance shall be made at a rate not to exceed five (5) cents for each mile actually traveled, and no additional expense incident to the operation of such automobile shall be allowed."

This statute was passed at the suggestion of the writer because the general law was indefinite and made no express provision for the allowance for the use of privately owned vehicles. At that time it was discovered that employees of many of the State departments were charging as much as 15c per mile for the use of the ordinary light car. The State Auditor made investigation and advised the Legislature that an allowance of 5c or 6c per mile would pay for the wear and tear and the use of the ordinary light car. This led to the passage of what is now Art. 6823, set out above, fixing the allowance at 5c per mile.

You are therefore advised, in response to question No. 2, in your letter of September 8, that district judges and district attorneys may

be paid 5c per mile for each mile actually and necessarily traveled by private conveyance in the discharge of their official duties outside of the counties of their residence.

A further limitation of the total amount allowed for these traveling expenses has probably been imposed by the passage of the act of 1931 (Art. 6823). It will be observed that this act stipulates that "the traveling and other necessary expenses incurred by the various officers \* \* \* and other employees in the various departments \* \* \* or other subdivisions of the State government, in the actual discharge of their duties, shall be such as are *specifically fixed and appropriated by the Legislature* in the general appropriation bill providing for the expenses of the State government from year to year". We understand that in the general appropriation bill for the ensuing biennium the Legislature may not have appropriated sufficient money to take care of a top allowance of \$100.00 per county for all judges and district attorneys. You should check into this matter at once and, of course, limit these expense accounts to the amounts that have been appropriated.

The opinion of the Hon. Paul D. Page, dated November 23, 1929, and Hon. R. B. Anderson, dated September 13, 1933, in so far as they conflict with this opinion, are hereby expressly overruled and, accordingly, withdrawn.

Very truly yours,

JAMES V. ALLRED,  
Attorney General.

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Op. No. 2915.

PUBLIC OFFICERS — HIGHWAY COMMISSION — DE FACTO OFFICER —  
ISSUANCE OF WARRANTS ON HIGHWAY FUND BY STATE  
COMPTROLLER.

1. All vouchers submitted to the Comptroller of Public Accounts as a basis for issuance of warrants against the State Highway Fund must be approved by a majority of the Highway Commission, including the Chairman of the Commission.
2. Where there is a dispute over the legal right and title of Chairman of the Highway Commission, the approval of vouchers by the Chairman de facto is a sufficient approval under Article 6694, R. C. S. 1925, where such vouchers are also approved by one other member of the Commission.
3. Facts surrounding claim of F. L. Denison to title of Chairman of the Highway Commission reviewed. Held that W. R. Ely, having remained in possession of office, is at least de facto Chairman of the Highway Commission.
4. Approval of vouchers drawn as a basis for issuance of warrants on the State Highway Fund by W. R. Ely, as Chairman of the Highway Commission, and D. K. Martin, as a member, is sufficient to authorize the Comptroller to issue warrants, and said vouchers need not be approved by F. L. Denison.
5. State Treasurer is authorized to pay warrants by the State Comptroller in accordance with this opinion.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, March 3, 1933.

*Hon. George H. Sheppard, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: Your inquiry of the 25th ultimo reads as follows:

"In view of recent development over the appointment of Frank L. Denison as a member of the State Highway Commission; and

"In view of the fact that Mr. Denison has filed his bond, as Highway Commissioner, properly approved by the Governor; and

"In view of the fact that Mr. Denison came to this department in person this morning showing me his commission of appointment as Chairman of the Highway Commission, notifying me that all claims from the Highway Department must bear his approval;

"Am I as Comptroller authorized under the law to issue any further warrants upon claims presented by the Highway Department without the approval of Mr. Denison as Chairman of the Highway Commission "

Article 6694, R. C. S., 1925, reads as follows:

"All funds coming into the hands of the Commission derived from the registration fees or other sources provided for in this subdivision, as collected, shall be deposited with the State Treasurer to the credit of a special fund designated as 'The State Highway Fund,' and shall be paid only on warrants issued by the Comptroller upon vouchers drawn by the chairman of the Commission and approved by one other member thereof, such vouchers to be accompanied by itemized sworn statements of the expenditures."

Under this article all vouchers submitted to the Comptroller of Public Accounts as a basis for issuance of warrants against the State Highway Fund must be approved by a majority of the Highway Commission, including the Chairman of the Commission. In discussing the duties of the State Treasurer under this article, the Supreme Court had the following to say:

"It is true that the state treasurer actually pays out the money on deposit to the credit of the highway department, as is generally the case with all obligations made by a state department for and on behalf of the state. He does this, however, as a mere disbursing officer *and on vouchers issued and approved by a majority of the highway commission.* He has no discretion in paying claims of contractors *when they are properly approved by the highway commission.*" (Italics ours). *Smith vs Texas Co.*, 50 S. W. (2)d 774.

In answering your inquiry, it is only necessary to determine whether the quoted statute as construed by the court is complied with when vouchers are presented which do not bear the signature of Mr. Denison as Chairman of the Highway Commission. You do not ask whether or not the commission presented to you by Mr. Denison is in fact a valid commission, and I do not deem it necessary to pass on that point in order to answer your question.

It is a well known fact that both W. R. Ely and D. K. Martin are duly appointed and qualified highway commissioners, and together constitute a majority of the board. It is also a well known fact that W. R. Ely has been the duly designated and acting Chairman of that Commission for more than two years, and under well known constitutional and statutory authority, will continue to serve as

Chairman until there has been a designation of a duly and legally qualified highway commissioner to succeed him in the chairmanship.

The term of Hon. Cone Johnson as a third member of the Highway Commission expired February 15, 1933. On February 1st and 8th, 1933, Governor Miriam A. Ferguson submitted the name of F. L. Denison to the Senate for confirmation as a member of the Highway Commission to succeed Hon. Cone Johnson, and designated him to act as Chairman. (S. J. p. 154 and 196). On February 8th the Senate, in executive session, refused to confirm this nomination and recorded its action in the Journal (S. J. p. 199). On February 9th Governor Ferguson again submitted Denison's name (S. J. p. 209), and on February 23, 1933, the Senate, in executive session, again refused to confirm (S. J. p. 474). Following the second rejection and the official entry of the same on the Journal, Governor Ferguson requested the Senate to advise her as to the vote by which the rejection was had (S. J. p. 535), and on February 28, 1933, the Senate refused to give this information to the Governor (S. J. p. 625).

On February 24, 1933, after the second rejection by the Senate, Governor Ferguson issued to Mr. Denison a commission of appointment as chairman of the Highway Commission, duly attested by the Secretary of State. We assume that this was the commission displayed to you by Mr. Denison.

After receiving the aforementioned commission, Mr. Denison issued a call for a meeting of the Highway Commission to be held in Austin on Monday, February 27, 1933. The majority of the Commission failed and refused to attend; and I am informed by Mr. Ely that he does not recognize Mr. Denison as Chairman but, on the contrary, contends that Mr. Denison has not been confirmed by the Senate and that he, Ely, is the Chairman of the Highway Commission, and will continue to hold that title until a legally qualified Highway Commissioner is designated to succeed him. Mr. Ely further states that he has not surrendered the books, papers and documents to Mr. Denison as Chairman, required to be delivered to his successor by Article 18, R. C. S., 1925, but that, on the contrary, he claims the title and exercises the prerogatives of Chairman, and his claim is recognized by the other member, D. K. Martin.

Because of the question that has been raised as to the legality of his appointment as a member and Chairman of the Highway Commission, Mr. Denison on February 28th requested an opinion of the Attorney General's Department; but on March 1st his request for this opinion was qualified by the statement of his counsel that such opinion should be based upon the assumption that he (Denison) received a majority vote for confirmation. We declined to indulge in such assumption for the reason that the only legal record available is the Senate Journal and the message to the Governor, which show that Denison was rejected. In view of the fact that the Senate had refused to furnish the Governor with the vote (S. J. p. 625), and in view of the rules of the Senate as to executive sessions, we did not feel at liberty to make an admission which we had no means of knowing to be true.

We are today in receipt of a letter from Mr. Denison's counsel in which he has assented to the institution of a test suit in the nature



of a quo warranto, which will be filed immediately. In the meantime, however, the orderly administration of the important business of the Highway Department demands that your inquiry of the 25th be answered, thereby enabling you to perform your official duties in connection with the issuance of warrants based upon vouchers of the Highway Department until the final determination of such suit.

Under this state of facts it is unnecessary for me to attempt to pass upon the validity of the commission issued to Mr. Denison, for the facts show that Mr. Ely is at least defacto Chairman and as such his public acts will be held valid in respect to the public whom he represents and to third persons with whom he deals officially.

Biencourt vs. Parker, 27 Tex. 558, at 563;  
Shriber vs. Culberson, 31 S. W. (2) 659;  
Rockingham County vs. Luten Bridge Co., 35 Fed. (2) 301, C. C. App.  
4th Cir. (Justice Parker):  
Commonwealth vs. Snyder, 144 Atl. 748, (Sup. Ct. Pa.)  
22 R. C. L. 601;  
Mecham on Public Officers and Officers, Sec. 327;  
46 Corpus Juris 1060;  
Throop on Public Officers, Sec. 649.

We do not hold that Ely is not the de jure Chairman of the Highway Commission at this time. Our opinion is that he is at least the de facto Chairman. He may be the de jure Chairman but, irrespective of the legal nature of his occupancy, his public acts are valid so long as he continues to hold the place of chairman, exercises the duties of Chairman, and receives public recognition as chairman. What shall constitute an officer de facto may admit of doubt in different cases, but it is well settled that where a duly qualified person is duly and legally appointed to an office and qualifies and enters into the possession thereof and serves for a long period of time, and refuses to surrender the office to a successor whose title is so clouded as to deny that successor the general public acknowledgment usually received by an officer whose title has no defect, such officer so holding over is a de facto officer irrespective of the merits of the legal claims of the contestant. 46 C. J. 1055 and 1058; Troop on Public Officers, Sec. 631; 22 R. C. L. 598; Hamlin vs. Kassafer, 15 Ore. 456, 15 Pac. 778.

An officer de facto must be in possession of the office, from which it follows that there cannot be two officers de facto for the same place because the one office cannot be in legal possession of two men at the same time. In case there be any contest over the point of possession, priority in time is the controlling factor. The leading case on this point, Braidy vs. Theritt, 17 Kansas 468, was decided by the Supreme Court of Kansas in 1877. The laws of Kansas provided for a mayor and council of five for the city of Wathena. One, Theritt, was a member of the city council prior to April 5, 1875, upon which date an election was held to name his successor. Theritt was opposed for re-election by one Braidy. The election resulted in a tie vote. Theritt received the certificate of election, though Braidy claimed to have received the award of the election judges. On April 13th Theritt took the oath of office as his own successor. A council meeting was called by the mayor for April 20th, which was attended

by the mayor, the four uncontested council members, and by both Theritt and Braidy.

The mayor refused to recognize Theritt as a member of the council, but recognized Braidy as the fifth member, and Braidy was sworn in as such. Theritt and two regular members retired from the meeting, whereupon the mayor, two regular members and Braidy proceeded to do business as a city council. Theritt sued for an injunction to restrain Braidy from acting as councilman, and Theritt and two others sued to restrain the mayor, the two members and Braidy from acting as the city council. A temporary injunction was granted by the trial court, and Braidy appealed. Since the suit was for injunction, the only question before the court was that of possession, and the Supreme Court of Kansas expressly stated that the only question for it to decide was whether Theritt or Braidy was in possession of the office. The opinion of the court follows:

"Now evendently, Theritt, Selover, and Dockhorn had no intention of abandoning their offices when they retired from the council meeting. They did not intend to create vacancies in their offices, whereby Braidy or any one else could step in and become a member of the council, *de facto*, or otherwise. They simply intended to leave the council without a quorum, so that the mayor and the two members of the council who recognized Braidy's claim could not do any business. Theritt has never abandoned his office. He has never created such a vacancy in his office that any other person could step in and become an officer *de facto*; and therefore Braidy has not become a councilman *de facto*. Or at most, we do not think that he has become such an officer *de facto* that he can receive any benefit therefrom as against the person whom he has illegally attempted to oust from office. As between Braidy and Theritt, Theritt must be considered as the officer *de facto*. It would be strange doctrine to announce, that whenever an officer steps out of the place where he usually does business, that any person who may choose to claim the office may at once step in and become immediately an officer *de facto*. *Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office.* The only legal remedy in such a case for the party out of office to obtain possession of the same is by a civil action in the nature of a *quo warranto*. We have already held that two persons cannot be officers *de facto* for the same office at the same time. *McCahon vs. Leavenworth Co.* 8 Kas. 437. And we have also held that the officer *de facto* is the proper person to hold the office during any contest therefor. *The State vs. Durkee*, 12 Kas. 308, 314." (Underscoring ours.)

This opinion, by Justice Valenfine, was concurred in by Justice Brewer, later a distinguished Justice of the United States Supreme Court.

Under the known facts and the authorities, we are of the opinion that Ely is indisputably possessor of the office or title of Chairman. Being in possession and holding over under a claim that cannot be said to be without reasonable grounds, he is at least *de facto* Chairman of the Highway Commission. *Hamlin vs. Kassafer*, 15 Oregon 456, 15 Pac. 778. As such his official acts are valid as to the public and to third persons with whom he deals officially. Under the above cited authorities, he is entitled to continue to act as *de facto* chairman until replaced by judgment of a court or by peaceful surrender to one whose title is without cloud.

It is a matter of common knowledge that Hon. Cone Johnson, the third member of the Commission, is confined by illness and unable

to personally discharge the duties of his office at this time; and that for some time prior to the issuance of the commission by the Governor to F. L. Denison, all vouchers have been drawn by W. R. Ely, as Chairman, and approved by C. K. Martin, as a member. In other words, these vouchers have been drawn and approved "by a majority of the Highway Commission" (Smith vs. Texas Co., supra). It is not necessary for us to pass on the question of whether the provision of Article 6695, supra, for vouchers to be drawn by the Chairman is mandatory. Certainly if W. R. Ely continues to draw these vouchers as Chairman of the Commission and same are approved by D. K. Martin as a member of such Commission, there would be a substantial compliance with the statute by a majority of the Commission, and you would be authorized to issue warrants based upon such vouchers. In our opinion, you would incur no liability upon your official bond by such action.

You are therefore advised it is not necessary at this time for vouchers drawn as herein indicated to be approved by Mr. Denison as Chairman of the Highway Commission before you may legally issue warrants thereon.

I am also in receipt of a communication from Hon. Charley Lockhart, State Treasurer, inquiring whether warrants drawn upon the Highway fund upon vouchers not bearing Mr. Denison's signature may be paid by him. It follows from what has been said heretofore that warrants issued by you in accordance with this opinion may be paid legally by the State Treasurer.

Very truly yours,  
 JAMES V. ALLRED,  
 Attorney General of Texas.

Op. No. 2931.

TAX COLLECTOR—COMMISSION FOR THE COLLECTION OF DELINQUENT TAXES—COUNTY CLERKS—FEES OF OFFICE—ARTICLE 7331 AND 7332 REVISED CIVIL STATUTES 1925 AND AMENDMENTS.

1. Fees of Tax Collector for collecting delinquent taxes on land as provided for by statutes from 1897 to 1933. See summary pages 16-19, inclusive, of this opinion.

2. Fees of Tax Collector for collecting delinquent taxes on land as affected by the Maximum Fee Bill of 1897 and subsequent amendments to 1933. See summary pages 26 and 27 of this opinion.

3. Fees of County Clerk for services performed in connection with the collection of delinquent taxes as allowed under statutory provisions from 1897 to 1933. See summary pages 36-38, inclusive, of this opinion.

4. Fees of County Clerk for performing services with reference to the collection of delinquent taxes as affected by the Maximum Fee Bill of 1897 and subsequent statutory provisions to 1933. See summary pages 38 and 39 of this opinion.

OFFICES OF THE ATTORNEY GENERAL,  
 Austin, Texas, August 18, 1933.

*Hon. Geo. H. Sheppard, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: Your letter addressed to the Attorney General, together with letters from various county officials of this State, pre-

sents for the consideration of this department the following questions:

1. To what fees are Tax Collectors entitled for their several services in regard to the collection of delinquent taxes on land?
2. To what fees are County Clerks entitled for their several services in regard to the collection of delinquent taxes on land?

The present laws governing the collection of delinquent taxes on land and prescribing the duties of the various officers of the county and state in regard thereto had their origin in Chapter 103, Acts Regular Session 25th Legislature (Vol. X, pp. 1186 et seq., Gammel's Laws of Texas), which was enacted in 1897. In dealing with the fees in question, therefore, our inquiry logically begins with the Acts of 1897.

### 1.

By this act it was made the duty of the commissioners court of each county in the State to cause to be prepared by the Tax Collector at the expense of the county a list of all lands, lots or parts of lots which since the first day of January, 1885, had been sold to the State for taxes or upon which taxes had been reported delinquent and which had not been redeemed. It was required that the Tax Collector include in said list the name of the owner of the land, the amount of taxes assessed against the owner thereof and returned delinquent, etc. (Sec. 3, Ch. 103, *supra*.)

Section 10 of the Act of 1897 provided in part that:

"If any person shall fail or refuse to pay the taxes imposed upon him or his property by law until the 31st day of January next succeeding the return of the assessment rolls of the county to the Comptroller, a penalty of ten per cent of the entire amount of such taxes shall accrue, which penalty, when collected, shall be paid proportionately to the state and county, and the collector of taxes shall, by virtue of his tax rolls, seize and levy upon and sell such personal property belonging to such person as may be sufficient to pay his taxes, together with the penalty above provided, interest, and all costs accruing thereon. If no personal property be found for seizure and sale, as above provided, the collector of taxes shall, on the 31st day of March of each year for which the state and county taxes, for the preceding year only, remain unpaid, make up a list of the lands and lots on which the taxes for such preceding year are delinquent, charging against the same all taxes and penalties assessed against the owner thereof.

"Said list shall be made in triplicate and shall be presented to the Commissioners Court for examination and correction of any errors that may appear, and when so examined and corrected by the Commissioners Court, such lists in triplicate shall be approved by said court, and one copy thereof shall be filed with the county clerk, and one copy retained and preserved by the collector, and one copy forwarded to the Comptroller with his annual settlement reports.

\* \* \* \* \*

"In the counties where the Delinquent Tax Record for former years has not been furnished, as provided for in Section 3 of this act, the collector of taxes shall, also, at the same time, make, in triplicate, a list of all lands and lots that have been previously sold to the state for taxes of former years, which have not been redeemed and on which the taxes are delinquent for the preceding year, and shall present the same to the Commissioners Court for examination and correction of any error that may appear, and when so examined and corrected by the Commissioners Court, such lists, in triplicate, shall be approved by said Court, and one copy thereof shall

be filed with the county clerk, one retained and preserved by the collector, and one copy forwarded to the Comptroller, with his annual settlement reports."

It will be observed that under this act the preparation of three distinct instruments was provided for: First, it was made the duty of the Commissioners Court to cause the Tax Collector to prepare and the County Clerk to record a list of all lands which had been sold to the State for taxes or upon which taxes were delinquent and unredeemed; said record was known (and hereafter referred to) as the "Delinquent Tax Record"; second, the collector of taxes was required to prepare on or before March 31, 1896 and of each year thereafter a list of the lands and lots upon which the taxes for the preceding year were delinquent and unpaid (this annual delinquent list became known and will be hereafter referred to as "Comptroller's Form No. 18"); third, in counties where the delinquent tax record for former years had not been prepared the Tax Collector was required at the same time he prepared the annual delinquent list to also prepare "a list of all lands and lots that have been previously sold to the State for taxes of former years, which have not been redeemed and on which the taxes are delinquent for the preceding year". This list was prepared in triplicate and was known and will be referred to herein as the "Separation List".

The compensation allowed under the Act of 1897 to the Tax Collector for his services in connection with the preparation of the Delinquent Tax Record was that fixed by the Commissioners Court of the county. This Delinquent Tax Record was the record of all lands and lots upon which taxes were delinquent and unpaid for any year or years or which had been sold to the State for taxes beginning with the date January 1, 1885, and it is to be distinguished from the annual delinquent list (Comptroller's Form No. 18) and the Separation List above mentioned.

The compensation allowed to the Tax Collector in connection with his services in preparing the annual delinquent list and the Separation List was fixed by Section 9 of the Act of 1897. Said section reads, in part, as follows:

"The collector of taxes, for preparing the delinquent list and separating the property previously sold to the state from that reported as delinquent for the preceding year, and certifying the same to the Commissioners' Court, shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent. \* \* \* provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; \* \* \*"

For preparing the annual delinquent list the Tax Collector was, under Section 9, supra, allowed a fee of \$1.00 "for each correct assessment of land to be sold, said fee to be taxed as costs against the delinquent. \* \* \* Provided, that in no case shall the State or county be liable for such fee, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale after the taxes, penalty and interest due

thereon to the State are paid; provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; \* \* \*."

In the case of *Houston Oil Co. vs. State*, 141 S. W. 805 (Civ. App. Galveston) the court held that each tract of land upon which taxes were delinquent should be considered as one assessment within the meaning of the statutory provisions allowing the Tax Collector a fee of \$1.00 for preparing the annual delinquent list, or Comptroller's Form 18.

The question of town lots was not injected into the case and was not discussed therein. It must be observed, however, that under the express provisions of the act, in so far as the fees allowed to the collector of taxes are concerned, all unimproved city or town lots situated in the same city or town and belonging to the same person were to be considered and proceeded against as one lot or tract, and costs (except those of advertising) assessed against them collectively regarding them as one tract.

In counties where the delinquent tax record for the years following January 1, 1885, had not been prepared in accordance with the provisions of the Act of 1897, it was made the duty of the Tax Collector to make up in triplicate not only a list of all lands upon which the taxes for the previous year were delinquent, but also a Separation List separating and listing the property included in the Annual Delinquent List which had been previously sold to the State for taxes and which was unredeemed, but against which the taxes for the previous year were delinquent.

For preparing the Annual List and the Separation List, the Collector in counties in which the Delinquent Tax Record had not been prepared was allowed the fee of \$1.00 "for each correct assessment of land to be sold" for preparing the Annual Delinquent List and was required to prepare the Separation List without additional compensation, and unless both records were prepared he did not earn this fee of \$1.00.

It must be further observed that the Tax Collector was not allowed a fee of \$1.00 upon all lots or lands upon which taxes were delinquent for the previous year, but was allowed the fee only upon each correct assessment as herein defined *of land to be sold*.

The fees above discussed were the only fees allowed the County Tax Collector for collecting delinquent taxes under the Act of 1897. The provisions of the act were carried forward verbatim in the Revised Statutes of 1911 (Art. 7683 et seq. R. S. 1911).

From the passage of the Act of 1897 until the passage of H. B. 40, Chapter 147, Acts Regular Session 34th Legislature, which became effective July 20, 1915, the fees of the Tax Collector remain unchanged. The provisions of this act of the 34th Legislature will now be considered in so far as they pertain to the questions under consideration.

The Act of 1915 imposed upon the Collector the duty of mailing notices to the address of any record owner of lands upon which taxes were delinquent, and provided that:

"In making up the notices or statements provided for in Section 1 of this Act, it shall be the duty of the tax collectors of the various counties of the State to rely upon the delinquent tax records compiled, or to be compiled, under the provisions of Article 7685 and 7707 of the Revised Civil Statutes of the State of Texas for 1911, which have been approved by the commissioners' court of such counties and a duplicate of which has been filed in the office of the Comptroller of Public Accounts of the State of Texas, and which has or shall hereafter be approved by such State officer; and it shall be the duty of the tax collector, whenever there shall be as many as two years of back taxes that have not been included in such delinquent tax records to prepare or cause to be prepared a Supplement to such records which shall be prepared in duplicate, one copy to be filed in the office of the county clerk and one copy thereof to be furnished to the Comptroller of Public Accounts subject to his approval; and whenever said supplement shall have been approved by the Commissioners Court and by the State Comptroller, then the Tax Collector shall rely thereon for the data covering delinquent taxes for said years in making out the notices or statements provided for in Section 1 of this Act; \* \* \*."

The provisions above quoted was the first act of the Legislature providing that the Delinquent Tax Record provided for by the 1897 Act could by supplement be brought down to date and the Tax Collector was required to prepare this supplemental delinquent tax record when as many as two years of back taxes had not been included in the prior Delinquent Tax Record.

The Act imposed many additional duties upon the Tax Collector. Judge Pierson, in the case of Curtin vs. Harris County, 111 Tex. 568, 242 S. W. 444, outlining these duties, said:

"The following additional duties are imposed upon Tax Collector by the Act:

"(1) To mail to every record owner of lands or lots, notice of delinquent taxes. The section provides also that, in addition to a brief description of the delinquent real estate, there shall be shown in the notice the 'various sums or amounts due against such lands or lots for each year.'

"(2) To furnish to the County or District Attorney duplicates of all notices mailed to the record owner of delinquent lands and lots.

"(3) To furnish to the County or District Attorney similar statements as to the taxes delinquent on lands or lots appearing on the records in the name of 'unknown' or 'unknown owners' or in the names of persons whose correct address the Tax Collector is unable to ascertain, or in lieu of such statements, lists of lands and lots delinquent against unknown owners.

"(4) To furnish on demand statements of delinquent taxes with reference to any lot or tract of land.

"(5) To make tax records, or supplements to delinquent tax records, whenever there shall be as many as two years of back taxes not included in a delinquent tax record, which has been filed in the office of the Comptroller and approved by him."

Concerning fees allowed the tax collector, Section 3 of the Act provided that:

"The tax collector shall, in addition to the compensation and costs now allowed by law, be entitled for making up the delinquent record or supplements where necessary under this Act the sum of 5 cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, such compensation to be paid out of the general fund of the county upon the completion of said record or supplement. The tax col-

lector shall also receive a commission of 5 per cent. on the amount of all delinquent taxes collected in addition to the commissions now allowed him by law."

As compensation for the additional duties imposed upon the collector of taxes by the Act of 1915, as the same were delineated by Judge Pierson in the Curtin case, the Legislature allowed the collector a commission of 5 per cent. on the amount of all delinquent taxes collected by him. In discussing the right of the officers to this commission, the Supreme Court, pointing out that the discharge of the additional duties imposed by the Act was made mandatory upon the tax collector, held that said officer was not entitled to receive the 5 per cent. commission unless he had substantially performed the additional duties required of him under the Act. *Curtin vs. Harris County*, supra; *Limestone County vs. Robbins*, 38 S. W. (2d) 580; *Hill County vs. Williams*, 53 S. W. (2d) 670.

In view of the decision in the Robins case, we think that the Comptroller would be justified in requiring the tax collector to submit satisfactory evidence that he had substantially complied with the law in regard to these additional duties before permitting him to take credit for his additional 5 per cent. commission in his annual settlement with the Comptroller.

It is to be noted that under the Act of 1915, the tax collector was required to prepare in duplicate the delinquent tax record required under the Act; theretofore, the statutes had not required him to make a duplicate record. Concerning the fee allowed to the collectors of taxes in reference to their services in preparing the delinquent tax record, the act of 1915 provided that he should receive the sum of 5 cents "for each and every line of yearly delinquencies entered on said delinquent tax record". Theretofore, the compensation for this service was such an amount as should be fixed by the Commissioners Court of the county.

Likewise, under the Act of 1915, the tax collector was allowed 5 cents per written line for the preparation of supplements to the delinquent tax record where the same were required to be prepared under said Act. The courts of this State have held that for preparing the delinquent tax record, or supplements thereto, the tax collector was entitled, under the Act of 1915, to 5 cents per line of the original only, and was not entitled to this compensation for the duplicate or duplicates made by him of such record or supplements. *Sherman County vs. Ross*, 197 S. W. 1055; *King vs. Marion County*, 202 S. W. 1052; *Curtin vs. Harris County*, supra.

The fee allowed under the Act of 1915 for the preparation of the delinquent tax record, or supplements thereto, was earned by the collector upon the actual preparation of said record, said compensation to be paid to the collector out of the General Fund of the county upon the completion of said record or supplements. The courts have held that where the tax collector had actually performed the service of compiling the delinquent tax record, or a supplement thereto, that he is entitled to said fee of 5 cents per line, although he had not substantially performed the additional duties for which he was allowed the 5 per cent. commission hereinabove discussed. *Curtin vs. Harris County* and *Hill County vs. Williams*, supra.



It will be observed that none of the fees allowed to the tax collector under the statutes above discussed were made dependent upon the filing of suit to collect taxes. They were allowed to the collector for the performance of certain services, and accrued to him upon the performance thereof.

The statutory provisions in reference to the fees of the collector of taxes remained unchanged from 1915 until the 14th day of August, 1923, at which time Chapter 13, Acts Second Called Session of the Thirty-eighth Legislature became effective. Section 7 of said Act amended Article 7691, Revised Civil Statutes, 1911, to read, in part, as follows:

“For preparing the annual delinquent list of assessments charged to the tax collector upon the tax roll, but which have not been collected at the time of his annual settlement with the State and county, separating the property previously sold to the State from that reported sold as delinquent for preceding years, and for prorating the State taxes into State revenue, State school and State pension, calculating the penalty, extending it and adding it in with other taxes, balancing the delinquent lists, certifying it to the commissioners’ court and the Comptroller, the tax collector shall be entitled to a fee of one dollar for each correct assessment of land to be sold, said fee to be taxed as costs against the delinquent. Provided that in no case shall the State or county be liable for said fee, which shall be additional and cumulative of all other fees now allowed by law and shall **not be accounted for under the fee bill, as fees of office.** For checking and taking off delinquency separating and assorting various tracts of each assessment, prorating the taxes thereon, arranging the items by abstract numbers or lot and block numbers, and compiling the delinquent tax record herein required to be compiled whenever there shall be as many as two years of back taxes that have not been included in the delinquent record, the tax collector shall be paid out of the general fund of the county, five cents for each written line of the original of such delinquent record, not to exceed twenty-five cents for any one tract or abstract rendered, returned delinquent and owned by one taxpayer. Such fee to be taxed as costs, and be paid back into the general fund of the county when collected. For issuing notices to taxpayers, furnishing copies to the county, district or delinquent tax attorneys, issuing statements in regard to particular tracts of land required by this Act, preparing and issuing cancellations, calculating and preparing redemption certificates, and receipts, reporting and crediting redemptions, posting Comptrollers redemption numbers on the delinquent record, mailing certificates of redemption to taxpayers after approval by the Comptroller, the tax collector shall receive five per cent. of all delinquent taxes collected by him, which, together with the five cents per line compensation for compiling the delinquent record as above provided, shall be accounted for as fees of office, and shall not be retained by such tax collectors so as to increase the maximum compensation now allowed by law for such respective office.

“The term tract in this bill shall be construed to mean all lands or lots in any survey, addition or subdivision or part thereof owned by the party or parties being sued for delinquent taxes.”

(a) It will be observed that under the amended Act of 1923, the fee allowed to the tax collector for preparing the annual delinquent list was not substantially changed, except insofar as it was affected by the legislative definition of the term “tract”. In construing the statutory provisions above quoted, the Supreme Court, in the case of *State vs. Slater*, 38 S. W. (2d) 1097, held that for preparing the annual delinquent list the tax collector was entitled to a fee of one dollar for each correct assessment of land to be sold, each tract of

land (as that term was defined by the Court) to be considered as one correct assessment.

The dollar fee allowed to the tax collector under said statutory provisions was not dependent upon the filing of suit to collect the delinquent taxes, but depended alone upon the performance of the services for which the fee was allowed. *Cameron County vs. Fox* (Sup. Ct. of Texas). 61 S. W. (2d) 483. In the case last cited, it was held that the fee of one dollar was earned upon the actual preparation of the annual delinquent list, and accrued to the incumbent of the office who actually performed the services of preparing said list, subject to the provisions of the Maximum Fee Law as hereinafter discussed.

(b) Concerning the fee allowed to the tax collector in connection with the preparation of the delinquent tax record of the county or any supplement to said record, the Act of 1923 provided that the tax collector should be allowed a fee of five cents for each written line of the original of said record, "not to exceed twenty-five cents for any one tract or abstract rendered, returned delinquent and owned by one taxpayer." The only change made by the Act of 1923 in regard to the fee allowed to the tax collector for this service in preparing the delinquent tax record and the supplements thereto was to limit said fees to "twenty-five cents for any one tract or abstract rendered, returned delinquent and owned by one taxpayer".

Further, the term "tract" as used in the statutory provisions last above quoted, was defined to mean "all lands or lots in any survey, addition or subdivision or part thereof owned by the party or parties being sued for delinquent taxes". As above stated, this definition was construed in the case of *State vs. Slater*, supra, and reference is here made to said decision for the purpose of defining the word "tract" as used in the foregoing paragraph.

(c) Under the Act of 1915, as heretofore pointed out, the tax collector was allowed, in addition to the other fees allowed to him by law, a commission of five per cent. of the amount of all the delinquent taxes collected by him. This provision of the Act of 1915 was construed by the courts as compensation allowed to the tax collector for the performance of the additional duties imposed upon him by the Act of 1915, and in order to earn the fee allowed, the tax collector was required to substantially discharge said additional duties. *Curtin vs. Harris County*, supra.

The Act of 1923, however, enumerated the services for the performance of which the commission of five per cent. was allowed, to-wit: "For issuing notices to taxpayers, furnishing copies to the county, district or delinquent tax attorneys, issuing statements in regard to particular tracts of land required by this Act, preparing and issuing cancellations, calculating and preparing redemption certificates, and receipts, reporting and crediting redemptions, posting Comptrollers redemption numbers on the delinquent record, mailing certificates of redemption to taxpayers after approval by the Comptroller. \* \* \* \*."

Under both the Act of 1915 and the Act of 1923, the five per cent. commission allowed to the tax collector was for the performance of a series of acts; the commission, of course, would not be earned until

the collector had substantially performed all of the acts required of him, and in case of division of performance of the series of acts between two incumbents of the office, the incumbent performing the last of the required acts of the series would earn and be entitled to the commission allowed. *Curtin vs. Harris County*, supra; *Cameron County vs. Fox*, 61 S. W. (2d) 483.

The provisions of the Act of 1923 above quoted and as discussed in subdivisions (a), (b), and (c), supra, were carried forward verbatim through Chapter 21, Acts Third Called Session, Thirty-eighth Legislature, and were brought forward in Article 7331, Revised Civil Statutes, 1925. The next material amendment to the laws in reference to the fees allowed to the collectors of taxes for their services in connection with the collection of delinquent taxes on land was Section 8 of Chapter 20, Acts Fourth Called Session, Forty-first Legislature, which became effective January 1, 1931. By Section 8 of Chapter 20, supra, Article 7331 was amended so as to read, in part, as follows:

“For calculating and preparing redemption certificates and receipts, reporting and crediting redemptions, posting Comptroller's redemption numbers on the delinquent tax record or annual delinquent list, mailing certificates of redemption to taxpayers after approval by the Comptroller, and for issuing receipts or certificates of redemption for property shown on the annual delinquent list, the tax collector shall be entitled to a fee of one dollar (\$1.00) for each correct assessment of land to be sold, said fee to be taxed as costs against the delinquent. Correct assessment as herein used means the inventory of all properties owned by an individual for any one year. \* \* \* .”

The above mentioned Act of the Forty-first Legislature did not affect the provisions of the statute allowing the tax collector a fee for compiling and preparing the delinquent tax record and supplements thereto nor did it change the provisions allowing the collector a commission of five per cent. of the amount of delinquent taxes collected for the performance of certain services as hereinabove discussed.

Relative to the fee of one dollar for each correct assessment of land to be sold, however, the act of the Forty-first Legislature materially changed the services for the performance of which said fees were allowed, as well as the amount of the fee. It will be observed that under the Act of the Forty-first Legislature, the tax collector was allowed a fee of one dollar “for each correct assessment of land to be sold,” for “calculating and preparing redemption certificates and receipts, reporting and crediting redemptions, posting Comptroller's redemption numbers on the delinquent tax record or annual delinquent list, mailing certificates of redemption to taxpayers after approval by the Comptroller, and for issuing receipts or certificates of redemption for property shown on the annual delinquent list.”

Here again the compensation allowed is for the performance of a series of acts which must be substantially performed before the fee allowed is earned. However, the fee is not dependent upon the filing of suit to collect the taxes delinquent, but is dependent upon the performance of the several services enumerated and upon the actual collection of the taxes, penalties, interest, and costs.

It must further be observed that the term "correct assessment," as used in the Act of the Forty-first Legislature, is meant "the inventory of all properties owned by an individual for any one year". Theretofore, the term "correct assessment" had been used to mean each tract of land as defined by the Legislature and by the courts; under the Act of the Forty-first Legislature, however, the term "correct assessment" would include all tracts of land upon which taxes were delinquent for any one year, located in the county and owned by one individual.

Briefly reviewing what has been said in the foregoing paragraphs of this letter, you are respectfully advised that the statutes prescribing the fees allowed to collectors of taxes in reference to their services in the collection of delinquent taxes on lands are divisible into four chronological periods, to-wit:

### I.

From August 20, 1897, to July 20, 1915:

(a) During the above mentioned interim the tax collector was allowed for preparing the delinquent tax record as hereinabove defined, such compensation as was fixed by the Commissioners (Court of the county for the performance of said services.

(b) The tax collector was allowed a fee of one (\$1.00) dollar for each correct assessment of land to be sold, each tract of land to be considered as one assessment (except in the instance of unimproved city or town lots located in the same city or town and belonging to the same taxpayer); however, in counties where the delinquent tax record for former years had not been prepared, the tax collector, in order to earn the above mentioned fee, was required to prepare a separation list in addition to the annual delinquent list.

### II.

From July 20, 1915, to August 14, 1923:

(a) At the beginning of this period the tax collector was for the first time allowed a fee of 5 cents for each written line of the original of the delinquent tax record or supplements thereto for preparing the same where required under the Act of 1915, said compensation to be paid upon the completion of said record or supplement, out of the general fund of the county, and to be taxed as costs against the delinquent and repaid to the general fund when the taxes and costs were collected.

(b) The one (\$1.00) dollar fee allowed to the collector for the preparation of the annual delinquent list remained unchanged during this period.

(c) Under the Act of 1915, the collector was for the first time allowed a commission of 5 per cent. of the amount of delinquent taxes collected, as compensation for the additional duties imposed upon him by said Act, including the mailing of notices to every record owner of land or lots upon which taxes were delinquent and for furnishing county or district attorneys duplicates of such notices, and the other duties thereunder required. In order to earn

the commission so allowed, it was required that the tax collector substantially perform the additional duties required under said Act.

### III.

From August 14, 1923, to January 1, 1931:

(a) The tax collector was allowed, for preparing the delinquent tax record or any supplement thereto, a fee of five cents for each written line of the original of said record or supplement, "not to exceed twenty-five cents for any one tract or abstract rendered, returned delinquent and owned by one taxpayer"; said fee to be paid out of the general fund of the county, but to be taxed as costs against the delinquent and paid back into the general fund upon the collection of the taxes and costs.

(b) For preparing the annual delinquent list (and in counties where the delinquent tax record had not been prepared, the separation list) the tax collector was allowed a fee of one (\$1.00) dollar for each correct assessment of land to be sold, each tract of land considered as one assessment, the term "tract" being used to mean "all lands or lots in any survey, addition, or subdivision or part thereof owned by the party or parties being sued for delinquent taxes". State vs. Slater, 38 S. W. (2d) 1097.

(c) "For issuing notices to taxpayers, furnishing copies to the county, district, or delinquent tax attorneys, issuing statements in regard to particular tracts of land required by this Act, preparing and issuing cancellations, calculating and preparing redemption certificates, and receipts, reporting and crediting redemptions, posting Comptroller's redemption numbers on the delinquent record, mailing certificates of redemption to taxpayers after approval by the Comptroller," the tax collector is allowed a commission of 5 per cent. of the amount of delinquent taxes collected.

### IV.

From January 1, 1931, to the present time:

(a) The tax collector has been allowed the same fee for preparing the delinquent tax record or supplements thereto, and is allowed the 5 per cent. commission for the performance of the same service as under the Act of 1923.

(b) Since January 1, 1931, however, the tax collector has been entitled to a fee of one (\$1.00) dollar for each correct assessment of land to be sold as shown by the annual delinquent list (correct assessment meaning the inventory of all properties owned by an individual for any one year) "for calculating and preparing redemption certificates and receipts, reporting and crediting redemptions, posting Comptroller's redemption numbers on the delinquent tax record or annual delinquent list, mailing certificates of redemption to taxpayers after approval by the Comptroller, and for issuing receipts or certificates of redemption for property shown on the annual delinquent list".

FEES OF TAX COLLECTOR FOR COLLECTING DELINQUENT TAXES AS AFFECTED BY THE MAXIMUM FEE BILL AND AMENDMENTS THERETO.

What is commonly known as the Maximum Fee Bill had its origin

in Chapter 5, Acts First Special Session of the Twenty-fifth Legislature in 1897. Section 17 of this Act, carried forward in the 1911 Revised Statutes as Article 3898, provided that officers in counties having a population of 15,000 or less, with the exception of district attorneys, should not be required to make the reports or keep the statements provided for in the Act.

The Maximum Fee Bill, however, as it pertains to the question hereinbefore discussed, has no real import until its amendment by Chapter 121, Acts Regular Session of the Thirty-third Legislature in 1913, since the only fees allowed the tax collector for collecting delinquent taxes on land were accountable prior to this time. Article 3898 of the Revised Statutes of 1911 was therein amended so as to read as follows:

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

The regular session of the Thirty-sixth Legislature, by Chapter 158, repealed Article 3898, Revised Statutes of 1911, as amended by the Act of 1913, and thereby made the fee bill applicable to all counties in the State, regardless of their population. This Act became effective June 18, 1919. The effect of this Act on the tax collector's fee was to require the tax collectors in counties of 25,000 or less inhabitants to account for the fees in the same manner as those in counties of a greater population. The Thirty-eighth Legislature, at its regular session in 1923, however, re-enacted Article 3898 of the 1911 statutes, and again exempted officers in counties having a population of 25,000 inhabitants or less from making the reports and filing the statements required under the provisions of the fee law. This became effective June 13, 1923. Therefore, tax collectors in counties containing 25,000 inhabitants or less were required to account for the one (\$1.00) dollar fee from June 18, 1919, to June 13, 1923. The 1923 Act exempting counties of 25,000 or less inhabitants continued in effect until the enactment of Chapter 20, Acts of the Fourth Called Session of the Forty-first Legislature, which became operative January 1, 1931, at which time all counties in the State were placed under the provisions of the Maximum Fee Bill and have continued to operate thereunder until the present time.

The Supreme Court of this State, in *Curtin vs. Harris County*, 111 Tex. 568, 242 S. W. 444, in discussing the 5 cents per line allowed the tax collector for making the delinquent tax record and supplements thereto, and the 5 per cent. commission on delinquent taxes collected, by the Acts of 1915, said:

"House Bill No. 40, Acts of 1915, after imposing new, important, and onerous duties upon the county tax collector, and as inducement for the thorough and proper performance of those duties, which performance is also made mandatory, in Section 3, provided: 'The tax collector shall, in addition to the compensation and costs now allowed by law, be entitled for

making up the delinquent record or supplements thereto where necessary under this Act, the sum of 5 cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, such compensation to be paid out of the General Fund of the county upon the completion of said record or supplement. The tax collector shall also receive a commission of 5 per cent. on the amount of all delinquent taxes collected in addition to the commissions now allowed him by law.' (Vernon's Annotated Civil Statutes, Supplement 1918, Art. 7688-a).

" . . . . The language of the bill as quoted is practically tantamount to saying, 'in addition to the compensation and costs now allowed by the Maximum Fee Bill of 1913.' Therefore, the 5 cents per line for making up the delinquent tax roll, and the 5 per cent. commission for collecting delinquent taxes under the Act of 1915, before it was amended in 1919, are not to be accounted for under the Maximum Fee Bill."

It has also been definitely decided that in counties operating under the Maximum Fee Bill, the tax collector's fee of one (\$1.00) dollar provided for by Article 7691, Revised Statutes of 1911, which fee has been previously discussed herein, was required to be accounted for, and therefore could not be retained by the collector except for the purpose of applying on his maximum and excess for the particular year in which the fee was earned. *Bitter vs. Bexar County*, 11 S. W. (2d) 163; *Barnes vs. Turner*, 27 S. W. (2d) 532.

By Chapter 21, Acts Third Called Session of the Thirty-eighth Legislature, the status of these fees was changed by the amendment of Article 7691, Revised Statutes of 1911, which amendment was carried forward in the 1925 Revised Civil Statutes as Article 7331, and became effective September 12, 1923. It is to be noted that the Legislature, by the enactment of the 1923 Act, supra, reversed the situation which had previously existed as to the accountability of these fees; that is, it provided that the one (\$1.00) dollar fee which had theretofore been accounted for should thereafter not be accounted for and provided that the 5 cents per line for preparing the delinquent record and the supplements thereto, and the 5 per cent. commission on delinquent taxes collected, which had not theretofore been accountable for, should thereafter be governed by the provisions of the Maximum Fee Bill.

In regard to the one (\$1.00) dollar fee, Article 7331, Revised Civil Statutes 1925, says:

"Provided, that in no case shall the State or county be liable for said fee which shall be additional and cumulative of all other fees now allowed by law, and shall not be accounted for under the fee bill as fees of office"

With reference to the accountability of the other fees, this Article provided:

" . . . . the tax collector shall receive 5 per cent. of all delinquent taxes collected by him, which, together with 5 cents per line compensation for compiling delinquent record as above provided, shall be accounted for as fees of office, and shall not be retained by such tax collectors so as to increase the maximum compensation now allowed by law for such respective office."

As has heretofore been pointed out in this opinion, the one (\$1.00) dollar fee to the tax collector was provided for by the Act of 1897, and the 5 cents per line and the 5 per cent. commission were provided for in House Bill No. 40 of the Acts of 1915. In order to

determine the proper disposition to be made of these several fees, the question necessarily presents itself as to the time when the same accrued, or became earned fees. As the fee of 5 cents per line for compiling the delinquent tax record or supplements thereto, became due and payable upon the completion of this service, and as the same was paid to the tax collector by the Commissioners Court out of the General Fund of the county, it was in most instances collected as a current fee, and the tax collector was required to account for it as such after the effective date of the 1923 Act.

At this point, it might be well to note that under the provisions of Article 3898, Revised Civil Statutes 1925, the fiscal year within the meaning of the fee statute begins January 1st of each year and closes on December 31st. Prior to the amendment of this Article, in 1923, the fiscal year of the county within the meaning of the fee statute began on December 1st of each year. Current and delinquent fees have been repeatedly defined by the holding of this department in the following manner: Current fees are those fees earned and collected by an officer within the fiscal year, and delinquent fees are those fees earned within the fiscal year but uncollected until some subsequent year.

Under the provisions of Article 3892, Revised Civil Statutes 1925, as amended by Chapter 20, Acts Fourth Called Session of the Forty-first Legislature, and as the same has existed since the enactment of Chapter 29, Acts of the Regular Session of the Thirtieth Legislature in 1907, the right of an officer to retain delinquent fees, where such fees must be accounted for, is made to depend upon several contingencies: (1) The fees must have been reported as delinquent in the officer's report for the year in which the fee was earned, and (2) the officer must have failed to collect sufficient current fees to complete the maximum and excess allowed him under the fee statutes. Therefore, even where the fee was an accountable one if the officer had reported it as delinquent, and had failed to collect sufficient fees to make his maximum and excess for the fiscal year in which the fee was earned, he had a right to retain sufficient delinquent fees when he collected the same to reach his maximum and excess for the year in which the fee was earned, and the balance remaining was to be paid to the county. If the officer earning the fee had retired from office, it was the duty of the incumbent of the office to which the fee accrued to collect the same and pay it to the officer who earned it in the event such officer had failed to collect his maximum and excess for the year in which the fee was earned. In the event the officer earning the fee had received the maximum and excess authorized by law, the incumbent of the office making collection was to pay the same over to the county treasurer for the benefit of the county. Of these delinquent fees payable to the county, the collecting officer was entitled to retain 10 per cent. of the amount collected until the provisions of Article 3894, Revised Civil Statutes 1925, were repealed by Section 10 of Chapter 20, Acts of the Fourth Called Session of the Forty-first Legislature, which became effective January 1, 1931. After the repeal of this Article, under the holdings of this department, the incumbent of



the office to which the fee accrued was bound to collect the same and pay it over to the county treasurer where the officer earning the fee had collected his maximum and excess for the year in which the fee defeat the right of the officer making the collection to the 10 per cent. commission which had previously been provided for by this Article.

The 5 per cent. commission allowed tax collectors for collecting delinquent taxes has been held by the courts of this State to be a current fee, collectable when the delinquent taxes are paid.

In *Cameron County vs. Fox*, decided by Section "A" of the Commission of Appeals, 61 S. W. (2d) 483, in discussing this 5 per cent. commission, it is said:

"The question raised by the assignment now under consideration is whether or not the above commission of 5 per cent., as regards delinquent taxes for previous years which remained uncollected when the last-mentioned act became effective, became, when said taxes were subsequently collected, subject to the Maximum Fee Law. We think it did. It matters not that prior to the passage of said act the tax collector performed the duties for which said commission is prescribed as compensation, or how often he or any of his predecessors in office performed those duties throughout a series of previous years, the commission did not become due until the delinquent taxes involved were collected. The commission did not accrue until that time. We adopt the following language of the Court of Civil Appeals, in this case, in reference to this matter: 'But the fee of 5 per cent commission, upon delinquent taxes to be collected, takes a very different status, for it is in payment of a series of acts, running sometimes over a period of several years, and since the act makes no provision for, and obviously does not contemplate, the separation and separate appraisal of the value of those several acts, the fee therefor may not be regarded as earned until the whole service is performed, and until it is earned it cannot accrue. The logical conclusion therefore must be that the fee does not accrue until the taxes are paid by the taxpayer, and the redemption certificate is issued by the collector in office at the time, who may retain, or shall account for, the fee, as the applicable law then in force provides. It seems obvious that any other construction of the act of 1915 would be wholly incompatible with the orderly administration of the law.'"

We think this necessarily disposes of the 5 per cent. commission allowed the tax collector for collecting delinquent taxes. As to the manner in which this fee should be accounted for, and as the commission is a part of the delinquent taxes themselves, it would always be collected by the tax collector as a current fee, and accounted for by him after the enactment of the 1923 Act accordingly.

The one (\$1.00) dollar fee for the preparation of the delinquent list has always been considered by the courts as being a fee earned upon the performance of the service and yet one which the tax collector is without power to collect until the delinquent taxes have been paid, or until the tax lien has been foreclosed in court and the property sold to satisfy the judgment. *Hoke vs. Simondon* (Writ of Error Denied), 46 S. W. (2d) 1013; *Barnes vs. Turner*, 27 S. W. (2d) 532.

In *Cameron County vs. Fox*, *supra*, in discussing the status of this fee, it is said:

"The fee was earned when the services prescribed in Article 7691 (Revised Statutes 1911) were performed. The fee became due at that

time, and was chargeable against the delinquent, although the enforcement of collection depended upon contingencies incident to the enforced collection of the delinquent taxes involved. The new statute of 1923 (Article 7331, Revised Statutes 1925) did not purport to modify any provision of the Maximum Fee Law with respect to such fees where the same had already accrued, or to surrender any rights which had accrued to the county respecting same. In this respect, the new statute did not have retroactive effect. *Turner vs. Barnes, supra.*

"As regards this fee of \$1.00, where same was earned while the county was not under the Maximum Fee Law, the situation would be different. In that case the right of a tax collector to the fee, irrespective of the Maximum Fee Law, would have become fixed at the time the fee was earned. Regardless of when the fee was collected, it would belong to the tax collector who earned it."

We believe that the status of these several fees remained the same from the effective date of the 1923 Act until the enactment of Chapter 20, Acts Fourth Called Session of the Forty-first Legislature. Section 8 of this Act amended Article 7331, R. C. S. 1925, and by Section 3 of the Act, amending Article 3891, R. C. S. 1925, all fees and compensation whatever collected by officers in their official capacity, were made accountable as fees of office and must thereafter be disposed of in accordance with the provisions of the Maximum Fee Law. Therefore, since January 1, 1931, all of these several fees must be accounted for by the tax collector receiving the same. As heretofore pointed out, the status of the fee of one (\$1.00) dollar was entirely changed by the enactment of this latter Chapter, and after the above date the one (\$1.00) dollar fee was not earned until after the delinquent taxes were paid, even though it was collected by the tax collector at the time of the payment of the tax. Its status from this date was therefore that of a current fee, belonging to the tax collector who collected the taxes, to be accounted for by him in the manner provided by law.

Summarizing briefly what has been heretofore discussed, you are advised that the one (\$1.00) dollar fee from 1897 to June 13, 1923, was accountable as a fee of office; that from June 13, 1923, to January 1, 1931, this fee was not accountable; that it again became accountable January 1, 1931, and has continued to be an accountable fee to the present time. That from 1897 to January 1, 1931, the fee was earned when the services for which it was paid—that is, the compilation of delinquent list—had been completed, and that unless it was collected within the current year in which the services were performed it became a delinquent fee. Since January 1, 1931, this fee has not been earned until the taxes were actually collected, and therefore can only be considered as a current fee.

The 5 cents per line for compiling the delinquent record and the supplement thereto, and the 5 per cent. commission for collecting delinquent taxes, and for the performing the services required by the 1915 Act, were accountable for from July 20, 1915, the effective date of House Bill No. 40, Acts of 1915, until September 12, 1923, at which time Chapter 21, Acts Third Called Session of the Thirty-eighth Legislature, became effective. Thereafter, these fees were not accountable until on and after January 1, 1931, from which latter date they again became accountable fees.

From 1897 to 1913, the Maximum Fee Bill did not apply in counties of 15,000 inhabitants or less. From the effective date of the 1913 Act to the effective date of Chapter 158, Acts Regular Session, Thirty-sixth Legislature, the Maximum Fee Bill did not apply in counties of 25,000 inhabitants or less; that after the effective date of Chapter 158 in 1919 until June 13, 1923, all counties were under the provisions of the Maximum Fee Bill; that from June 13, 1923, to January 1, 1931, counties containing a population of 25,000 inhabitants or less were exempt from the provisions of the General Fee Bill; after January 1, 1931, to the present date, all counties have been subject to the provisions of the Fee Bill.

#### FEEES ALLOWED TO COUNTY CLERKS.

By Chapter 103, Acts Regular Session of the Twenty-fifth Legislature (Vol. 10, p. 186 et seq. Gammel's Laws of Texas), the Legislature provided that upon the taking effect of the Act, it should be the duty of the Commissioners Court in each county in the State to cause to be prepared by the tax collector, at the expense of the county, a list of all lands, lots or parts of lots sold to the State for taxes, or upon which taxes were delinquent for any year or years, since the first day of January, 1885, and containing certain information in reference thereto. This record of delinquencies was required to be delivered to the county clerk of the county, and it was made his duty to certify the same to the Commissioners Court for examination and correction, to enter into the minutes of the Commissioners Court the corrections made in the record, and to thereafter cause the same to be recorded in a book, labeled the "Delinquent Tax Record of \_\_\_\_\_ County". The clerk was also required to prepare and to send a duplicate copy of the corrected record of delinquencies to the Comptroller of Public Accounts. The Legislature provided for the compensation of the county clerk for the services above mentioned by the following provision contained in Section 9 of the Act of 1897:

" \* \* \* the County Clerk, for making out and recording the data of each delinquent assessment, and for certifying the same to the Commissioners' Court for correction, and for noting the same in the minutes of the Commissioners' Court, and for certifying the same, with corrections, to the Comptroller, and noting the same on his delinquent tax record, shall receive the sum of one dollar, to be taxed as costs against the land in each suit; \* \* \* ."

It will be observed that under the statutory provision quoted, the measure of the clerk's compensation was one dollar for each "delinquent assessment" contained in the list of delinquencies and transcribed by him into the Delinquent Tax Record. The term "delinquent assessment" as used in reference to the fee allowed to the county clerk has never been comprehensively defined by the courts. In two cases, however, the question of the meaning of the term has been before the courts. In *State vs. Wolfe*, 51 S. W. 657, the State had brought suit to collect taxes for the previous seven years and penalties, interest, and costs on one tract of land owned by the appellant and situated in Frio County. It was contended in that case

that the county clerk was entitled to but one dollar in full as compensation for his services in reference to the collection of the delinquent taxes on said property; it was conceded that the county clerk had performed all the services for which the fee was allowed. The Court of Civil Appeals for the Fourth District held, however, that the county clerk was entitled to the fee of one dollar on said tract for each year that the taxes were delinquent thereon; that is, to the sum of seven dollars, since the taxes were delinquent over a period of seven years. In the Wolfe case, the question whether the fee of one dollar was to be allowed on each "tract" of land was not in issue; in that case, as has been pointed out, only one tract of land was involved. In *Houston Oil Company vs. State*, 141 S. W. 805, the Court of Civil Appeals for the First District considered and discussed the question whether the terms "correct assessment", as used in reference to the one dollar fee allowed to the tax collector, and "delinquent assessment", as used in regard to the fee of one dollar allowed to the county clerk, contemplated and meant that said fees should be allowed on each and every "tract" of land upon which taxes were delinquent, or whether it was intended that the fee to each officer should be allowed for the services by him performed in the collection of the delinquent taxes on all of the properties of the delinquent located within the county. The court held that the fee was allowable to each officer as compensation for the performance of the several services set forth in the statute in reference to each "tract" upon which taxes were delinquent. The court did not assume to define the term "tract" as used in its opinion; it must, therefore, be regarded as having been used in its ordinary acceptation; however, under the Act of 1897 it was provided that two or more unimproved city or town lots belonging to the same person and located in the same city or town were to be considered as one "tract" and costs assessed against them collectively as one tract. Considering the cases cited in connection with each other and in reference to the statutory provision last above mentioned, we find that under the Act of 1897, the county clerk:

1. Was allowed one dollar on each tract of land owned by the delinquent.
2. For each year each particular tract was delinquent.

We further find that the compensation in the measure above discussed was allowed to the clerk for the performance of the following services, to-wit:

1. For certifying the record of delinquencies from 1885, which the tax collector had prepared, to the Commissioners' Court for correction.
2. For noting in the minutes of the Commissioners' Court the corrections made in said record.
3. For recording the record as corrected in the book required to be kept by him, to-wit, one to be labeled the "Delinquent Tax Record of ---- County," and
4. For making out and sending to the Comptroller of Public Accounts a correct copy of the delinquent tax record.

It will be seen from what has been said above that the fee of one (\$1.00) dollar was allowed to the county clerk for the performance of a series of acts in connection with the preparation of the delinquent tax record, and the fee, of course, would not have accrued

until each and all of those services were actually performed. *Cameron County vs. Fox*, 61 S. W. (2d) 483. *A priori*, the clerk would be entitled to the fee provided by statute unless he had actually performed the services for the performance of which the fee was allowed as compensation; furthermore, the services for the performance of which the fee was allowed under the Act of 1897 were to be rendered in connection with the preparation of the delinquent tax record, and was, therefore, allowed only in reference to those lands which under the statutes were required to be listed in said delinquent tax record.

Prior to July 20, 1915, there was no provision made by statute for preparing a supplement to the delinquent tax record. Under the statutory provisions existing prior to the date last above mentioned, it was contemplated that a delinquent tax record should be prepared but once, and that taxes should thereafter be collected annually by enforced collection if necessary, and it was intended the taxes should not be allowed to become delinquent over a period of several years. It was provided that after the delinquent tax record was prepared, the tax collector should prepare each year thereafter a list of the lands delinquent for that year (this list has been identified in the preceding paragraphs of this opinion as "Comptroller's Form No. 18"), and it was contemplated that the enforced collection of taxes on the lands included in said list should be immediately begun. While the county clerk was allowed a fee in reference to the preparation of the delinquent tax record, he was not allowed a fee in connection with the services performed by him in reference to the annual delinquent list (see letter opinion written June 8, 1898, by Honorable John M. King, then Assistant Attorney General, to I. W. Stephens, Esq., formerly Sheriff of Bandera County).

Evidently, however, the system for the enforced collection of taxes on land as evolved in the Act of 1897, and as carried forward in the Revised Statutes of 1911, did not work out as well as expected, for in 1915, the Thirty-fourth Legislature in its Regular Session made it mandatory that a delinquent tax record be prepared in those counties where the same had not already been prepared, and provided that until an officer charged with the performance of any duty under Chapter 15 of Title 126, Revised Statutes 1911, had discharged the same, he could not make settlement with either the Commissioners Court of his county or with the Comptroller of Public Accounts. (Section 4, Chapter 147, Acts Regular Session, Thirty-fourth Legislature.)

In most of the counties of the State, there was prepared in 1915 a delinquent tax record containing the data required by statute, and covering the years from 1885 through 1914, and these records were prepared in many counties whether a delinquent tax record had theretofore been prepared or not. Under said Act, it was provided that the tax collector, in making up the delinquent tax record, should prepare the same in duplicate.

Further, as we have pointed out in the foregoing paragraphs of this opinion, the Act of 1915 for the first time provided for bringing down to date delinquent tax records which had theretofore been prepared by the making of supplements to said record. The tax col-

lector was required to prepare said supplement or supplements in duplicate. Further, the Act provided that the original delinquent tax record or the supplement thereto should be filed in the office of the county clerk, the duplicate of said record or supplement to be certified to the Comptroller of Public Accounts.

Under the Act of 1897, the tax collector was required to prepare a list of lands and lots upon which taxes were delinquent or which had been sold to the State for taxes for any year or years after 1885, and the county clerk was required to transcribe the list so prepared into books to be known as the delinquent tax record for that particular county, one copy of which was to be retained in the office of the county clerk and one copy of which was to be certified to the Comptroller of Public Accounts. Under the Act of 1915, in view of the fact that the tax collector was required to prepare the delinquent tax record in duplicate, the statutory requirement that the county clerk transcribed the record was as a practical matter obviated, since it would be a useless task to recopy an already completed record. Theoretically, the clerk was yet required to make a duplicate transcription of the record prepared by the tax collector; as a practical matter, he merely adopted the record as prepared, and after making the corrections required by the Commissioners Court, filed it as the "Delinquent Tax Record of \_\_\_\_\_ County".

Likewise with the supplementary records required under the Act of 1915, the county clerk merely adopted the duplicate records prepared by the collector of taxes as the same were corrected by the Commissioners Court. The supplements to the delinquent tax record have always been regarded, both by this department and by the officers concerned, as a part of the delinquent tax record, and it has always been the position of this office that the county clerk is entitled to the same fees with reference to his services in connection with the supplements to the delinquent tax record as he would have been had the same been a part of the original delinquent tax record. In view of the long continued construction placed upon the statute, we feel constrained to follow the same. As hereinabove pointed out, under the Act of 1897 the county clerk was allowed a fee of one (\$1.00) dollar on each tract of land owned by the delinquent for each year each particular tract was delinquent as compensation for the performance of four specified several services.

Further, as indicated above, the Act of 1915 practically obviated the performance of the third of the services for which the fee was allowed, to-wit: for transcribing in duplicate the records prepared by the collector of taxes. We think, however, that after 1915 the county clerk would be entitled to the fee allowed where he had performed the services other than the actual transcription of the records prepared by the collector of taxes.

In 1923, the Second Called Session of the Thirty-eighth Legislature changed the compensation allowable to county clerks for their services in connection with the enforced collection of delinquent taxes on land. Of course, it could not and did not assume to release fees already earned and accrued to the clerk's office, but as to services to be rendered in the future (that is, after August 14, 1923, at

which time the Act became effective), Chapter 13, Acts Second Called Session of the Thirty-eighth Legislature, provided:

"And the county clerk, for making out and recording the data of each delinquent assessment and for certifying same in the minutes of the commissioners' court, *and for all other services rendered in such suits*, shall receive the sum of \$1.00."

The provisions of the amendatory Act of 1923 became a part of Article 7332, Revised Civil Statutes, 1925. Under the amendatory provision, it has been held that the county clerk was entitled to but one (\$1.00) dollar in full for all of the services for which compensation was not otherwise specifically provided, performed by him in reference to the enforced collection of delinquent taxes, irrespective of the number of tracts owned by any one taxpayer upon which taxes were delinquent (*State vs. Slater*, 38 S. W. (2d) 1097), and in our opinion, without reference to the number of years the taxpayer had been delinquent at the time the services were performed.

In view of the nature of the service for which the fee of one (\$1.00) dollar was allowed to the county clerk under the Act of 1923, the fee did not accrue until the taxes were collected with or without suit, and the incumbent of the office at the time the taxes were collected would earn the fee, as the Act evidently contemplated that the county clerk would render such services as he was called upon to render where suit was necessary to the collection of the taxes, such as furnishing copies of his record and other necessary data, etc.

It must further be observed that under said Act, the fee of one (\$1.00) dollar was allowed to the clerk as compensation for all services performed by him in the collection of delinquent taxes; under the statutes he was required to perform a series of acts, the number depending upon the length of time the taxes had been delinquent. If the clerk had done and performed every act required of him by law from the time the taxes first became delinquent until the taxes were collected, we are of the opinion that, under the Act of 1923, he would be entitled to the fee of one (\$1.00) dollar for the services by him performed, although he would have been required to have done other acts in order to have earned the fee had the taxes been longer delinquent. The clerk would not be entitled to the fee allowed under the Act of 1923 unless he had entered upon and begun to perform the acts for which the fee was allowed as compensation; the first act required of him under the statutes was the filing of the annual list of delinquencies; i. e. Form 18. Unless the taxes had become so far delinquent as to have required the preparation and filing of the annual list of delinquencies, the clerk could have performed no act for which he could claim compensation under the Act of 1923.

The provision of the Act of 1923, above discussed, continued in force until August 22, 1931, on which date Chapter 258, Acts Regular Session, Forty-second Legislature, became effective. Under said Chapter 258, the county clerk was allowed a fee of one (\$1.00) dollar "in full for his services in each case"; providing, however, that:

"In case the delinquent taxpayer shall pay to the collector the amount of the delinquent taxes for which he is liable, together with accrued interest after the filing of suit before judgment is taken against him in the case, the only one half of the fees taxable in such a case, as provided for herein, shall be charged against him."

Under the Act of the Regular Session of the Forty-second Legislature, the county clerk is clearly not entitled to the fee allowed thereunder until suit has been filed for the collection of the delinquent taxes; and if after the filing of the suit and before judgment is rendered, the taxpayer pays to the collector of taxes the delinquent taxes and accrued interest, the taxpayer is liable only for one half of the fees provided in said Act for the officers mentioned, and the county clerk in that event is entitled to only one half of the fees stipulated under said Act, although suit has been filed.

The provisions of the Act of 1931 govern the fees allowed to the county clerk on taxes collected since the effective date of the Act. Where, since the effective date of the Act of 1931, a taxpayer voluntarily paid the taxes which became delinquent after 1923, the county clerk would not be entitled to a fee unless suit had been filed to collect the taxes, although had the taxpayer paid the taxes prior to 1931, the county clerk would have been entitled to a fee of one (\$1.00) dollar.

A summary of the conclusions stated here in reference to the fees allowed to county clerks may be stated as follows:

(a) From August 20, 1897, to August 14, 1923, the county clerk was allowed a fee of one (\$1.00) dollar on each tract of land upon which taxes were delinquent (two or more unimproved city or town lots located in the same municipality and belonging to the same taxpayer considered as one tract) for each year each particular tract was delinquent, as compensation for his services for the performance of the following duties:

1. For certifying the record of delinquencies from 1885, which the tax collector had prepared, to the Commissioners' Court for correction.
2. For noting in the minutes of the Commissioners' Court the corrections made in said record.
3. For recording the record as corrected in the book required to be kept by him, to-wit, one to be labeled the "Delinquent Tax Record of ----- County," and
4. For making out and sending to the Comptroller of Public Accounts a correct copy of the delinquent tax record.

(b) From July 20, 1915, to August 14, 1923, the county clerk, for his services in connection with the supplements to the delinquent tax record, was allowed the same fee as if the supplement had been a part of the delinquent tax record proper.

(c) From August 14, 1923, to August 22, 1931, the county clerk was allowed a fee of one (\$1.00) dollar in full for all of the services by him performed in connection with the collection of delinquent taxes on land; said fee, however, did not depend upon the filing of suit to collect the taxes, and the fee was earned by the clerk where he had performed the duties required of him from the time the taxes became delinquent until the same were collected. Under the Act of 1923, the fee did not accrue until the collection of the taxes,



and the incumbent of the office at the time the taxes were collected would earn the fee allowed under said Act.

(d) From August 22, 1932, to the present time, the county clerk has been allowed a fee of one (\$1.00) dollar in full for his services in each case where suit has been filed for the collection of the taxes and has been prosecuted to final judgment; if, however, after suit has been filed, the delinquent taxpayer pays the delinquent taxes, penalties, and interest, the county clerk is entitled to but fifty cents in full for his services. Since August 22, 1931, the county clerk has not been entitled to a fee in connection with the collection of delinquent taxes unless suit has been filed for the collection thereof.

FEES OF COUNTY CLERK FOR PERFORMING THE SERVICES HEREIN  
DISCUSSED WITH REFERENCE TO THE COLLECTION OF DELINQUENT  
TAXES AS AFFECTED BY THE MAXIMUM FEE BILL AND  
THE AMENDMENTS THERETO.

Chapter 103, Acts Regular Session of the Twenty-fifth Legislature, in 1897, provided a one (\$1.00) dollar fee for the county clerk for the performance of the duties placed upon him by the provisions of that Act. The first Maximum Fee Bill was passed as Chapter 5, Acts First Called Session of the Twenty-fifth Legislature, in 1897, and became effective December 1, 1897. Since Chapter 103, supra, was enacted and became effective prior to the enactment and effective date of the Maximum Fee Bill, and since the one (\$1.00) dollar fee to county clerks was not referred to in the latter Act as being an unaccountable fee, we take it that there is no question but that such fee was accountable, and remained so until the enactment of Chapter 21, Acts Third Called Session of the Thirty-eighth Legislature, which became effective August 14, 1923, and was carried forward into the 1925 Revised Civil Statutes as Article 7332. This Act, with reference to the accountability of the one (\$1.00) dollar fee allowed county clerks, provided as follows:

"All fees provided for the officers herein mentioned shall be in addition to the fees allowed by law to such officers, and shall not be accounted for by said officers as fees of office."

Thereafter, the fee remained unaccountable until the enactment of Chapter 20, Acts Fourth Called Session of the Forty-first Legislature, which became effective January 1, 1931, from which date to the present time such fees have been accountable under the Maximum Fee Bill as fees of office.

Otherwise than as above mentioned, the discussion of the effect of the Maximum Fee Bill as it has been heretofore discussed with reference to the fees of the tax collector would be applicable also to the county clerk, to which discussion we make reference in order to avoid the necessity of repetition and the prolonging of this opinion unnecessarily.

All opinions of this department expressing conclusions inconsistent with those expressed herein are hereby, in all things, overruled insofar as such inconsistency exists. Yours very truly,

HOMER C. DEWOLFE,  
Assistant Attorney General.  
GAYNOR KENDALL,  
Assistant Attorney General.

## Op. No. 2916

ATTORNEY GENERAL, DUTIES—RAILROAD COMMISSION, DUTIES—PRORATION—CONSTITUTIONAL LAW—ACREAGE—MARGINAL WELL LAW—ACTS 1931, P. 92, CH. 58, ART. 6049b, R. S.—REASONABLENESS OF CLASSIFICATION.

1. The Attorney General's Department cannot decide disputed issues of fact or determine the policy or wisdom of official acts of other departments.

2. It is the duty of the Railroad Commission to make findings from the evidence for itself and determine policies to be followed and the character of orders to be promulgated.

3. Conservation statutes enjoin upon Railroad Commission duty of allocating allowable production upon a reasonable basis; the particular method of allocation is to be determined upon facts adduced at hearings but whether method is in fact arbitrarily unreasonable is legal question.

4. So-called "proration" of oil production under conservation statutes is only constitutional when constitutionally administered.

5. When public necessity and individual property rights are fairly weighed and public necessity requires, in order to prevent waste, that restrictions be placed upon production, such restrictions are valid if fairly applied without discrimination, and if applied only to the extent that public necessity requires.

6. Method of allocation of production under conservation statutes is primarily question of fact.

7. "Acreage" upon which wells are situated is not necessarily an indispensable factor in writing a valid "proration" order, although it might be considered along with other elements if Commission should determine from evidence before it that same ought to be taken into consideration in order to fairly allocate production.

8. Under so-called "marginal well law" (Acts 1931, p. 92, Ch. 58, now Art. 6049b, R. S.) pumping wells from horizon in East Texas oil field may not be curtailed by Railroad Commission to daily allowable of less than 40 barrels.

9. A classification made by Legislature will be upheld unless it clearly appears that such classification is without sufficient basis to reasonably justify it.

10. It is extremely doubtful whether fact that pumping wells require additional expense for equipment and that cost of operating pumping well is considerably greater than that necessary to operate flowing well, and that other differences may exist which are not within knowledge of Attorney General's Department, constitutes such a distinction between pumping and flowing wells as will justify holding that such classification is reasonable.

11. In view of doubt as to whether classification made by Legislature as to "marginal wells" is reasonable, Attorney General's Department is apprehensive that any order of Railroad Commission attempting to curtail production of flowing wells in East Texas field below figure fixed for pumping wells will be held invalid.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, April 1, 1933.

*Railroad Commission, Austin, Texas.*

GENTLEMEN: We are in receipt of your letter of recent date reading as follows:

"A careful review and study of the opinion in the Peoples Petroleum case No. 386, in connection with the Champlin case and the reference to it in the latest opinion of the court leads us to believe that we must issue

an order for the East Texas Oil Field based upon potential production of the wells alone.

"1. Will you please give us your opinion as to the validity of an order for that field based upon potential.

"2. Is it necessary in view of the marginal well statute to have the order provide that no well shall be restricted to a daily allowable less than 40 barrels allowed to marginal wells?

"3. Is it necessary that we include acreage in order to have a valid order?"

At the very outset, we desire that it be clearly understood that our answer to your inquiries will be strictly confined to the law points involved. The Attorney General's Department cannot decide disputed questions of fact or determine the policy or wisdom of official acts of other departments of the State government.

In the administration of the conservation laws of this State it is the duty of the Railroad Commission to make its findings from evidence before it and to determine from that evidence, for itself, the policies to be followed and the character of orders to be promulgated. You have not heretofore requested us to determine question of policy or fact for the Commission, and, even if you did, it would be improper for us to do so as it would constitute a clear invasion by one department of the government upon the duties and prerogatives of another. We make this statement in view of the fact that in certain quarters of the oil industry the impression has been sought to be created that the Attorney General's Department had the power, or should be called upon, to substitute its judgment for that of the Railroad Commission elected by the people to perform those duties. We are very happy to consult with and advise the Commission at all times as to the legal aspects of any proposed order affecting their official duties, and shall endeavor to advise you as to the law to the best of our ability that you may, if possible, shart your official course accordingly.

The statutes of Texas which delegate to the Railroad Commission the power to restrict the production of oil in the oil fields of the State for the purpose of preventing or lessening waste also enjoin upon the Commission the duty of allocating the allowable production upon a reasonable basis among the various operators in a given pool or field. The particular method of allocation is a matter to be determined by the Commission upon the facts adduced at its hearings, but the question as to whether the method is in fact so unreasonable as to amount to an arbitrary denial to each property owner of the rights to which he is entitled is, in its final analysis, a matter for determination by the courts.

Your letter apparently assumes that it is possible and practicable to arrive at the various potentials of the wells located in the East Texas oil field upon a basis of relative accuracy as between wells, and our answer to this portion of your inquiry is based upon the assumption that, from a standpoint of field practice, you will be able to do this. By "potential", we assume that you mean the amount of oil which a given well in the East Texas field would be able to produce from an open-flow test as compared with the amount that another well, in the same field can produce over the same period under the same or similar conditions.

You understand, of course, that the matter of allocating the amount of oil to be produced from each well in a field does not arise until the Commission has first determined the fact issue of the aggregate maximum production of oil which public necessity justifies; or to put it another way, the percentage of restriction which, when weighed in the balance against individual property rights, public necessity requires. Certainly no order is valid, however, which does not, upon some reasonable basis, substantially give to each operator the same proportion of production to which he would be entitled if there were no proration. In other words, proration is constitutional only when it is constitutionally administered; and in our opinion no order will be upheld which, in its practical operation, will necessarily result in taking oil from those who are most favorably situated on the structure and allowing it to be produced through the wells of others less favorably situated.

For the purpose of identification, we have numbered your questions consecutively. In considering questions numbered 1 and 3, we have made an effort to keep in mind what we conceive to be the distinction between "potential" and "elements of potential". These two questions will be considered together, and, although Rule 37, insofar as it restricts the drilling of wells on tracts containing less than a minimum number of acres, is not mentioned in your inquiry, we deem it necessary, in view of our conclusions as to the proper answers to questions 1 and 3, to consider and discuss this rule.

"Potential," as we understand the term, as applied to an oil well or a particular tract of land on which an oil well has been drilled, means the number of barrels of oil which can be daily extracted from the particular tract of land on which an oil well has been drilled, means the number of barrels of oil which can be daily extracted from the particular tract of land through the particular well located thereon. If and when public necessity and individual property rights are fairly weighed, and the balance of public necessity requires, in order to prevent waste of natural resources (in which, to a certain extent, the public as a whole has an interest), or for any other justifiable purpose, that restrictions be placed upon the right to extract such natural resources (in this instance the underlying petroleum) as rapidly and in such manner as the owner thereof might desire, then such restrictions are valid, if fairly applied without discrimination, and if applied only to the extent that public necessity and convenience requires.

The question of whether or not a particular method of allocation accomplishes the above mentioned permissible result is, primarily, one of fact, and can possibly best be determined by consulting Petroleum Engineers and Geologists. However, according to information which we have, surface acreage is not an indispensable factor to be considered in writing a valid order, although it might be considered along with sand thickness, bottom-hole pressure, permeability and porosity of the oil sand, if the Commission should determine that such factors ought to be taken into consideration in order to fairly allocate production.

In the recent attack made by Rowan and Nichols upon the Commission's order of January 2, 1933, it was contended, among other

things, that the Commission should have taken acreage into consideration. In defense of the Commission's order, this department asserted that, in legal effect, the contention of Rowan and Nichols was really an attack upon Rule 37, as applied to the East Texas field, which limited the drilling of wells, with certain exceptions, to one well for each ten acres; and that, since the Commission had not included acreage in its orders, it might be that, in a *direct attack* upon Rule 37, as applied to the East Texas oil field, such rule would fall and Rowan and Nichols, and all others similarly situated, could secure the benefit of the acreage element by the drilling of additional wells; that the drilling of such wells to prevent drainage and secure the maximum production would have been their common law remedy, and was still their remedy even under proration.

We are of the same opinion at this time; and if the Commission, in its proposed order, sees fit not to include acreage, as such, in determining allocation of production, it may result in the striking down of Rule 37 as applied to the East Texas field.

From what has been said, you will observe that it is our opinion that if the facts justify it, a valid restrictive order for the East Texas field, based on potential, can be written, and that the inclusion of acreage, except as one of the elements (if it is) of allocation, is not necessary. This disposes of questions 1 and 3.

By question number 2 you inquire whether or not it is necessary, in view of the marginal well statute, to have the order provide that no well shall be restricted to a daily allowable of less than forty barrels. This presents a very interesting question and one which is now before the Federal Court for decision. Rowan and Nichols, in their previous suit, raised this question and we presume they also raise it in their new suit which they have filed since the recent opinion by the three-judge Federal Court. The question has likewise been raised by L. B. Hudson, Receiver of the Ajo Oil Company, in a suit against the Commission now pending in the District Court of Dallas County, styled H. A. McCommas vs. W. G. McCommas et al.

Under the marginal well law (Acts, 1931, 42nd Leg., p. 92, Ch. 58—Now Art. 6049b, R. S.), pumping wells which produce from the horizon which exists in the East Texas field may not be curtailed by a proration order of the Railroad Commission to a daily allowable of less than forty barrels, although they may be curtailed to that figure to prevent waste. Pumping wells, of course, are, in their inception, put to the additional expense of being equipped to pump, which, we understand, involves an expenditure of several thousand dollars. We understand also that the life of such wells in the East Texas field will be of shorter duration than that of the flowing wells, and that the expense of operating a pumping well is considerably greater than that necessary to operate a flowing well. There may be other differences which might justify a classification in favor of the pumping wells which are not within the knowledge of this department. Since that matter is now presented in court for decision, it would not be proper for us to undertake to decide same as an absolute legal proposition. We will say that it is not a question, however, which is free from doubt in any event.

There are, as we understand it, some four hundred wells in the East Texas field which are covered by the marginal well statute and which are allowed to produce forty barrels of oil per day. It is extremely doubtful that there are sufficient elements of difference in the production of oil from the pumping wells to justify an order which grants to such wells a greater amount of oil per day than is accorded to the flowing wells. Any order, therefore, which curtailed the production of the flowing wells in the East Texas field to a point below that of the marginal pumping wells must run the gauntlet of an attack based upon a claim that an unwarranted and arbitrary classification has been made which denies to the owners of flowing wells equal protection of the law.

A classification made by the Legislature will be upheld unless it clearly appears that such classification is without sufficient basis to reasonably justify it, and that, lacking justification, is arbitrary. We are not in possession of sufficient facts at this time to determine whether or not there exists sufficient distinctions between flowing and pumping wells to warrant the classification so made. We are apprehensive that sufficient distinction does not exist, and that any order attempting to curtail production of flowing wells in the East Texas Field below the figure which the Commission is authorized to fix for pumping wells in this field will be held invalid.

Very truly yours,

NEAL POWERS,  
Assistant Attorney General.

MAURICE CHEEK,  
Assistant Attorney General.

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Op. No. 2919

BOARD OF BARBER EXAMINERS—OFFICERS—TERMS OF OFFICE—CONSTITUTIONAL LAW—STATUTES.

1. Under present Constitutional limitations upon the power of the Legislature to fix terms of public offices, the Legislature is without power to create three-year terms of office, except in offices of the public school system.
2. Section 30 of Article 16 of the Constitution, is general limitation upon the legislative power to fix the terms of public offices, to which Section 30a of Article 16 and Section 16 of Article 7 are exceptions.
3. In the interpretation of Constitutional provisions, the rule of construction *expressio unius est exclusio alterius* is applicable to exceptions to general prohibitions expressed in the Constitution.
4. Where the Legislature attempts to create longer terms of office than it has the power to create, the effect of its action is to create a two-year term of office.
5. Members of the Board of Barber Examiners hold office for a term of two years, notwithstanding the fact that Sec. 26, Ch. 65, Acts 1st Called Session, 41st Legislature (Art. 734a Penal Code Ver. Ann. Tex. Stats.) provides that the members of said Board shall hold office for a term of three years.

OFFICES OF THE ATTORNEY GENERAL,  
Austin, Texas, May 30, 1933.

*Hon. W. W. Heath, Secretary of State, Capitol.*

DEAR SIR: Your letter of the 6th instant, addressed to Attorney General Allred, has been placed in the hands of the writer for reply. You submit the following inquiries, requesting the advice of this office thereon:

"1. When do the terms of office of L. W. Smith, E. L. Jenkins and T. J. Thompson as members of the Board of Barber Examiners of Texas expire?

"2. Is Section 26 of Article 734a of the Penal Code of Texas, which section creates the Board of Barber Examiners of Texas, void in whole or in part because of the terms of office of the board members being fixed at three years, and consequently in violation of Article 16, Section 30 and 30a of the Constitution of Texas?

"3. If in answer to question 2, you determine that Section 26 of Article 734a of our Penal Code is unconstitutional and void, then please answer: By reason thereof, is all of Article 734a of our Penal Code unconstitutional and void?"

In replying to the above, the second and third questions will be answered before considering the first. You refer in your second question to Section 26 of Article 734a of the Penal Code, Vernon's Annotated Texas Statutes (Sec. 26 of Ch. 65, Acts 1st C. S., 41st Leg.); that section reads as follows:

"Sec. 26. That a Board to be known as the State Board of Barber Examiners is hereby created and shall consist of three members to be appointed by the Governor upon the taking effect of this Act. Each member of said Board shall be a practical barber who has followed the occupation of a barber of this State for at least five years immediately prior to his appointment. The members of the first Board appointed under this Act shall serve for three years, two years and one year, respectively, as appointed, and members appointed thereafter shall serve for three years. The Governor may remove any member of the Board for cause. All members appointed by the Governor to fill vacancies in the Board caused by death, resignation or removal shall serve during the unexpired term of his predecessor."

In determining questions concerning the validity of statutory provisions, it must be remembered that the Legislature has, under our theory of government, power to enact any law where the power to do so is not denied to it by either the Federal or by the State Constitution. Ex parte Hart, 56 S. W. 341 (Ct. Cr. App. Tex.); Dallas County Levee Improvement Dist. No. 6 vs. Rugel, 20 S. W. (2d) 148, 152 (Dallas Ct. Civ. App.); Whittenberg vs. Craven, (Tex. Comm. App.) 258 S. W. 152, 156; 9 Texas Juris., p. 436, Sec. 25, and p. 444, Sec. 30. The Legislature would therefore have the power, not only to create the Board of Barber Examiners, but to fix the term of office of members of the Board at any period of time, unless the power to do so is limited or denied by the Constitution of this State. Turning, then, to the Constitution, we find the following limitations, upon the proper interpretation of which the answer to your second question depends:

"The duration of all offices not fixed by this Constitution shall never exceed two years; provided, that when a Railroad Commission is created by

law it shall be composed of three Commissioners who shall be elected by the people at a general election for State officers, and their terms of office shall be six years; provided, Railroad Commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years, and one four years, and one six years; their terms to be decided by lot immediately after they shall have qualified. And one Railroad Commissioner shall be elected every two years thereafter. In case of vacancy in said office the Governor of the State shall fill said vacancy by appointment until the next general election." (Article 16, Sec. 30, as amended 1894.)

"The Legislature may provide by law that the members of the Board of Regents of the State University and boards 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 office for the term of six (6) years, one-third of the members of such boards to be elected or appointed every two (2) 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." (Article 16, Sec. 30a, adopted, 1912.)

"The Legislature shall fix by law the terms of all offices of the public school system and of the State institutions of higher education, inclusive, and the terms of members of the respective boards, not to exceed six years." (Article 7, Sec. 16, adopted 1928.)

Your question makes it our problem to determine whether the Constitutional provisions above set out prohibit the Legislature from prescribing three-year terms of office for members of the Board of Barber Examiners—to determine, in that regard, the intention of the framers of the Constitution and of the people who adopted it, and to give effect to that intention. In interpreting the meaning of constitutional provisions, different sections, amendments and provisions of the instrument which relate to the same subject-matter must be construed together and considered in the light of each other. *Collingsworth County vs. Allred*, 120 Tex. 473, 40 S. W. (2d) 13, 15. Further, the meaning of Constitutional provisions must be determined primarily from the language in which they are couched, as must the meaning of any other written instruments be determined; and the words used in framing the provisions must be understood as having been used to express that which in ordinary acceptation they express, unless the context indicates otherwise. *Cox vs. Robinson*, 105 Tex. 426, 150 S. W. 1149; *Ferguson vs. Wilcox*, 119 Tex. 280, 28 S. W. (2d) 526, 530; 9 Texas Juris., p. 429, 430, Sec. 21.

Looking to the language of the provisions of the Constitution under consideration, with an eye single to the determination of the problem before us, it will be observed that, while Section 30 of Article 16 provides that the duration of all offices not fixed by the Constitution shall never exceed two years, and while Section 16 of Article 7 provides that the Legislature may fix the terms of office of the public school system and of state institutions of higher learning and of members of other school boards at any term "not to exceed six years." Section 30a of Article 16 declares that "the Legislature may provide by law that the members" of State boards "may hold their respective offices for the term of six (6) years."

The difference in the language of the constitutional provisions under consideration is obvious; evidently, some difference in substance and meaning was intended to be expressed thereby. It must



also be observed that Section 30 of Article 16 purports by its terms to limit the duration of *all* offices not fixed by the constitution, whereas the other provisions pertain to certain classes of offices, to-wit, to state boards and to offices of the school system. Another factor which we deem worthy of consideration is that Section 30 of Article 16 of the Constitution was part of that instrument long before either of the others above quoted. In view of that fact, and in view of the general nature of its provisions, we cannot escape the conclusion that Section 30 is the general limitation upon the legislative power to fix terms of office, to which Section 30a of Article 16 and Section 16 of Article 7 are exceptions. In other words, we think that the Constitution denies to the Legislature the power to create terms of office of more than two years, except in two instances wherein it specifies what the Legislature *may* do: that it prohibits the Legislature from creating terms of office of more than two years, except (1) in offices of the school system, wherein the Legislature may prescribe terms of office of not more than six years, and (2) in state boards, wherein it may provide that members of such boards may hold office for a term of six years. While the rule of construction *expressio unius est exclusio alterius* cannot be applied in construing constitutional provisions so as to shut out the elementary rule above stated, to the effect that the Legislature may enact any law where the power to do so is not denied to it by express provisions of the Constitution or by necessary implication arising from express provisions of that instrument (*City of Denison vs. Municipal Gas Co.*, 257 S. W. 616; affirmed, 3 S. W. (2d) 794, we think the rule peculiarly applicable to exceptions to general constitutional limitations, and hence to the provision that the Legislature may provide that members of state boards shall hold office "for the term of six years." Excepting offices of the school system, and viewing the language of the constitutional provisions above quoted in the light of the rules of construction discussed, we can express our opinion in no better language than that used by Justice Greenwood of the Supreme Court of Texas in the case of *Cowell vs. Ayres*, 110 Tex. 348, 220 S. W. 764, 766; we borrow his language to say that:

"We cannot ascribe to Section 30a any other meaning than as placing it within the power of the Legislature to fix terms, at its discretion, for the offices specified, of either six years or of any time not to exceed two years."

In consequence of the above language of the Supreme Court and of the language of the Constitution as we read it, we are constrained to advise you that in our opinion the Legislature was without power to fix the terms of office of the members of the Board of Barber Examiners at three years.

Your third question makes it requisite that we next consider whether the twenty-sixth section of the Texas Barber Law is in any way effective, if we are correct in our proposition that the three year terms therein provided for contravene the constitutional provisions discussed. Of course, it was clearly within the power of the Legislature to create the Board, and no question is raised as to its power to do so; likewise, we think it was clearly within the power of the

Legislature to provide that of the three members of the first Board, one should serve for a term of one year and that one should serve for a term of two years. However, the act further provides that the third member of the first Board and all subsequent appointees shall serve for a term of three years; this provision is, in our opinion, in excess of the power of the Legislature. The three-year terms provided were longer than the Legislature could, under Section 30 of Article 16 of the Constitution, create, and it failed to bring its action within the permissive power allowed it under Section 30a of Article 16. Under the decision of the courts of this State, we think that the effect of the Legislature's enactment was to create two-year terms of office instead of three-year terms. *San Antonio Independent School Dist. vs. State*, 173 S. W. 525 (*San Antonio Court of Civ. App. Error Refused*); see also, *Royston vs. Griffin*, 42 Tex. 566; *Proctor vs. Blackburn*, 67 S. W. 548; *City of Houston vs. Estes*, 79 S. W. 848, (*Error Refused*). In the case of *San Antonio Independent School Dist. vs. State*, supra, the Legislature had provided that members of the various boards of school trustees of the State should serve for the term of six years, one-third of the members of each board to be elected every two years. The case arose before the Constitution was amended by the addition of Section 16 to Article 7. It was held that Section 30a of Article 16, supra, applied only to state boards, and not to local boards such as boards of school trustees, and that the statutory provision that members of boards of school trustees should hold office for six years was invalid; but, it was further held, that the effect of the enactment was to create two-year terms for members of such boards.

In others of the cases cited, the provisions under consideration declared that certain officers should hold office "during good behavior"; and in each case, the court read into the provision the further condition "not to exceed two years." The trend of the decisions, therefore, is to the proposition that an act which attempts to create a term of office longer in duration than is permitted under the Constitution, the effect of the act is to create a term of office of two years. It is our opinion, therefore, that those provisions of section twenty-six of the Texas Barber Law attempting to create three-year terms of office for members of said board have the effect of creating two-year terms.

You are respectfully advised that the twenty-sixth section of the act under consideration was not wholly void. As above stated, the Legislature by the provisions of said section created the Barber Board, as it undoubtedly had the power to do; the provision that of the three members of the first board, one should serve one year was within power of the Legislature and had the effect it was intended that it should have; the other provisions with reference to the terms of office, had the effect of creating two-year terms. In view of our conclusion that section twenty-six of the act in question was not void and of no effect, but was effective as above stated, it is our further opinion that the remainder of the act is unaffected by the attempt on the part of the Legislature to create three-year terms of office for the members of the Board of Barber Examiners.

We come now to a consideration of your first question, to-wit, when the terms of the present members of the Board of Barber Examiners expire.

An examination of the act creating the Board of Barber Examiners discloses that the Legislature did not fix the date of the beginning or ending of the terms created, but merely fixed the length of the term of office. (See Sec. 26, Ch. 65, Acts 1st C. S., 41st Leg. above quoted.) It has long been the advice of this office that where the Legislature fixes the length of a term of office, but does not prescribe the date of the beginning or the ending of the term, the beginning of the term dates from the date of the first appointment. See Departmental Opinion No. 2572, Opinions of the Attorney General of Texas; see also, *Royston vs. Griffin*, supra. In answering your first question, therefore, it is requisite that we observe the dates of the first appointments as well as of the subsequent appointments to the Board of Barber Examiners.

The records of your office disclose that the following appointments have been made to the Board of Barber Examiners:

On October 14, 1929, Governor Moody appointed C. J. Adams for a term of one year; Joe Chestnut for a term of two years; and R. W. Johnson for a stipulated term of three years. Mr. Adams served his one year term and was succeeded by Mr. E. R. Smith, who was appointed for a term of three years. Mr. Chestnut resigned and was succeeded for the unexpired portion of his two year term by Mr. J. B. Robinson; Mr. Robinson was succeeded at the end of the term for which he was appointed by Mr. E. T. Jenkins, who was appointed to serve for the specified statutory term of three years. The third member of the first Board, Mr. Johnson, who had been appointed for a term of three years, served for three years from October 14, 1929 and until December 22, 1932, when he was succeeded by Mr. T. J. Thompson, who was appointed to serve for three years.

Tracing the terms of the various members of the Board, and applying the conclusions reached in this opinion to the facts taken from the records of your office thereto, it is our opinion and you are advised that:

(1) The term of Mr. C. J. Adams began on October 14, 1929, and expired on October 14, 1930, and the term of Mr. E. R. Smith, his successor, began on the latter date. The term of Mr. Smith, in our opinion, expired two years from the date his term began, to-wit, on the 14th day of October, 1932. Since that time Mr. Smith has been holding office by virtue of the Constitutional provision that officers shall hold their offices until their successors are elected and qualify.

(2) The term of Mr. Chestnut began on October 14, 1929; he was succeeded on October 29, 1930 by Mr. J. B. Robinson for the unexpired portion of his term of two years. Mr. Robinson's term therefore expired on October 14, 1931, and the term of his successor, Mr. E. T. Jenkins, began on that date. In view of our opinion that members of the Board of Barber Examiners hold office for a term of two years, it is further our opinion that Mr. Jenkins' term will expire on October 14, 1933.

(3) The term of Mr. R. W. Johnson began on the 14th day of October, 1929. In our opinion, his term expired two years from the date of his appointment, to-wit, on the 14th day of October, 1931. From the latter date until December 22, 1932, Mr. Johnson held over until his successor, Mr. Thompson, had been selected and had qualified. However, the term of Mr. Thompson must, in our opinion, date from the 14th of October, 1931, and will expire, if we are correct in our premise that members of the Board hold office for only two years, on October 14th, 1933.

You are, therefore, respectfully advised that, in our opinion, the expiration dates of the terms of the present members of the Board of Barber Examiners are as follows:

1. Mr. E. R. Smith.....October 14, 1932
2. Mr. E. T. Jenkins.....October 14, 1933
3. Mr. T. J. Thompson.....October 14, 1933

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

Op. No. 2907.

CONSTITUTIONAL LAW—DISTRICT ATTORNEYS—COUNTY OFFICERS.

1. The Legislature may provide that tax collectors, district clerks, tax assessors, county auditors, county surveyors, justices of the peace, constables and public weighers shall receive a salary as compensation for their respective services in lieu of fees, commissions, or other mode of remuneration.

2. The Constitution having provided that sheriffs, county judges and county clerks shall be compensated by "fees and perquisites," and county attorneys by "fees, commissions and perquisites," the Legislature may not provide another mode of compensation for said officers, hence these officers cannot be paid salaries.

3. The Constitution fixes the salary of district attorneys at five hundred dollars per annum, and authorizes the Legislature to supplement the same by "fees, commissions and perquisites." The Legislature may not increase or decrease the *salary* of five hundred dollars allowed to district attorneys by the Constitution. If it wishes to grant district attorneys a greater compensation than the five hundred dollar *salary* allowed by the Constitution, it may do so *only* by allowing them "fees, commissions and perquisites."

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 30, 1933.

*Senate Investigating Committee, Capitol Station, Austin, Texas.*

GENTLEMEN: Honorable George C. Purl, a member of your committee, recently addressed to the Attorney General a letter in behalf of the committee, reading as follows:

"Will you kindly advise this Committee whether or not the Legislature, if it saw fit, could place the following officers on a salary basis in lieu of all fees:

- |                         |                     |
|-------------------------|---------------------|
| 1. Sheriff              | 7. Constable        |
| 2. Tax Collector        | 8. County Attorney  |
| 3. District Clerk       | 9. Tax Assessor     |
| 4. District Attorney    | 10. County Judge    |
| 5. County Clerk         | 11. County Auditor. |
| 6. Justice of the Peace |                     |

"The wisdom or policy of placing such other officers as public weigher, county surveyor, etc., probably is not pertinent at this time, but in order to include them all while we are on this subject we might as well ask the same question pertaining to them.

"In the event some of the above officers' remuneration is authorized by the Constitution, will you please list those particular officers who do not come under the Constitution and who could be placed on a salary basis without a Constitutional Amendment."

In reply you are advised that there are no constitutional objections to the Legislature providing for the compensation of district clerks, justice of the peace, tax assessor, tax collectors, constables, county auditors, public weighers, and county surveyors by salaries. All of these officers are creatures of the Constitution, except county auditors and public weighers. The Constitution is silent as to the manner of compensating them.

The pertinent constitutional provisions relating to sheriffs, county judges, county clerks, county and district attorneys respectively are as follows:

*Sheriffs:*

Section 23, Article 5, provides for the election of a sheriff in each county by the qualified voters thereof, fixes the term of his office at two years, and further provides:

"\* \* \* whose duties and perquisites and fees of office shall be prescribed by the Legislature."

*County Judges:*

Section 15, Article 5, establishes a county court in each county of this State, provides for the election of a county judge, fixes his term of office, and provides for his compensation in this language:

"He shall receive for his compensation for his services such fees and perquisites as may be prescribed by law."

*County Clerks:*

Section 20, Article 5, provides for the election of a county clerk, fixes his term of office, declares he shall be the clerk of the county and commissioners courts, and the recorder of the county, and provides for his compensation, and other duties as follows:

"\* \* \* whose duties, perquisites and fees of office shall be prescribed by the Legislature."

*County and District Attorneys:*

Section 21, Article 5, reads:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of two years. In case of vacancy the commissioners' court of the county shall have power to appoint a county attorney until the next general election. The county attorneys shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys

shall in such counties be regulated by the Legislature. The Legislature may provide for the election of district attorneys in such districts, as may be deemed necessary, and make provisions for the compensation of district attorneys, and county attorneys; provided, district attorneys shall receive an annual salary of five hundred dollars, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and as may be prescribed by law."

It will be noted that in the above section, the only reference made to a criminal district attorney is in the first paragraph of said section, wherein it is provided that:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor and hold his office for the term of two years."

There is no other mention made in the Constitution of a criminal district attorney. The distinction, if any, between the office of district attorney and the office of criminal district attorney is not clear to me. The Constitution specifically provides for the creation of the former and perhaps by implication authorizes the latter, but apparently the officers are, in effect, the same. In so far as I have been able to ascertain, there has been no discussion of the subject by any of the appellate courts of this State. The office of county attorney was created by the Constitution of 1876. It did not exist prior thereto.

The pertinent provisions of the Constitution of the Republic of Texas, and the former Constitutions of this State, relating to district attorneys, are as follows:

#### CONSTITUTION OF THE REPUBLIC OF TEXAS:

##### *Section 5, Article 4:*

"There shall be a District Attorney appointed for each district, whose duties, salaries, perquisites and term of service shall be fixed by law."

#### CONSTITUTION OF THE STATE OF TEXAS, 1845:

##### *Section 12, Article 4:*

"The Governor shall nominate and by and with the advice and consent of two-thirds of the Senate appoint an Attorney General, who shall hold his office for two years, and there shall be elected by joint vote of both Houses of the Legislature, a District Attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the Attorney General and District Attorneys, shall be prescribed by law."

#### CONSTITUTION OF THE STATE OF TEXAS, 1861:

##### *Section 12, Article 4:*

"The Governor shall nominate and by and with the advice and consent of two-thirds of the Senate appoint an Attorney General, who shall hold his office for two years, and there shall be elected by joint vote of both Houses of the Legislature, a District Attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the Attorney General and District Attorneys, shall be prescribed by law."

#### CONSTITUTION OF THE STATE OF TEXAS, 1866:

##### *Section 14, Article 4:*

"There shall be a District Attorney for each Judicial District in the State, elected by the qualified electors of the District, who shall reside in the District for which he shall be elected; shall hold his office for four years;

and, together with the perquisites prescribed by law, shall receive an annual salary of one thousand dollars, which shall not be increased or diminished during his term of office."

CONSTITUTION OF THE STATE OF TEXAS, 1869:

*Section 12, Article 5:*

"There shall be a District Attorney elected by the qualified voters of each Judicial District, who shall hold his office for four years; and the duties, salaries, and perquisites of District Attorneys shall be prescribed by law."

It will be noted that under the Constitution of the Republic and the State Constitutions of 1845 and 1861, district attorneys received such salaries and perquisites as were prescribed by law. The Constitution of 1866 fixed the salary of these officers at one thousand dollars per annum, and such perquisites as prescribed by law while the Constitution of 1869 provided that "the duties, salaries and perquisites of district attorneys shall be prescribed by law." Prior to the adoption of the Constitution of 1876, there never had been any constitutional provision providing for the payment of fees to district attorneys.

The present Constitution has provided for the compensation of county judges, county clerks, and sheriffs by prescribing that the same shall be "fees and perquisites," "perquisites and fees," and "perquisites and fees," respectively, as may be fixed by the Legislature. It provides a district attorney "shall receive an annual salary of \$500.00, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law."

Sheriffs, county judges, county clerks, and county attorneys have always been paid for services rendered by fees and ex-officio allowances. No constitutional or statutory provision has ever specifically provided that any of these officers should be paid a salary.

The law books are full of definitions of the terms "fees," "commissions," "perquisites" and "salaries." I shall not attempt to distinguish all of these terms, but they are clearly distinguishable. I will draw a distinction between the words "salary" and "fees." These words have their ordinary signification, the distinction being that a salary is fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods payable at the time the services are rendered. *Cochise County vs. Wilcox* (Ariz.) 127 Pac. 758, 759. "Salary" is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered. *State vs. Blank*, (Kan.) 136 Pac. 947; *Lobano vs. Police Jury of Parish of Plaquemines*, 90 So. 423, 425, 150 La. 14, and the numerous authorities found in *Words & Phrases*, First Series, Vol. 7, page 6287, et seq., as well as in subsequent series of this publication; *Corpus Juris*, Vol. 54, 1120 et seq.; 25 *Corpus Juris*, 1010.

Lexicographers and some authorities class "salary" and "wages" as synonymous, but the terms "salary" and "fees" are not held synonymous, since fees indicate compensation or recompense for particular acts or services. *Landis vs. Lincoln County*, (Or.) 50 Pac. 530.

In the Lobano case the court, after discussing the distinction to be made between the terms "fees" and "salaries" said: "While the terms may be more or less synonymous in many connections, they are not so as ordinarily used in connection with the compensation of an office. 34 CYC 462."

The Constitution of Alabama contains a section reading as follows:

"The salary, fees or compensation of any officer holding any civil office of profit under this state, or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Supreme Court of Alabama has held that the term "salary," as used in the above quoted section of the Constitution of that state, as applied to the compensation of a public officer for services rendered, does not denote the same class of compensation as indicated by the expressions "fees," "commissions," and "percentages." *Osborn vs. Henry*, 76 So. 119, 121, 200 Ala. 353, and the authorities there cited.

Section 22, Article 4, of our Constitution prescribes the compensation of the Attorney General in this language:

"He shall receive for his services an *annual salary* of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually."

Here, as in Section 21, Article 5, a clear distinction is drawn between the terms "salary" and "fees."

Words used in the Constitution and statutes should be given the meaning intended by the framers of the former and the Legislature that enacted the latter. This meaning may be ascertained from the language used in connection therewith. The framers of our Constitution evidently drew a distinction between the word "salary" and the words "fees, commissions and perquisites," as used in Section 21, Article 5. Our Constitution was ratified on the third Tuesday in February, 1876; declared adopted by proclamation of the Governor March 4, 1876, and became effective April 18, 1876. Shortly thereafter, the Legislature convened and passed appropriate legislation, providing for the collection of certain fees and commissions as compensation for the performance of certain duties by sheriffs, county judges, county clerks, county and district attorneys, respectively. These statutes, with amendments, are still in force, except as applied to some district attorneys. District Attorneys have been allowed the annual salary of five hundred dollars authorized by the Constitution in addition to fees, commissions and perquisites. No statute has ever been enacted since the adoption of our present constitution, providing for the compensation of sheriffs, county judges, county clerks, and county attorneys by salary. Therefore, the courts of this State have never passed upon the question of whether the Legislature has the authority to provide that these officers may be compensated exclusively by salaries. The question was raised in the case of *Lewis, County Attorney vs. Terrell, Comptroller*, 273 S. W. 560, but the Commission of Appeals held that the statute there under consideration did not attempt to provide for the payment of the constitutional



salary of five hundred dollars allowed district attorneys to county attorneys performing the duties of district attorneys, and therefore it was not necessary for the court to pass upon the question of the Legislature's authority to make such a provision.

Our Supreme Court in the case of Veltman, County Judge et al vs. Slater et al., 217 S. W. 378, had before it the question of the authority of the Legislature to authorize commissioners courts to allow ex-officio compensation to county attorneys under Article 21, Section 5 of our Constitution. The court held that the statute authorizing such compensation was valid. We think this opinion is correct for the reason that the statutes impose many duties upon county attorneys for which they receive no compensation whatever. These officers must, under the statute, advise all county officers about matters pertaining to their official duties and for this service no specific fees or other compensation is fixed. While the court gave to the word "fees" its broadest definition, and holds that it means "the reward or compensation or wages allowed by law in return for their services," it does not attempt to in anyway pass upon the identical question we now have under consideration.

Our statutes also authorize counties to allow ex-officio compensation to sheriffs, county judges, and county clerks. Each of these officers are required to perform certain duties for the county and for which no specific fee is allowed by law and by reason of the very nature of these services it would be impractical, if not impossible, to provide a specific fee for each service. This compensation is either a fee or a perquisite, it is not a salary.

It is my opinion that the Legislature may not, under the several constitutional provisions hereinabove quoted, provide that sheriffs, county judges, county clerks, district and county attorneys be compensated for their services by salaries. Of course, the Constitution allows a salary of five hundred dollars to district attorneys. The Legislature cannot add to nor take from that provision. It may fix absolutely the salaries of district attorneys at five hundred dollars per annum. It cannot provide for a salary greater or less than that amount. If any additional compensation is allowed a district attorney, it must be in the nature of "fees, commissions and perquisites." I think it is too clear for argument that the framers of our Constitution did make a clear distinction in this section and article of our Constitution between "salary" and "fees." All the constitutional provisions relating to the compensation of the several officers under consideration were framed, adopted and became effective at the same time. They must be considered together and the meaning given to the word "fees" in one section of the Constitution, should not, in the absence of some express provision, evidencing a different intention, be given a different meaning in another section. The language used in the Constitution with reference to the compensation of county attorneys shows clearly that a salary cannot be paid to such officers.

Legislatures have heretofore evidently entertained the same view, for in 1913, 1919 and 1927, amendments to the Constitution were submitted to the people for ratification, which would have the effect of removing all doubt upon the question under consideration.

The pertinent part of the amendment proposed by the Thirty-third Legislature, read:

"All state, district, county and precinct officers within the State of Texas shall hereafter be compensated by the payment of a salary to be fixed and provided for by the Legislature."

The pertinent part of the proposed amendment submitted by the Thirty-sixth Legislature, read:

"Compensation of Public Officials: All State, district, county and precinct officers within this State shall receive as compensation for their services a salary, the amount of which, the terms and methods of payment and the fund out of which such payments shall be made, shall be ascertained, declared and fixed by the Legislature from time to time; provided that the Legislature may make such exceptions as it may deem advisable.

"This section shall supersede all other provisions of this Constitution fixing and declaring the compensation of officers by salary, fees or otherwise and all provisions for salaries or other compensation for public officials, executive, legislative or judicial."

The pertinent part of the proposed amendment submitted to the people by the Fortieth Legislature read:

"The Legislature may provide compensation for said district and county officers, to-wit: District attorney, county judge, county attorney, sheriff, county clerk, district clerk, county tax assessor and county tax collector, by prescribing their duties and fixing salaries in lieu of fees, commissions and other perquisites, as now provided by the Constitution."

The people rejected each of these proposed amendments.

I am herewith enclosing copy of departmental opinion No. 2075, dated May 29, 1919, addressed to the Honorable G. G. Hazel, County Attorney, Eastland, Texas, and signed by E. F. Smith, Assistant Attorney General. This opinion is to the effect that the Legislature is without authority to change the compensation of county attorneys from "fees of office" to a salary or per diem remuneration. In so far as I have been able to ascertain, this opinion has never been overruled by this department.

Very truly yours,

BRUCE W BRYANT,  
First Assistant Attorney General.

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Op. No. 2908.

PUBLIC OFFICERS—UNIVERSITY OF TEXAS REGENTS—DATE OF EXPIRATION OF TERMS OF.

1. Members of the Board of Regents of the University of Texas, where appointed for full terms, hold office for approximately six years from the date of their appointment, and until the regular session of the third Legislature thereafter.

2. Terms of office of three University Regents expire at each regular session of the Legislature, and the incoming Governor has the power and privilege, by and with the advice and consent of the Senate, of appointing their successors.

3. Custom by which incoming Governor appoints Regents having been followed for more than fifty years, fixes construction of ambiguous statute.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 16, 1933.

*Honorable R. S. Sterling, Governor of Texas, Executive Offices  
Capitol.*

DEAR GOVERNOR: Receipt is acknowledged of your inquiry of the fifteenth instant, reading as follows:

"Will you kindly advise me whether or not you concur in the opinion prepared by First Assistant Attorney General Wright Morrow of Feb. 9, 1925, in reference to the expiration dates of the Regents of the University of Texas."

In response to said inquiry, you are advised that I concur in the main with the opinion referred to above, which is conference opinion No. 2583 of this department, dated February 9, 1925, printed at page 467, Report of the Attorney General, 1924-1926.

Your attention is called to the fact, however, that Mr. Morrow's opinion cover several points, and while I believe the opinion to be correct in its principal holding I find myself unable to agree with certain statements contained therein which are not material to a decision of the question then under consideration.

In your letter you do not apprise us as to the exact inquiry you have in mind, but Judge Bruce W. Bryant, First Assistant Attorney General, has given me a brief statement of the situation as he understands it from a conversation with you today. I am informed that at the time of the convening of the Regular Session of the Forty-third Legislature, you nominated for reappointment and confirmation by the Senate three members of the present Board of Regents of the State University. The question has arisen as to whether you, as retiring Governor, should make these appointments for the succeeding six-year terms or whether the incoming Governor (to be inaugurated January 17, 1933) would be entitled to fill these offices. As you will observe from the official records and history of appointments to the Board of Regents of the University, hereinafter set out, the problem now confronting you is not identical with the question submitted to my predecessor in 1925.

The Journal of the State Senate for the Regular Session of the Thirty-ninth Legislature, which convened January 15, 1925, (Journal p. 23), reveals that the Honorable Pat M. Neff, the then retiring Governor, sent to the Senate for confirmation on January 14, 1925, the following appointments to the Board of Regents of the University: Charles E. Marsh, Tucker Royall, W. S. Whaley, Dr. Joe Wooten, and R. G. Storey. On January 19, 1925, Governor Neff submitted the additional name of Earl C. Hankamer (Journal, p. 76). This made a total of six names submitted to the Senate just prior to the retirement of Governor Neff. The Journal further shows (pp. 23 and 76) that these men had been nominated by the Governor for appointments for places on the Board of Regents on various dates during the years 1923 and 1924. On January 19, 1925, Tucker Royall and R. G. Storey were confirmed. (Journal p. 80). The other four appointments having been rejected, Governor Neff submitted on January 20, 1925, the appointments of Cullen F. Thomas, W. W. Woodson, T. W.

Davison and Miss Florence Sterling to fill the places made vacant by the failure of the Senate to confirm Marsh, Wooten, Hankamer and Whaley (Journal p. 82). After Governor Miriam A. Ferguson had been inaugurated, she appointed Marcellus Foster, Ted Dealey, George W. Tyler, S. C. Paddelford and L. J. Truett. This was on January 29, 1925. (Journal, p. 180.) The message submitting the appointments stated that each of these appointees were to fill certain unexpired terms with the exception of Marcellus Foster, whose appointment carried this notation, "full six year term." Messrs. Foster, Dealey, Tyler, Paddelford and Truett were all confirmed on January 30, 1925. (Journal, p. 200).

On February 9, 1925, Governor Ferguson submitted the following additional appointments for membership on the Board of Regents: Edward Howard, to fill the unexpired term of Ted Dealey, resigned; Mart H. Royston, to fill the unexpired term of L. J. Truett, resigned; H. J. L. Stark, "for the term ending 1931," and Sam Neatherly, "for the term ending 1931." (Journal, p. 322). On February 11, 1925, these four appointments were confirmed by the Senate. (Journal, p. 379).

In the meantime, on January 30, 1925, the Senate, by simple resolution No. 21, requested Governor Ferguson to advise that body as to the dates of the terms of office of all Regents for the University, including those serving and those submitted to the Senate. (Journal, p. 192). In answer to that resolution, Governor Ferguson on February 2, 1925, advised the Senate as follows:

"Gentlemen: Complying with your request as set forth in Resolution No. 21, by Senator Murphy, requesting the dates of the terms of office of all regents of the University of Texas, those now serving, and those submitted to the Senate, you are advised as follows:

"Mrs. H. J. O'Hair (now serving); term expires May 11, 1927.

"R. G. Storey (now serving); term expires June 28, 1929.

"H. J. L. Stark (now serving); term expires May 28, 1925.

"Ted Dealey (newly appointed); term expires June 28, 1929.

"Geo. W. Tyler (newly appointed); term expires June 28, 1929.

"S. C. Paddelford (newly appointed); term expires November 1, 1927.

"L. J. Truitt (newly appointed); term expires May 11, 1927

"Marcellus Foster, appointed for full six-year term.

Respectfully submitted,

MIRIAM A. FERGUSON,  
Governor.

F. S. One vacancy by virtue of the resignation of H. A. Wroe, whose term expires February 3, 1925." Journal, p. 223)

The next day, by Senate Resolution No. 25, Attorney General Moody was requested to advise the Senate of 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 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, after reciting that confusion existed over the terms of the members of the Board of Regents, requested certain other information relative to such terms. (Journal, p. 242). The resolution is copied in full in the Report of the Attorney General, 1924-1926, p. 4467. In compliance with that request,

the then Attorney General, on February 9, 1925, rendered the opinion inquired about by you. The substance of that opinion is that Governor Ferguson was wrong in her statement found on page 223 of the Journal of said Session, when she fixed the expiration dates of three of the members in May, three in June and one in November. Mr. Morrow, (who wrote the opinion), held in substance that an appointment for an unexpired term of office was valid only until the date when that regular term would have expired had no vacancy occurred. That opinion was in accord with a previous conference opinion of this department (No. 2572, dated November 19, 1924, addressed to the Hon. W. W. Boyd, Game, Fish & Oyster Commissioner, and written by Assistant Attorney General L. C. Sutton. See Report of Attorney General, 1924-1926, p. 344). Mr. Sutton's opinion was to the effect that an appointment to a vacancy in an office was for the unexpired term only, and not for a full term.

It was held in Mr. Morrow's opinion, however, that the term of a member of the Board of Regents expired with the *convening* of the Regular Session of the third succeeding Legislature after the session at which he was appointed. This opinion is self-contradictory; in four different places, it is stated that the terms of the members of the Board of Regents expire with the *convening* of the Legislature; while in the same breath, the writer states that:

"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.*" (Underscoring ours.) Report of Attorney Gen., 1924-1926, p. 472).

Mr. Morrow was evidently in doubt as to the exact date that the terms of the members of the board *expired*, but correctly held that they expired *during* the Regular Session of the third succeeding Regular Session of the Legislature after the session at which they were appointed. It will be observed, therefore, that the primary question for consideration at the time of Mr. Morrow's opinion was whether the terms of the members of the Board of Regents expired *during* Regular Sessions of the Legislatures or at arbitrary dates during the months of May, June and November (which happened to be the months during which some appointments had been theretofore made).

To answer your inquiry, it becomes necessary to examine the statutes and their heretofore established construction. The earliest governing board provided for the University of Texas was a Board of Administrators of ten members, created by an Act of 1858, two of said members being the Governor and the Chief Justice of the Supreme Court, and the other eight being appointed by the Governor by and with the consent of the Senate for four year terms. 4 Gam-mel's Laws of Texas 1020.

The first "Board of Regents" was created by the Act of 1881, being "An Act to Establish the University of Texas." It provided for a governing board, to be called the "Board of Regents," and to consist of eight members selected from different portions of the State,

to be nominated by the Governor and appointed by and with the advice and consent of the Senate. Section 6 of that act reads as follows:

“The board of regents shall be divided into classes, numbered one, two, three and four, as determined by the board at their first meeting; shall hold their offices two, four, six and eight years, respectively, from the time of their appointment. From and after the 1st of January, 1883, two members shall be appointed at each session of the Legislature to supply the vacancies made by the provisions of this section, and in the manner provided for in the preceding section, who shall hold their offices for eight years respectively.” 9 Gammel’s Laws of Texas 172.

It will be noted that the second sentence of Section 6, above quoted, specifically provides that two members of the board were to be appointed *at each session of the Legislature*, beginning with that session convening after the first day of January, 1883. The Act of 1881 was approved March 30, 1881, and took effect June 30, 1881. It was the intention of the Legislature at that time that a board with overlapping terms be created. While the Constitution did not permit that overlapping terms were filled until the decision of *Kimbrough vs. Barnett*, 93 Tex. 309, 55 S. W. 120, by the Supreme Court. Following that decision, the practice was established in 1901 and has since been followed by which each *incoming* Governor appointed a full board of eight members. Such board served for two years and a new board was appointed every two years.

The last Board of Regents of the University selected prior to the adoption of the constitutional amendment of 1912 was that appointed by Governor O. B. Colquitt shortly after he was inaugurated in January, 1911. On January 19, 1911, Governor Colquitt appointed eight members of the board, all of whom were confirmed on January 20, 1911. (See p. 128, Senate Journal, Reg. Ses., 32nd Leg., 1911).

Section 30a of Article 16 of the Constitution of Texas was submitted to the people by the Legislature at its Regular Session in 1911, and was adopted in 1912. That section reads as follows:

“The Legislature may provide by law that the members of the Board of Regents of the State University and boards 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 (6) years, one-third of the members of such boards to be elected or appointed every two (2) 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.”

On February 8, 1913, following the adoption of this amendment, and shortly after his inauguration for a second term, Governor Colquitt appointed seven members of the Board of Regents. Two additional members were appointed later on; one on July 1, 1913, the effective date of Chapter 103 of the General Laws of the Regular Session of the Thirty-third Legislature, reading, in so far as applicable to the present question, as follows:

“Section 1. The Board of Regents of the University of Texas shall be composed of nine persons, who shall be qualified voters; the Board of Directors of the Agricultural and Mechanical College of Texas shall be composed of nine persons, who shall be qualified voters; the State Board of Regents of the Normal Colleges shall be composed of six persons, who shall be qualified voters; the Board of Regents of the College of Industrial

Arts for Women shall be composed of six persons, three of whom may be women; the Board of Managers of the Blind Institute, the Deaf and Dumb Institute, the Deaf, Dumb and Blind Institute for Colored Youths, the Confederate Home, the Confederate Woman's Home, of each of the Insane Asylums, the Epileptic Colony and the Orphans Home, shall each be composed of six members, who shall be qualified voters.

"Sec. 2. The members of the governing board of each of the State institutions of higher education mentioned in Section 1 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. In 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 each of said boards 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 requirements of Section 3 of this Act, and additional members shall be appointed in the manner prescribed herein to fill out the membership herein provided for.

"Sec. 3. The following members of the several governing boards 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, these classes shall hold their offices two, four and six years respectively, from the time of their appointment. And one-third of the membership 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, who shall hold their offices for six years, respectively. The duties of the several governing boards shall be determined by law heretofore enacted or that may hereafter be enacted, no changes in the said duties being made by this Act."

That portion of the first section of the above quoted act dealing with the Regents of the University of Texas now appears as Article 2907, Revised Civil Statutes, 1925.

On the 20th day of September, 1913, the nine men then constituting the Board of Regents drew lots and they, (or some one thereafter appointed to succeed such as had resigned), held office for approximately two, four or six years, from February 8, 1913. (Senate Journal Reg. Ses., 39th Leg., pp. 364, 365.)

Prior to 1913, it had been the long established practice and custom for each *incoming* Governor, during each regular biennial session of the Legislature, to appoint a Board of Regents. Since 1913, it has likewise been the practice for each newly elected Governor to appoint three persons to membership on the Board of Regents, each to serve for six years.

In 1915 three appointments were made by Governor Jas. E. Ferguson, on February 3rd, shortly after his first inauguration. In 1917 three appointments were made by him on January 27th, shortly after his second term began. In 1919, the three appointments were made on January 31st, by Governor W. P. Hobby. In 1921, the appointments were made on May 11th by Governor Pat M. Neff; while in 1923 they were made by him on June 28th. (P. 365, Senate Journal, Reg. Ses., 39th Leg.)

Since 1923 appointments have been on varying dates, but always after the recently elected Governor had been inaugurated, with the exception of the above stated instance when Governor Neff made certain appointments which were not confirmed.

Since the rendition of the opinion of February 9, 1925, by Mr. Morrow, this established custom of appointment by the incoming Governor

has been continued. Governor Miriam A. Ferguson, shortly after her inauguration in 1925, appointed members of the Board of Regents, as hereinabove related. Three members were appointed by Governor Dan Moody after his first inauguration; he appointed three additional members in 1929, said appointments being after his inauguration for a second term. Three new members were appointed by Your Excellency after your inauguration in 1931.

My conclusion that the opinion of Mr. Morrow is not controlling and is not in point, is borne out by the fact that Governor Moody, (during whose administration as Attorney General the opinion was rendered) later during both of his administrations as Governor followed the long established custom of his predecessors.

Mr. Morrow in his opinion (Report of Attorney General, 1924-1926, p. 469) invokes the well known rule of contemporaneous construction (with which I am in entire accord), and points to the fact that in January, 1915, three persons were appointed as Regents, to-wit: Dr. George McReynolds, Dr. S. J. Jones and M. Faber. He evidently overlooked the fact that the regents named were appointed by the *incoming* Governor—at that time (January, 1915), James E. Ferguson. The rule of construction by custom supports, therefore, my conclusion that the duty or privilege of appointment, in this instance, is that of the *incoming* administration.

It will be noted that the statute merely states that the members of the Board of Regents shall be *appointed* at each Regular Session of the Legislature. It does not state that these appointments shall be made at the *convening* of each Regular Session of the Legislature; and, in my opinion, the Legislature, in enacting Chapter 103, General Laws, Regular Session of the Thirty-third Legislature in 1913, did not intend to disrupt the then established custom of having such appointments made by the incoming Governor. That act simply added an additional member to the Board of Regents, raising the membership to the present number (nine), and the terms of office of the members were lengthened and overlapping terms were created under authority of Section 30a, Article 16 of the Constitution. (Adopted in 1912).

In this opinion I have made no reference to those members who were appointed to serve unexpired terms. Members appointed to serve unexpired terms would not serve a full six years, but would serve to the date of expiration of the term to which they were appointed, which expiration date will be unchanged by the vacancy and appointment to fill the vacancy. (See Opinions of the Attorney General, 1924-1926, p. 344).

In my opinion, the practical construction of the statutes, which has been long followed by the chief executives of this State, constitutes the true construction thereof and settles the question of the duty or privilege of appointment of members of the Board of Regents

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.



Op. No. 2909.

PUBLIC OFFICERS—STATE BOARD OF EDUCATION—TERMS OF OFFICE  
OF MEMBERS.

Term of office of members of State Board of Education expire on January 1st and the Governor holding office at date of expiration of these terms has the power to reappoint them or name their successors.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 16, 1933.

*To the Honorable President and Members of the Senate of the Forty-third Legislature.*

GENTLEMEN: Receipt is acknowledged of a copy of Senate Resolution No. 11 adopted by Your Honorable Body today, requesting that I furnish to the presiding officer of the Senate, at my earliest convenience, an opinion answering the following questions, to-wit:

“What date does the term of the Honorable B. F. Tisinger, Member of the State Board of Education, expire?”

“What date does the term of the Honorable C. H. Chernosky, Member of the State Board of Education, expire?”

“What date does the term of the Honorable Tom Garrard, Member of the State Board of Education, expire?”

“Does the Governor holding office as Governor on the date of expiration of term of office of above named officials have the power under the laws of this State to reappoint or name their successors?”

Upon examination of the relevant constitutional and statutory provisions and executive action based thereon, I find the following:

The Constitution of 1876 created a State Board of Education composed of the Governor, Comptroller and Secretary of State. Article 7, Section 8, Constitution of the State of Texas. By statute the Governor was made ex-officio President of the Board and the State superintendent of Public Instruction was made ex-officio Secretary of the Board. Article 2664, Revised Civil Statutes, 1925. This board composed of the Governor, Comptroller and Secretary of State, serving in the manner provided by the Constitution, performed the functions of the State Board of Education prior to the amendment of the Constitution in 1928.

By House Joint Resolution No. 14, the Fortieth Legislature of the State of Texas at its Regular Session held in 1927 proposed that Section 8 of Article 7 of the Constitution be amended and that a new section to be known as Section 16 of Article 7 be added to the Constitution of 1876. General and Special Laws of Texas, 40th Legislature, Regular Session, page 499. The proposed amendments were adopted at the general election held on November 6, 1928, and now form a part of our Constitution. Section 8, Article 7, as amended, now reads as follows:

“The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law.”

Section 16, Article 8, being the added section, now reads as follows:

"The Legislature shall fix by law the terms of all offices of the public school system and of the State institutions of higher education inclusive, and the terms of members of the respective boards, not to exceed six years."

Pursuant to such constitutional authority, the Forty-first Legislature of Texas, at its 2nd Called Session, created a State Board of Education to be composed of nine members, to be appointed by the Governor with the advice and consent of the Senate. General Laws. 2nd Called Session, 41st Legislature, Ch. 10, p. 12.

Section One of said Act reads as follows:

"Section 1. There is hereby created the State Board of Education. Said Board shall consist of nine members to be appointed by the Governor with the advice and consent of the Senate. Of the first Board to be appointed the terms of three members shall expire on January 1 1931; the term of the next three members shall expire on January 1, 1933; and, the terms of the remaining three members shall expire on January 1, 1935. After the first Board, the term of each member shall be for six years from the date of the respective appointments. and the appointments shall be made and the terms arranged in such manner that three of said members shall retire on the first day of January biennially, and the Governor shall biennially, on the first day of January, fill such vacancies by the appointment of three members. Each member of said Board shall be a citizen at least thirty years of age and otherwise qualified to vote and no member shall at the time of his appointment, or during the term of his service, be engaged as a professional educator."

This Act was approved July 3, 1929. Its terms are clear and explicit and admit of no doubt. Of the first Board of nine members to be appointed, the terms of three members expired on January 1, 1931, the terms of the next three members expired on January 1, 1933, and the terms of the remaining three members shall expire on January 1, 1935. In determining the date of expiration of the terms of those members named by you, the only question left for consideration is the date of their appointment and the designation of the term for which they were to serve. The 1928 election register of the Secretary of State shows the following:

"	<i>Appointed</i>	<i>Confirmed</i>	<i>Term Expires</i>
Mrs. Noyes D. Smith .....	9-6 -29	2-6 -30	6 years
Mrs. Minnie Fisher Cunningham..	9-6 -29	2-6 -30	
No date of qualification or commission,			
Nat Washer .....	9-6 -29	2-6 -30	6 years
F. L. Henderson .....	9-6 -29	2-6 -30	6 years
Ben F. Tisinger .....	9-6 -29	2-6 -30	4 years
C. H. Chernosky .....	9-6 -29	2-6 -30	4 years
J. W. O'Banion .....	9-6 -29	2-6 -30	2 years
T. E. Jackson .....	9-6 -29	2-6 -30	2 years
Notation: Resigned			
Tom Garrard .....	9-6 -29	2-6 -30	4 years
Mrs. J. E. Watkins .....	9-11-29	2-6 -30	2 years
J. O. Guleke .....	1-27-30	2-6 -30	Vice-Jackson
J. O. Guleke .....	12-23-30	1-1 -31	1937
Mrs. J. E. Watkins.....	12-23-30		1937           "

The 1930 election register carries forward the names of Tisinger,

Chernosky and Garrard, and under the column heading "Term Expires," carries this notation for each of these three gentlemen:

"4 years

1-133."

On examination of the files in the office of the Secretary of State, I find that on September 6, 1929, Hon. Dan Moody, Governor, addressed to Mrs. Jane Y. McCallum, Secretary of State, a letter notifying the Secretary of State of the appointment of Messrs. Washer, Henderson, Jackson, Tisinger, Chernosky, Garrard, O'Banion and Mrs. Smith to membership on the State Board of Education. Under date of September 11, 1929, a similar letter was forwarded containing notice of the appointment of Mrs. J. E. Watkins to membership on the State Board of Education. By official letter bearing date of October 5, 1929, signed by Governor Moody, addressed to Mrs. Jane Y. McCallum, Secretary of State, and found in the archives of the office of the Secretary of State, in the file of appointments, confirmations, and resignations for 1929, Governor Moody designated terms for the members of the State Board of Education, shortly theretofore appointed by him, in the following language:

"I have designated the following terms for the members of the State Board of Education:

"Hon. J. W. O'Banion.....	2 year term
Hon. T. E. Jackson.....	2 year term
Mrs. J. E. Watkins.....	2 year term
"Hon. Ben F. Tisinger.....	4 year term
Hon. Tom Garrard.....	4 year term
Hon. C. H. Chernosky.....	4 year term
"Hon. Nat Washer.....	6 year term
Hon F. L. Henderson.....	6 year term
Mrs. Noyes D. Smith.....	6 year term."

The statute prescribes no manner of fixing the terms of the members of the State Board of Education. We are of the opinion that the Governor making the original appointments had the right and power to designate the terms for which the appointees on the original board should serve. State vs. Williams, 222 Mo. 268, 121 S. W. 64; 46 C. J. 965.

Section 3 of the Act creating the State Board of Education as now constituted (Ch. 10, Gen. Laws, 2nd C. S., 41st Leg.) reads as follows:

"The State Board of Education shall organize by the election of one of its members as President, and the State Superintendent of Public Instruction shall be ex-officio secretary of the board."

The statute providing for the organization of the State Board of Education at its original meeting contains no directions relative to the selection of the terms for which the members should serve. This strengthens our conclusion that the Governor making the original appointments had the right and power to designate the terms for which the newly appointed members should serve. Hon. F. L. Henderson, a member of the State Board of Education since its organization, informs us that no attempt was made by the members of the Board at any of their meetings to cast lots or to fix for themselves the dates of expiration of their terms but that on the contrary the

members of the Board accepted the designation made by Governor Moody in the official letter heretofore mentioned.

The 1930 election register shows that when Mrs. J. E. Watkins' term expired on January 1, 1931, in accordance with the statute and with Governor Moody's designation of her term as one of the two year terms, she was reappointed for a full six year term. The same is true of Hon. J. O. Guleke, who was originally appointed January, 1930, to succeed T. E. Jackson, who had resigned. Jackson was one of those members whose term had been designated as a two year term and on expiration of that term J. O. Guleke was reappointed and was confirmed for a full six year term ending in 1937. J. W. O'Banion, who was designated for the third two year term, was succeeded by Ernest Alexander in 1931.

It is clear from the term of the statute that the terms of three of the members expired on January 1, 1933. Since, by the letter of October 5, 1929, Ben F. Tisinger, C. H. Chernosky and Tom Garrard were designated for the four year term and since that designation by the Governor was accepted by the State Board of Education and has been heretofore followed as to those three members designated for the two year term, such designation will govern the date of expiration of the terms of Messrs. Tisinger, Chernosky and Garrard.

We are, therefore, of the opinion that the terms of Messrs. Ben F. Tisinger, C. H. Chernosky and Tom Garrard, as members of the State Board of Education, all expired on January 1, 1933.

In your last question, which is quoted above, you asked my opinion as to the power of Governor holding office as Governor on the date of the expiration of the terms of office of the above named members to reappoint them or to name their successors. This question is settled by the statute in language so clear as to admit of no doubt and in words which call for no rule of interpretation. Section 1 of the Act creating the Board states that, after the first Board, the term of each member shall be for six years from the date of the respective appointments and "the appointments shall be made and the terms arranged in such manner that three of said members shall retire on the first day of January biennially and the Governor shall biennially, *on the first of January*, fill such vacancies by appointment of three members. (Underscoring ours).

The statute, by express terms, settles the fourth question asked by you in your Resolution No. 11. Governor Sterling on January 1, 1933, had the right, power and express duty under the statutes, of reappointing or naming the successors of the three members whose terms expired on January 1, 1933. The power, right and duty of naming these members did not terminate on that day, however, but was a continuing right and duty which would arise on January 1, 1933, and would continue until the appointment had been made.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

Op. No. 2910.

PUBLIC OFFICERS—GOVERNOR—NOMINATIONS WITHDRAWALS  
FROM SENATE.

1. After names of appointees to public office have been submitted to the Senate for its confirmation or rejection, such names may not be withdrawn by the Governor without the consent of the Senate but may be withdrawn with the consent of the Senate.

2. A change in the person of the occupant of the Governor's office does not alter the rule. The executive power is continuous and its scope does not change with the change in Governors.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 21, 1933.

*Honorable Will M. Martin, Chairman Senate Committee on Nominations of the Governor, Forty-third Legislature, Austin, Texas.*

DEAR SIR: Your inquiry of the nineteenth instant reads as follows:

"Before Governor Sterling left the office of Governor, on or about January 11th, 1933, he sent a message to the Senate advising the Senate of his appointment of three members to the State Board of Education. Before the Senate acted upon the appointments Governor Ferguson sent the Senate a message requesting that she be permitted to withdraw these three names.

"I have been requested as chairman of the committee on Governor's nominations to call upon you today for an opinion as to whether or not Governor Ferguson has a legal right to withdraw these three names either with or without the consent of the Senate.

"The foregoing history with reference to these appointments is shown in the Senate Journal."

In logical sequence, we will determine: (1) Whether Governor Miriam A. Ferguson has the legal right to withdraw from the consideration of the Senate, *without* its consent, the names mentioned; and (2) if she has not that power, whether she has the legal right to withdraw such names *with* the consent of the Senate.

Under date of January 16, 1933, upon request of the Senate, I advised that the terms of the Honorable B. F. Tisinger, C. H. Chernosky, and Tom Garrard, as members of the State Board of Education, expired on January 1, 1933; and that the retiring Governor, Ross S. Sterling, had the legal right to make appointments to fill the three regular terms on said Board which began on January 1, 1933. It necessarily follows from that opinion that the reappointments of Tisinger, Chernosky, and Garrard were valid, in so far as a Governor could make them so; and that those appointments were properly before the Senate for its consideration before Her Excellency, Miriam A. Ferguson, succeeded to the Governorship on January 17, 1933.

All constitutional and statutory provisions for the State Board of Education and the manner of appointment of its members are set forth in the opinion of the 16th instant, which is found printed in the Senate Journal of January 17, 1933 (Senate Jour. 43rd Leg., Reg. Ses., p. 72). Without here repeating all of those provisions, it suffices to say that the Legislature, acting under proper constitutional

grant of authority (Constitution, Art. VII, Secs. 8 and 16), has provided that the members of the State Board of Education shall be appointed by the Governor, *with the advice and consent of the Senate*. (Ch. 10, Gen. Laws, 2nd C. S. 41st Leg., 1929).

It will be noted that the powers of the Governor and the Senate are co-equal, as respect appointments of this nature. The Governor alone may nominate, and in the making of the nominations the Governor needs no senatorial consent. Senatorial consent is required for the appointments, after the nominees for membership on the Board are first selected. (See *Myers vs. United States*, 272 U. S. 52, at 265; 71 Law. Ed. 160, at 228). When the Governor selects his nominees for membership he appoints these nominees, with the consent of the Senate. In the instant case the Governor has both nominated and appointed, and the names of the three appointees under consideration have been referred to the Senate Committee on Governor's Nominations. Sen. Jour., Reg. Ses. 43rd Leg., p. 20.

All of this was done before the attempted withdrawal of the gubernatorial appointments from senatorial consideration. It is our opinion that this matter had passed from the hands of the Governor and into the control of the Senate before the recall was attempted. *Barrett vs. Duff*, 114 Kan. 220, 217, Pac. 918. It is immaterial that there was a change in Governors after the appointments were sent to the Senate and before the recall was attempted. The executive power vested in the Governor *is continuous and knows neither names, persons, nor terms of office*. It began with the Revolution and establishment of an independent government for Texas, and will continue so long as our Constitution endures. *Barrett vs. Duff*, 114 Kan. 220, 217 Pac. 918; *State vs. Mastassarini*, 114 Kan. 224, 217 Pac. 930; *People vs. Shower*, 30 Wyo. 366, 222 Pac. 11. The power of appointment of the members of the State Board of Education began with the amendments to the Constitution adopted in 1928, and the Legislative Enabling Act of 1929, *supra*. It has extended in unbroken line since that date, and will exist so long as these constitutional and statutory provisions remain unchanged.

After appointment by the Governor neither the appointing Governor nor his successor has any power over the appointment, in the absence of *senatorial acquiescence*. *Barrett vs. Duff*, *supra*. The mere fact that the appointing Governor has been succeeded in office by another does not deprive *the Senate* of its *confirming power* over appointments made by the retiring Governor. *People vs. Shower*, *supra*.

To hold that the Governor could withdraw these nominations against the will of the Senate would be to destroy the *co-equal power* of the Governor and the Senate over such nominations. Such a rule would reduce the Senate to the status of a mere ministerial body, would ignore its co-equal power and responsibility, would cripple its appointive powers, and would be destructive of our traditionally weighted American governmental system of checks and balances.

While I have cited other cases in this opinion, I regard this question as settled by the great Chief Justice in the classic case of *Marbury vs. Madison*, 1 Cranch 137, 2 Law. Ed. 60. That case has been

regarded for more than a hundred years as the leading and most important ever decided on the question under consideration. In discussing the power of the executive over appointments, Chief Justice Marshall said:

"The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source."

The first point covered in your inquiry is, therefore, settled by this quotation. The second inquiry is likewise governed by the same case. Under the terms of the Act creating the State Board of Education, *senatorial confirmation* is required before the appointments become final. Until an appointment becomes final so that the appointee is legally entitled to the office, it is subject to revocation by the *appointing power*. *Marbury vs. Madison*, 1 Cranch 137, 2 Law. Ed. 60; *Schulte vs. City of Jefferson*, 273 S. W. 170 (Kan. City Ct. of Apps.); *Board of Education of Boyle County vs. McChesney*, 235 Ky. 692, 32 S. W. (2d) 26.

Since the appointments of Messrs. Tisinger, Chernosky and Garrard have not been made final by confirmation, the *appointing power* has the right to recall their appointment. In this case the *appointive power* is vested *jointly* in the *Governor* and the *Senate*; and if the Senate gives its *consent* to the withdrawal, it thereby joins in the recall and the names of those submitted may unquestionably be withdrawn.

You are, therefore, respectfully advised that Governor Ferguson has not the legal right to withdraw the names of the three appointees without the consent of the Senate. It necessarily follows that she may do so with the consent of the Senate.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2911.

DISTRICT ATTORNEYS—FEES OF OFFICE—SALARIES, DISTRICT ATTORNEYS—ARTICLE 1021, C.C.P. CH. 236, ACTS 40TH LEG.—CH. FF, 41ST LEG. 2ND AND 3RD C.S., 1929—CONSTITUTIONALITY APPROPRIATIONS—REPEAL OF STATUTES.

1. Legislature can not place district attorneys upon salary basis other than the salary of \$500.00 provided by Constitution; any additional compensation can only be allowed by way of "fees, commissions and perquisites."

2. Ch. 236, Acts 40th Leg., 1927, p. 350, construed and held to fix salary

of district attorneys in districts composed of two or more counties at \$20.00 per day based upon necessary attendance upon court and discharge of certain duties.

3. Per diem of \$20.00 per day allowed district attorneys by Ch. 236, Acts 40th Leg., supra, held not to be a "salary" but a "fee" conditioned upon necessary performance of certain services.

4. Ch. 236, 40th Leg., 1927 (now Art. 1021, C.C.P.), held constitutional.

5. Ch. 66, p. 134, Gen. Laws, 41st Leg., 2nd and 3rd C.S., 1929, attempting to change basis of compensation from per diem to flat sum of \$10.00 per day for first 350 days of every calendar year held to be unconstitutional because, in effect, a salary additional to constitutional salary of \$500.00.

6. A valid and existing law can not be repealed by an unconstitutional enactment; held Ch. 66, Acts 41st Leg., 2nd and 3rd C.S., supra, did not repeal Ch. 236, Acts 40th Leg., 1927, supra.

7. That portion of Ch. 95, Acts 42nd Leg., 1931, attempting to appropriate \$182,000.00 for "District Attorneys compensation and per diem—fifty-two attorneys—\$10.00 per day for each of 350 days of calendar year" held invalid.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, February 4, 1933.

*Honorable George H. Sheppard, Comptroller of Public Accounts,  
Austin, Texas.*

DEAR SIR: Your letter of February 2nd reads as follows:

"I will thank you to advise this department as to whether or not the pay of district attorneys in judicial districts composed of two or more counties is controlled by the provisions of your opinions dated January 30, 1933, addressed to the Senate Investigating Committee and carrying your number 2907."

This department's opinion number 2907, dated January 30, 1933, referred to in your letter, was in response to an inquiry from the Senate Investigating Committee as to whether the Legislature, if it saw fit, could place certain officers, including district attorneys, on a salary basis in lieu of all fees. The opinion holds, in substance, that the Legislature could not place district attorneys on a salary basis (other than the salary of \$500.00 provided by the Constitution); and that any additional compensation could *only* be allowed by way of "fees, commissions and perquisites."

The compensation of district attorneys in judicial districts composed of two or more counties was fixed by Ch. 236, Acts of the 40th Legislature, 1927, p. 350, reading as follows:

"District Attorneys in all judicial districts composed of two counties or more, shall receive from the State as pay for their services the sum of \$500.00 per annum, and in addition thereto, shall receive from the State as pay for their services, the sum of \$20.00 for each day they attend the Session of the District Court in their respective districts in the necessary discharge of their official duties, and \$20.00 for each day used in necessarily going to and coming from the District Court in one county to the District Court in another county in their respective districts in the necessary discharge of their official duties, and in attending any Session of said Court; and \$20.00 per day for each day they represent the State at examining trials, inquests proceedings and habeas corpus proceedings in vacation; said \$20.00 per day to be paid upon the sworn account of the District Attorney, approved by the District Judge, who shall certify that the attendance of said District Court for the number of days mentioned in his account



was necessary, after which said account shall be recorded in the Minutes of the District Court; provided that the maximum number of days for which compensation is allowed shall not exceed one hundred and seventy-five days in any one year. All commissions and fees allowed District Attorneys under the provisions hereof, in the districts composed of two or more counties, shall, when collected, be paid to the District Clerk of the County of his residence, who shall pay the same over to the State Treasurer."

This quoted act of the 40th Legislature amended Ch. 173, Acts 39th Legislature, 1925, p. 406. The only substantial difference between the Acts of 1925 and 1927 was in the maximum number of days for which compensation might be allowed, and the amount of compensation per day.

It will be observed that by the act of 1927 the compensation of district attorneys (in addition to the constitutional salary of \$500), was fixed at \$20 per day, based upon the number of days they attended the sessions of the district courts in their respective districts in the *necessary* discharge of their official duties, and the same amount for each day used in *necessarily* going to and coming from the district court in one county to the district court in another county in the *necessary* discharge of their duties; and a like sum fore each day *necessarily* spent in representing the state at examining trials, inquest proceedings and habeas corpus proceedings in vacation. This per diem allowance of \$20.00 per day was *conditioned* upon the discharge of these duties, the attendance of the district attorney upon the court and the *necessity* for such attendance. In other words, the district attorney was not entitled to receive this sum of \$20.00 per day irrespective of his discharge of the duties or of his attendance upon the court, or of the necessity of same.

We think it may be safely said that this \$20.00 per day is a compensation or reward for particular services rendered at irregular period, payable only in event the services are rendered. It is therefore additional compensation in the form of a "fee" for each day of actual necessary service. (See conference op. Atty. General's Dept. No. 2907, supra). Certainly this compensation can not be said to be "salary", since it was not provided as a periodical and regular payment dependent upon time but, on the contrary, is contingent upon the performance of certain services and necessary attendance upon the court.

The Act of 1927 (Ch. 236, 40th Leg., p. 350) has been carried forward in Vernon's Annotated Criminal Statutes as Article 1021 of the Code of Criminal Procedure. Since the additional compensation therein allowed to district attorneys is not provided for by way of "salary" but rather as "fees" for particular services, we hold this act to be in all things constitutional.

In 1929, however, the 41st Legislature attempted by the passage of Senate bill 121, (Ch. 66, p. 134, Gen. Laws 41st Leg., 2nd and 3rd C. S., 1929), to change the basis of compensation of district attorneys in judicial districts composed of two or more counties by providing as follows:

"Section 1. District Attorneys in all Judicial Districts composed of two or more counties, shall receive from the State as pay for their services, the sum of \$500.00 per annum as provided by the Constitution, and in ad-

dition thereto, and in lieu of the fees, commissions, and perquisites provided by law, shall receive from the State the sum of \$10.00 for each of the first three hundred fifty days of every calendar year as compensation for attending examining trials, Habeas Corpus hearings, the session of the District Court of the District they represent, and for performing such other duties as imposed by law. The compensation provided for in this Act shall be paid monthly by the State upon warrants drawn by the Comptroller of Public Accounts, and it shall not be necessary for the District Attorney to file any account with the District Judge or the Comptroller of Public Accounts. Nothing in this Act shall be construed so as to deprive District Attorneys of the expense allowance now provided by law, nor shall this Act affect the salary or compensation of any District Attorney fixed by special law. All commissions, perquisites and fees allowed to and collected by District Attorneys in Districts composed of two or more counties shall be paid to the District Clerk of the county of his residence, who shall pay the same over to the State Treasury."

This Act of 1929 sought to change the basis of compensation from a per diem, dependent upon the performance of services and necessary attendance upon the court, to a fixed sum of \$10.00 per day for the first 350 days of every calendar year. This compensation was to be paid *monthly*, by warrants drawn by the Comptroller of Public Accounts without even the necessity of the filing of accounts by district attorneys. It was and is nothing more than the payment of a flat salary of \$3,500.00 per year, to be paid irrespective of necessary attendance upon court or of the number of days required of the district attorney to discharge the duties imposed upon him by law. It was, in other words, "a periodical payment dependent upon time," and falls, therefore, clearly within the definition of the word "salary" set out in department opinion 2907, *supra*.

You are, therefore, advised that, in our opinion, Senate bill 21 (Ch. 66, Acts 41st Leg. 2nd and 3rd C. S., 1929, p. 134) is unconstitutional.

This act of 1929, however, did not attempt to expressly repeal Article 1021, C.C.P. (Acts 1927, 40th Leg., p. 350, Ch. 236). The rule is elementary that a valid, existing law can not be repealed by an unconstitutional enactment. Since the act of 1929 (S. B. 21, Ch. 66, Acts 41st Leg., 2nd and 3rd C. S., p. 134) was clearly unconstitutional, and since it did not attempt to repeal Article 1021, C. C. P., *supra*, the former act (of 1927) is, therefore, in full force and effect. *Ex parte Heartsill*, 38 S. W. (2d) 803.

You are, therefore, advised that the "additional compensation" of district attorneys in all judicial districts comprising two or more counties is definitely fixed by the provisions of Article 1021, C. C. P., *supra*, at \$20.00 per day for not exceeding 175 days of *necessary* attendance and service in any one year. Your attention is particularly directed to the provisions of this law as to the requirements for the filing and approval of accounts of the district attorney.

Our investigation of the matters submitted in your letter of February 2nd discloses another serious question. Chapter 95, Acts 42nd Leg., 1931, making appropriations for the operation of the judicial department, attempted to appropriate \$182,000.00 for the fiscal year ending August 31, 1933, to pay the compensation (additional to the \$500.00 constitutional salary) of fifty-two district at-

torneys. (See p. 147, Acts 42nd Leg., 1931). This particular appropriation reads as follows:

"District Attorneys compensation and per diem: Fifty-two attorneys, \$10.00 per day for each of 350 days of calendar year—\$182,000.00."

This attempted appropriation was clearly based upon an unconstitutional act (Ch. 66, Acts 41st Leg. 2nd and 3rd C. S., 1929). In fact this appropriation itself limits these district attorneys to \$10.00 per day for 350 days, automatically allowing them only one-half of the sum to which they will be entitled for a day of actual and necessary service and attempting to authorize compensation for just twice as many days as that to which they were entitled. In round numbers, of course, the result is the same; but in view of our holding that the act of 1929 is unconstitutional, and of the peculiar language employed in this attempted appropriation, we are inclined to the belief that the appropriation itself is invalid. We have so advised a number of district attorneys in person, and have drawn at their request a bill, making an emergency appropriation to pay them for the remainder of the fiscal year under the act of 1927.

It is our understanding that the bill will be promptly introduced in the Legislature, but until this emergency appropriation is actually made you are respectfully advised that there is no appropriation other than for the salary of \$500.00 each per year for district attorneys in districts composed of two or more counties.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2906.

HIGHWAY COMMISSIONERS—TERMS OF OFFICE—ARTICLE 6664, R.C.S.,  
1925 CONSTRUED—CHAP. 152, GEN. LAWS 38TH LEG. 1923,  
PAGE 325, CONSTRUED.

Held that terms of Highway Commissioners expire biennially on February 15th following the convening of the Legislature.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 28, 1933.

*Honorable Cone Johnson, State Highway Department, Austin, Texas.*

DEAR SIR: Your letter of January 24th reads as follows:

"I wish to submit to you this question, relating to the expiration of my term of office as a Highway Commissioner.

"I was appointed by Governor Moody for a term of four years on January 27, 1927; I was confirmed by the Senate on the same date, to-wit, January 27, 1927; I qualified and assumed the discharge of the duties February 1, 1927. However, no commission was issued to me until October of that year on account of neglect or delay, I suppose.

"I was reappointed by Governor Moody to fill out the unexpired term of two years of Mr. Sterling upon his election as Governor and retirement from the Highway Commission.

"The question is whether my term of office expires on February 1, six years from the date of my original appointment, or whether it expires on February 15 next. In 1923 the Legislature enacted a law, Chapter 152, page 325, Acts of 1923, which makes the term of office of the Highway Commissioners to begin and expire on the 15th day of February; but my attention has been called to the fact that this provision of law was not carried forward in the revision, or compilation of the statute, as seems to have been the case with a number of acts. I am not familiar with the ruling of the courts, or of the department, as to the legal effect on such acts or provisions as were not carried forward but seem to have been dropped or omitted.

"It is not of great consequence to me whether my term of office expires on the 1st of February next or on the 15th of February next, except that I want to act legally and regularly in the matter and avoid any confusion. I am willing to be governed by your opinion or suggestion in the matter.

"There is to be a meeting of the Commission on the 9th of February, and if my successor is to be appointed by the 1st of February he ought to have notice so that the Governor, the Senate and he may act so that he may attend that meeting of the Commission."

By an act of the 38th Legislature at its regular session (S. B. 155, Ch. 152, Gen. Laws, 1923, p. 325), it was provided in part as follows:

"The Governor shall within sixty days after this act becomes effective, by and with the advice and consent of the Senate, appoint three citizens of the state as a Board of Highway Commissioners . . . who shall hold their offices until February 15, 1925. That *beginning February 15, 1925*, the terms of office of the members of the Commission shall be for a period of six years, except that those first appointed shall be appointed for two, four and six years. . . . All vacancies which shall appear in the Commission for any reason shall be filled in the same manner as hereinbefore provided."

Pursuant to the terms of this act, on February 9, 1925 (S. J. 1925, p. 321), Governor Miriam A. Ferguson submitted to the Senate for confirmation, among others, the following appointments:

"For State Highway Commission:

"Hon. Frank V. Lanham, of Dallas County, Texas for chairman, *for the term ending February 15, 1927*;

"Hon. Joe Burkett, of Eastland County, *for the term ending February 15, 1929*; and

"Hon. John H. Bickett, of Bexar County, *for the term ending February 15, 1931*."

These appointments were afterward regularly confirmed by the Senate. Commissioners Frank V. Lanham and Joe Burkett served from February 16, 1925, to December 3, 1925, at which time they resigned (See 7th Biennial Report, State Highway Department, p. 18.) Upon the resignation of Lanham and Burkett, Hal Mosely and John M. Cage were appointed and served with Commissioner John H. Bickett, Sr., until October 8, 1926, at which time the entire Commission resigned. (See p. 18, Biennial Report, State Highway Department, *supra*).

Hon. Eugene T. Smith of Tarrant County, Hon. George P. Robertson of Bosque County, and Hon. Scott Woodward of Tarrant County, were given recess appointments to succeed Mosely, Cage and Bickett. (Biennial Report, Highway Commission, *supra*). When the 40th Legislature convened on January 11, 1927, Governor Miriam A. Fer-

guson in a message to the Senate (S. J. 1927, p. 18 and 19) submitted these recess appointments for confirmation, employing the following language:

"On State Highway Commission:

"Hon. Eugene T. Smith, of Tarrant County, chairman, to fill the unexpired term of Hon. Hal Mosely, of Dallas County, resigned, whose term would expire *on February 15, 1927*;

"Hon. Scott Woodward, of Tarrant County, to fill out the unexpired term of Hon. John Cage, of Erath County, resigned, whose term would expire *on February, 15, 1929*;

"Hon. George P. Robertson, of Bosque County, in place of Hon. John H. Bickett, of Bexar County, resigned, whose term would expire *on February 15, 1931*."

Immediately after the message submitting these names for confirmation was received by the Senate, a motion was made that the Senate go into executive session to consider these nominations. This motion was tabled (S. J. 1927, p. 19). No further action seems to have been taken toward the confirmation of Mrs. Ferguson's recess appointments to the State Highway Commission until January 20th when Governor Dan Moody addressed the following message to the Senate (S. J. 1927, p. 74):

"I hereby respectfully withdraw from consideration the names of appointees heretofore submitted to you for consideration and confirmation, which up to the present time have not been acted upon."

This purported withdrawal of all appointees was apparently acquiesced in by the Senate since no objection was made, and no point of order raised.

On January 26, 1927, Governor Moody submitted the names of Hon. R. S. Sterling and Hon. Cone Johnson for appointment (S. J. 1927, p. 127 and 128), and employed the following language:

"Hon. R. S. Sterling, of Harris County, Texas, to be member of the Highway Commission to *succeed* Hon. Eugene T. Smith, and the chairman of the Highway Commission *for the term of six years*.

"Hon. Cone Johnson, of Smith County, to be members of the Highway Commission to *succeed* Judge G. P. Robertson *for the term of four years*."

The appointments of Sterling and Johnson were regularly confirmed by the Senate on January 27, 1927 (S. J. 1927, p. 141).

It will be observed that the term for which Sterling was appointed to succeed Hon. Eugene T. Smith expired, however, on February 15, 1927 (See message of Governor Miriam A. Ferguson, S. J. 1927, p. 18). For this reason, apparently, Governor Dan Moody, on January 31, 1927 (S. J. 1927, p. 155), sent to the Senate the following message:

"I heretofore submitted to you the appointment of Hon. R. S. Sterling, of Harris County, as chairman of the Highway Commission to succeed Hon. Eugene T. Smith for the term of six years. This appointment has been confirmed.

"It appears that the term heretofore held by Hon. Eugene T. Smith expires on the 15th of February, and I desire to appoint, with your advice, consent and confirmation, Hon. R. S. Sterling to be Highway Commissioner and chairman of the Commission for the unexpired term of said Eugene Smith."

Governor Sterling's regular six year term began, therefore, on February 16, 1927, and does not expire until February 15, 1933.

The original term to which you, the Hon. Cone Johnson, were appointed for a term of four years expired February 15, 1931 (See message of Governor Miriam A. Ferguson, S. J. 1927, p. 18, supra). Meantime, however, Hon. R. S. Sterling, having been elected Governor, resigned as Highway Commissioner on October 6, 1930 (7th Biennial Report, State Highway Department, p. 18), and Hon. Cone Johnson was appointed to fill out his unexpired term. This appointment was submitted to the Senate on January 16, 1931, by Governor Dan Moody (S. J. 1931, p. 24). It was confirmed on January 29, 1931 (S. J. 1931, p. 107). The term to which you, the Hon. Cone Johnson, succeeded and for which you were confirmed expires, therefore, February 15, 1933.

From your letter it seems that some doubt as to the expiration of this term of office has been created by virtue of the fact that you were originally confirmed January 27, 1927, and qualified on February 1, 1927, The date of your first appointment and confirmation for the four year term, and the date of your qualifying, is at this time immaterial. In the first place, the *original* term to which you were first appointed expired unquestionably in 1931. Meantime, however, you had been appointed and confirmed to fill out the *unexpired* term of Hon. R. S. Sterling, resigned. As pointed out above, this term does not expire until February 15, 1933. This is readily apparent from the fact that Sterling was appointed to *succeed* Hon. Eugene T. Smith; and that Governor Miriam A. Ferguson in her message to the 40th Legislature (S. J. 1927, p. 18), in submitting Smith's name for confirmation, had stated that she was appointing him to fill the unexpired term of Hal Mosely, resigned, *whose term would expire February 15, 1927.*"

Your letter directs attention to the fact that the provision in the act of 1923 for six year terms "beginning February 15, 1925" was left out of the codification and revision of 1925; and you suggest that this might possibly have the legal effect to change the date of the beginning or end of these terms of office. We direct your attention, however, to the fact that in the revision of 1925, it is provided in part as follows:

"With the advice and consent of the Senate the Governor shall biennially appoint one member to serve for a term of six years, *the classification to continue as constituted by law.*"

The classification evidently referred to was in part, at least, the dates as to when the terms of office would expire; that is, either two, four or six years. The Revised Statutes of 1925 took cognizance, therefore, of the outstanding and existing terms of office and did not alter the dates of their expiration.

It is a familiar rule that repeals by implication are not favored, and will not be presumed unless the language employed clearly evidences an intention to repeal or modify the terms of existing law. We think the language used and underscored above clearly relates back and has reference to the appointments already made and then in existence, and the terms of office which had not expired.

If there were any doubt, however, the construction thereafter placed upon it in 1927 by Governor Miriam A. Ferguson in her

message to the Senate, submitting the names of Smith, Woodward and Robertson (S. J. 1927, p. 18), would lend weight to the conclusion we have reached. In that message she specifically called attention to the dates of *February 15, 1927, 1929 and 1931*, respectively, when the terms of Smith, Woodward and Robertson would expire.

You are, therefore, respectfully advised that your term as a member of the State Highway Commission expires February 15, 1933.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2901.

PUBLIC OFFICERS—DISTRICT COURTS—CONSTITUTIONAL LAW  
LEGISLATURE—JUDICIAL DISTRICTS.

1. It is not mandatory on the Legislature under Section 1 of Article 5 of the Constitution to maintain a Criminal District Court for Harris County.

2. Under Section 7 of Article 5 of the Constitution the Legislature may abolish a District Judge's office during the term for which he was elected, by abolishing the district over which he presides.

3. The office of a District Judge having been effectually abolished during the term for which he was elected, he could not by writ of mandamus compel the Comptroller of Public Accounts to issue a warrant in his favor for a statutory compensation for the remainder of his term.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, October 17, 1932.

*Honorable Olan R. Van Zandt, Chairman, Judicial Redistricting Committee, House of Representatives, Austin, Texas.*

DEAR SIR: Your letter of October 3rd addressed to Attorney General Allred has been received and referred to the writer for attention. You submit to this department for answer the following inquiries:

"First. Is it mandatory under the Constitution to maintain a Criminal District Court for Harris County, Texas?"

"Second. Is the District Court such a constitutional office and the Judge holding such an office that prevents the abolishment of such a court during the term for which such a Judge was elected?"

"Third. In the event a court is abolished by the Legislature before the term of office expires, will a mandamus hold compelling the Comptroller to issue a warrant in favor of such Judge for a statutory compensation for the remainder of his term?"

It is the opinion of this department that each of these questions should be answered in the negative.

In discussing your first question, it is necessary to consider Section 1 of Article 5 of the Constitution, which reads:

"The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County courts, in Commissioners Courts, in courts of Justices of the Peace, and in such other courts as may be provided by law.

*"The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.*

“The Legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.”

In this discussion, the underscored portion of Section 1 of Article 5 of the Constitution above quoted must be construed. It is our opinion that the language in this section “until otherwise provided by law” not only has reference to the organization and jurisdiction of this court, but also to its continuance as a Criminal District Court. The Legislature has heretofore shown that it considers that under this section it was given authority to change the district jurisdiction of this court. See Acts of the Thirty-second Legislature (1911), Chapter 67, wherein the territorial limit of this court as provided in the Constitution was changed by the Legislature so as to eliminate Galveston County and establish within the limits of Harris County a separate Criminal District Court for that county alone. This act restored to the District and County Courts of Galveston County jurisdiction of those cases over which the Criminal District Court of Galveston and Harris Counties had previously exercised jurisdiction.

In *Harris County vs. Crooker*, 248 S. W. 652, decided by the Supreme Court of Texas in 1923, the court in effect upheld the constitutional authority of the Legislature to enact Chapter 67, supra. Quoting from that decision:

“In view of the Acts of 1868 and 1870, each of which created the office of District Attorney as a part of the organization of the court, there is no doubt that the word ‘organization’ as used in the Constitution embraced such an office, and in express language authorized the Legislature to change the law, not only as to the district and jurisdiction of the court, but as to the office of District Attorney as well.”

If the Legislature had authority to in effect abolish this Criminal District Court in so far as Galveston County was concerned and confer that portion of its business on the District Courts of Galveston County, we believe that the Legislature has like authority to abolish Criminal District Court of Harris County and confer the jurisdiction exercised by it upon the other District Courts of that county. We think the use of the phrase, “until otherwise provided by law,” by the framers of the Constitution manifests an intent to permit the Legislature to make such changes in the jurisdiction and organization of this court in the future as it might desire, even to the extent of abolishing same.

In *People vs. Wall*, 88 Ill. 75, it is said:

“A Constitution, like any other instrument, admits of no-interpretation other than that which the common understanding places upon it, where no technical words are employed.”

That part of the State Constitution in reference to your second question is Section 7 of Article 5, which in part reads:

“The State shall be divided into as many judicial districts as may now or hereafter be provided by law, *which may be increased or diminished by law*. For each district there shall be elected by the qualified voters thereof, at a general election, a Judge, who shall be a citizen of the United States and this State, who shall have been a practicing lawyer of this State or a Judge of a court in this State, for four years next preceding his election,



who shall have resided in the district in which he was elected for two years next preceding his election, who shall reside in his district during his term of office, *who shall hold his office for the period of four years*, and shall receive for his services an annual salary of \$2500.00, until otherwise changed by law. He shall hold the regular terms of his court at the county seat of each county in his district at least twice in each year, in such manner as may be prescribed by law."

Since every public office is the creation of law, either constitutional or statutory, the general rule is that it continues only so long as the law to which it owes its existence remains in force, and that the office can be abolished during the term of the officer holding such office either by amending the Constitution or statutes, depending on which instrument the office depends for its existence. 46 C. J. 934-935; *Lockett vs. Madison County*, 137 Miss. 1; 101 So. 851; 37 A. L. R. 814.

Under this section of the Constitution the Legislature is given authority to create new judicial districts. To that extent the office of the Judge of such a created district is an office created by the Legislature. The appointment or election to a public office does not establish a contractual relationship between the person appointed or elected, and the public, so as to fall within constitutional restrictions against legislative impairment of contracts. See R. C. L. Vol. 22, pp. 376-379.

In *Throop on Public Officers*, Section 19, this doctrine is stated as follows:

"It is therefore well settled in the United States that an office is not regarded as held under a grant or a contract within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abolish the term, or to abolish the office itself."

Here the Constitution does not expressly provide that an office cannot be abolished before the expiration of the term of the officer holding the office.

In *Cowell vs. Ayers*, 110 Tex. 348, 220 S. W. 764, the court, in passing on an act of the Legislature creating the Board of Control and abolishing the board of managers of lunatic asylums, used this language:

"Interference with statutory terms of present incumbents furnishes no obstacle to the exercise of the power of the Legislature, to abolish offices of its own creation. As declared by Judge Cooley in the case of *City of Wyendotte vs. Drennen*, 26 Mich. 473, 9 N. W. 500: 'Offices are created for the public good at the will of the legislative power, with such power, privileges and amoluments attached as are believed to be necessary or important to make them accomplish the purposes designed, but except as it may be sustained (restrained) by the Constitution, the Legislature has the same inherent authority to modify or abolish that it has to create, and it will exercise it with a like consideration in view'"

In *Bennett vs. City of Longview*, 268 S. W. 786, the court uses this language:

"Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force. It logic-

ally follows that when that law is authoritatively abrogated, the office ipso facto ceases, unless perpetuated by virtue of some other legal provision."

We believe that the above cases clearly demonstrate the fact that unless the Constitution contains some provision in effect specifying that a District Judge shall remain in office during the term for which he is elected, the Legislature would clearly have authority to abolish the judicial district over which such a Judge presided during the term for which he was elected. If any such inhibition obtains, it is contained in the language of Section 7 of Article 5 above quoted. This section confers upon the Legislature the authority to increase or diminish the number of judicial districts in this State. The only inhibition in this section is contained in these words, "*who shall hold his office for the period of four years.*" It is our opinion that this phrase, when properly construed in connection with authority granted by the Constitution to the Legislature to diminish the number of districts, simply means that he shall hold his office for the period of four years, subject to the power of the legislature to abolish his office by abolishing his district.

In *Carter vs. M. K. & T. Ry. Co.*, 106 Tex. 137, 157 S. W. 1169, the court had before it an act of the Legislature creating special District Court for Grayson County, such court to exist until a designated future date. It was contended that the act violated Section 7 of Article 5 of the Constitution because the Legislature had established a District Court for a less period than the four years provided in the Constitution as the term of office of a District Judge, but the court held that the Legislature had power to limit the existence of the court that it was authorized to create.

The Thirty-ninth Legislature passed an act changing the territory of certain judicial districts by adding certain counties to some of the that the then Judges of the Ninth and Seventy-fifth Judicial Districts and removing certain counties from others, and providing that the Judges should remain as Judges of the reorganized districts and hold their office until the next general election. The Judge of the Ninth District at the time of the next general election had only been in office two years. As to whether the Legislature had authority to thus shorten the term was before the courts in the case of *State ex rel McCall vs. Manry*, 16 S. W. (2d) 609, and *Manry vs. McCall*, 22 S. W. (2d) 348. The court in each of these cases held that the Act of the Thirtiyninth Legislature only reorganized these judicial districts and that the Ninth District was not abolished, and hence the provision of the Act which attempted to shorten the term of the Judge and cause a new election for that office, was unconstitutional and void, as being in conflict with the provision of the Constitution providing that the Judge shall hold his office for the period of four years. However, the court in passing on this question uses this language in the first of these cases, the same language being quoted with approval in the second case:

"It is provided by Section 7 of Article 5 of the Texas State Constitution that: 'The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters

thereof, at a general election, a Judge, who shall be a citizen \* \* \* who shall hold his office for a period of four years \* \* \*.'

"If the Legislature created no new district, *and did not abolish the Ninth District*, then it follows that Judge Manry having been elected Judge of the Ninth District in November, 1924, at the general election of that year, for a four year term, was entitled to such full four year term under the Constitution, and that the part of Section 5 of the Act of 1925 which attempted to shorten the term and cause a new election in 1926 for such office, was in plain violation of the express provision of our Constitution above quoted, and is null and void. However, this does not affect the validity of the balance of the Act.

"It follows from what we have said that there is no doubt under the Constitution and laws of this State Judge Manry was duly and constitutionally elected Judge of said Ninth District in 1924 for a full four year term, and that, *said district not having been abolished*, he was entitled to serve out said full term."

While the court in these cases was not passing upon the question of the authority of the Legislature to abolish the office of a District Judge, we think that by the language used, which is underscored above, the court recognized the fact that the Legislature had authority under the Constitution, by abolishing the district, to in effect abolish the office. In other words, if the district itself were abolished there would be no office for the Judge to hold. We think this is the proper interpretation of that part of Section 7 of Article 5 which authorizes the Legislature to increase or diminish the number of judicial districts in this State, and that having granted to the Legislature this authority, it should not be held that the Legislature was without been elected had expired, in the absence of a specific provision in power to exercise it until the term for which the District Judge had the Constitution to this effect. Otherwise the Legislature might in certain instances have to sit silent and permit the continuance of a District Court for four years even though there was no necessity for same.

Should the Legislature in its wisdom decide that the State is now divided into more judicial districts than necessary, it may, by abolishing such judicial district, abolish the office of the District Judge for that district before the end of the term for which such Judge was elected without doing violence to the State Constitution.

It is our opinion that by conferring upon the Legislature authority to diminish the number of districts that it was the intention of the framers of the Constitution to permit the Legislature to abolish at any time unnecessary courts and thus cut down the expense incident to the operation of our district courts.

In view of the answer to your first two questions, it seems unnecessary to discuss your third question at length, because if the Legislature has authority to abolish the office of the District Judge before his term of office expires by abolishing the district over which he presides, it necessarily follows that he could not by mandamus compel the Comptroller of Public Accounts to issue a warrant in his favor for the compensation due him for the remainder of his term.

Yours very truly,

HOMER C. DEWOLFE,  
Assistant Attorney General.

Op. No. 2900.

## CONSTITUTIONAL LAW—PUBLIC OFFICERS—REDUCTION OF COMPENSATION AND FEES—LEGISLATURE.

1. The Legislature has full authority to alter, change or diminish the salary of any officer whose salary, fees or compensation is fixed by statute, whether the office itself be created by the statutes or by the constitution.

2. Where the office is created by the constitution and the salary is fixed by statute, the Legislature cannot reduce the salary to such an extent that the reduction would have the practical effect of abolishing the office.

3. Article 3, Section 40 of the State constitution prohibits the Legislature in special session from considering subjects other than those designated in the proclamation of the Governor.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, October 5, 1932.

*Honorable J. W. E. H. Beck, Chairman, Senate Investigating Committee, Austin, Texas.*

DEAR SIR: Your letter of September 22nd addressed to Attorney General Allred has been received and referred to the writer for attention. Your letter reads:

“Please advise this committee if there is any constitutional inhibition that would prevent the Legislature of Texas, in either regular or special session, from reducing the salary of any statutory officer during his term of office in this state.

“This information is desired in order that we may proceed to prepare a general fee bill reducing the salaries of various officials.

“If there should be any particular office, the salary of which could not be changed, please list the office.”

I assume that by the term “statutory officer” as used in your letter you mean an officer holding an office created by statute, or an officer holding an office, the emoluments or compensation of which is fixed by statute, although the office itself may have been provided for in the constitution. Therefore the questions presented by your letter may be restated as follows, to-wit:

First. Is it within the power of the Legislature to reduce, during his term of office, the salary or fees of an officer whose office is created by statute?

Second. If the office is created by the constitution, but the salary or fees incident thereto are fixed by statute, does the Legislature have authority to reduce the salary or compensation during the term of the officer?

In connection with the foregoing questions, we must first consider the nature of the relationship between the government and a person holding office under it. Under the common law in England a public office was considered an incorporeal hereditament grantable by the Crown as a source of all power, and certain public offices were actually inheritable; but in the United States public offices have never been regarded as property nor as having the character or qualities of grants. In the United States there is no such thing as a vested interest or an estate in an office, or even an absolute right to hold

office. A public office is more of a public trust, and although emoluments may attach as an incident of office to enable the officer better to perform his duties, the office itself is created in the interest of and for the benefit of the public. An appointment or election to a public office does not establish a contractual relationship between the person appointed or elected and the public, so as to fall within constitutional restrictions against legislative impairment of contracts. See R. C. L., Vol. 22, pp. 376-379; 46 C. J. 932.

In Throp on Public Officers, Section 19, this doctrine is laid down as follows:

"It is therefore well settled in the United States that an office is not regarded as held under a grant or a contract, within the general constitutional provisions protecting contracts; but, unless the constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself."

Among the numerous cases cited in support of this proposition is the case of *Jones vs. Shaw*, 15 Tex. 577.

The authorities are legion to the effect that in the absence of a constitutional prohibition the Legislature may change the compensation of those then in office, as well as future incumbents. 23 Am. & Eng. Enc. of Law, 401; 22 R. C. L. 432; 46 C. J. 1020, and authorities cited.

With reference to offices created by the Legislature, there is no provision in our constitution, express or implied, which prohibits the Legislature from increasing or diminishing the compensation incident to such offices during the term of any incumbent in so far as services to be rendered during the remainder of the term of such incumbent are concerned.

The doctrine to the effect that in the absence of a constitutional limitation the Legislature has power to diminish the salaries or fees incident to offices of its own creation, is sustained in the Texas cases discussed hereunder. In *Cowell vs. Ayers*, 110 Tex. 348, 220 S. W. 764, in passing on an act of the Legislature creating the Board of Control and abolishing the board of managers of lunatic asylums, the court, after deciding that the board of managers of lunatic asylums was a statutory office, said:

"Interference with statutory terms of present incumbents furnishes no obstacle to the exercise of the power of the Legislature to abolish offices of its own creation. As declared by Judge Cooley in the case of the City of Wyandotte vs. Drennan, 46 Mich. 476, 9 N. W. 500, 'offices are created for the public good at the will of the legislative power, with such powers, privileges and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But except as it may be sustained (restrained) by the constitution, the Legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with a like consideration in view.'"

See also *Stanfield vs. State*, 83 Tex. 317; 18 S. W. 577; *City of Palestine vs. West* (Civ. App.) 37 S. W. 783; *Carver vs. Wheeler County* (Civ. App.) 208 S. W. 537; and *Bennett vs. City of Longview*, 268 S. W. 786.

In the last case above cited, the court uses this language:

“Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force. It logically follows that when that law is authoritatively abrogated, the office ipso facto ceases unless perpetuated by virtue of some other legal provision.”

Under the rule announced in the above cases it is clearly within the power of the Legislature to abolish any office created by statute during the term of the incumbent. That power would necessarily include the lesser power to diminish the compensation incident to such an office during the term of an incumbent.

In a conference opinion dated August 6, 1913, prepared by Honorable C. M. Cureton, then First Assistant Attorney General, to Honorable Louis J. Wortham, passing on a similar question, it was stated:

“But the possession of an office, as has been shown, is not a vested right and therefore this Legislature may increase, diminish or alter the salary of any officer whose salary is fixed by statute instead of by constitution, without violating any provision of either the state constitution or the constitution of the United States. Of course the rule is different as to salaries which are fixed by the constitution of the state, as for instance the salary of the Governor. The Legislature, of course, could not change the salary of the Governor or of any constitutional officer except in the manner provided by the constitution, but so far as statutory salaries are concerned, the Thirty-third Legislature has absolute plenary power.”

The only limitation upon the power of the body entitled to fix said compensation is contained in Article 6824, Revised Civil Statutes, 1925, as amended by Chapter 9, Acts Regular Session Forty-second Legislature, which reads:

“The salaries of officers shall not be increased nor decreased during the term of office of the officer entitled thereto; provided however, that the members of the Legislature by majority vote may at any time set their salaries at any amount within the constitutional limit.”

This is purely a statutory provision which may be amended or repealed at any time and cannot be construed as a limitation upon the power of the Legislature. *Arnold vs. Cass County*, 289 S. W. 749.

What has been said in the foregoing paragraphs of this opinion applies with equal force to the power of the Legislature to diminish the compensation incident to offices created by the constitution, but the emoluments of which are fixed by statute, subject to the limitation that the emoluments of such offices shall not be decreased to such an extent that it would be tantamount to abolition of such offices.

It is therefore our opinion, and you are so advised, that the Legislature has full, complete and ample authority to alter, change or diminish the salary of any officer in this state whose salary is merely fixed by the statutes and not by the constitution, subject to the qualification that where the office is created by the constitution and the salary is fixed by statute the Legislature cannot, of course, abolish the office indirectly by reducing the salary to such an extent that the reduction would have the practical effect of abolishing the office. Opinions of Attorney General of Texas, 1906-8, p. 337; *Bastrop County vs. Hearne*, 70 Tex. 563; 46 C. J. 1020, and cases there cited, Note 11; *Throop on Public Officers*, Sec. 20.

As to the authority of the Legislature to enact such legislation at a special session, I call your attention to Section 40 of Article 3 of the State constitution, which provides:

“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.”

While this section of the constitution prohibits legislation upon subjects other than those designated in the proclamation of the Governor, or later submitted by him, it has been held by the Supreme Court of Texas in the case of *Jackson vs. Walker*, 49 S. W. (2d) 693, that a duly authenticated, approved and enrolled statute imports absolute verity and is conclusive that the act was passed in every respect as designated by the constitution, and that resort may not be had to the proclamation of the Governor and the journals of the two Houses to invalidate the law where the same has been filed with the approval of the Governor in the office of the Secretary of State, and this even though the subject matter contained in the act was not submitted to the special session by the Governor.

From this it follows that such legislation could be enacted by a special session of the Legislature if the subject was submitted by the Governor, or if not submitted and an act was passed and later approved by the Governor and filed in the office of the Secretary of State, it would still be a valid act even though not submitted.

This opinion is not to be construed as applicable to position held by virtue of contract nor to offices, the compensation incident to which is fixed by the constitution.

Yours very truly,

HOMER C. DEWOLFE,  
Assistant Attorney General.

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Op. No. 2905.

STATE DEPARTMENTS (Appointment of Employees of Vocational Educational Department)—STATE BOARD OF VOCATIONAL EDUCATION (Appointment Power)—STATE SUPERINTENDENT OF PUBLIC INSTRUCTION—STATUTES CONSTRUED.

1. The State Board of Vocational Education has the authority to appoint the employees in the Department of Vocational Education.

2. Under resolution of the State Board of Vocational Education, the State Superintendent of Public Instruction is made its executive officer with the power to appoint the persons employed in the Department of Vocational Education, that is, the division carrying out the work authorized by Chapter 131, General Laws of Texas, Regular Session, Thirty-eighth Legislature.

3. The State Board of Vocational Education may modify its order making the State Superintendent its executive officer with power to appoint the employees of the Vocational Educational Department and divest the State Superintendent of the appointive power granted him under said resolution. If the State Board divests the State Superintendent of the power to appoint the employees in the Vocational Educational Department,

the State Board may resume the power it had delegated to the superintendent and thereafter appoint the persons in said department.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, January 16, 1933.

*Hon Nat M. Washer, President, State Board of Vocational Education,  
Majestic Theater Building, San Antonio, Texas.*

DEAR SIR: This will acknowledge receipt of your communication of December 30, addressed to Attorney General James V. Allred.

You ask that we advise the State Board of Vocational Education with reference to the following inquiry, to-wit:

"Has the State Board of Vocational Education the authority to appoint and employ the various employees in order to carry out the work authorized under the statute, Chapter 131, Acts of the 38th Legislature, Regular Session, 1923?"

By an act of Congress (39 Stat. L. 929) popularly known as the Smith-Hughes Act, there are appropriated out of the moneys of the United States certain sums to be expended, upon conditions therein stipulated, to co-operate with the states accepting the provisions of said act in paying salaries of teachers, supervisors and directors of agricultural subjects and of teachers of trade, home economics and industrial subjects, and in paying expenses incident to the training of teachers of the subjects aforesaid. There is created by said act a federal board of vocational education to administer the act in behalf of the federal government, and to co-operate with the administrative agencies of the states in the administration of the act. Among the conditions precedent to the granting of federal aid, tendered to the states by said act, are those contained in Section 5, which reads in part as follows:

"That in order to secure the benefits of the appropriations provided for in sections two, three, and four of this act, any state shall, through the legislative authority thereof, accept the provisions of this act and designate or create a State Board, consisting of not less than three members, and having all necessary power to cooperate, as herein provided, with the Federal Board of Vocational Education in the administration of the provisions of this act. The State Board of Education, or other board having charge of the administration of public education in the State, or any State board having charge of the administration of any kind of vocational education in the State may, if the State so elects, be designated as the State board, for the purposes of this act."

The Legislature of the State of Texas accepted the provisions of the Smith-Hughes Act and, by statute enacted, designated the State Board of Education as the State Board of Vocational Education "with necessary authority and power to co-operate with the Federal Board of Vocational Education, as provided and required by the said act of Congress, in the administration of the provisions of said act; and to do all things necessary to entitle the State to receive the full benefits thereof." Chapter 131, Acts Regular Session, Thirty-eighth Legislature.

The question which has been submitted for our consideration must be answered by determining whether the power delegated to the Board of Vocational Education to co-operate with the Federal Board in the



administration of the provisions of the federal act and to do all things necessary to entitle the State to the benefits tendered by the federal act includes the power to appoint the various employees in the Vocational Educational Department.

An examination of the Smith-Hughes Act discloses that federal moneys are appropriated to pay the salaries of teachers, *supervisors* and directors of agricultural subjects, and to pay the salaries of *teachers* of trade, home economics and industrial subjects, and that federal moneys are appropriated to defray expenses of *training* teachers of agricultural, trade, industrial, and home economics subjects, all appropriations conditioned that the state match, dollar for dollar, the federal appropriation allotted to the state for each of the purposes enumerated. It is to be observed that while the Smith-Hughes Act makes an appropriation for the payment of salaries of supervisors of *agricultural* subjects, no appropriation is made by said act to pay the salaries of supervisors of *trade, home economics* and *industrial* subjects.

The Federal Board has ruled, however, that a portion of the *teacher training funds* may be used to pay the salaries of supervisors of trade, industrial and home economics subjects *under the following conditions*:

1. That a plan of supervision be set up by the State board and approved by the Federal board.
2. That the qualifications of supervisors be set up by the State board and approved by the Federal board.
3. That all supervisors employed in connection with supervision for the maintenance of which Federal funds are used shall meet the qualifications set up by State board and approved by the Federal board, and that such supervisors shall be employed by and be responsible to the State board for vocational education.

(Extracts from Bulletin No. 1, "Statement of Policies" Federal Board for Vocational Education, Revised Ed., December, 1926.)

Among the positions which may be listed as positions in the Department of Vocational Education are those of supervisors of agricultural education, of trade and industrial education, and of home economics. It is clear, under the ruling of the Federal Board, that supervisors paid in part from federal funds for teachers training, *must be employed by* and be responsible to the state board for vocational education. From the fact that under the Smith-Hughes Act supervisors of trade, industrial and home economics subjects may be paid *only* from federal teacher training funds, the conclusion follows that the State Board of Vocational Education, having the power to do all things necessary to secure the federal aid in those fields, has the exclusive power to appoint supervisors of trade, industrial and home economics subjects in this State where such supervisors are paid in part out of the moneys appropriated by the Smith-Hughes Act.

Subsequent to the Smith-Hughes Act the Congress of the United States enacted what is popularly known as the George-Reed Act, adding to the federal funds appropriated by the Smith-Hughes Act certain smaller sums than those appropriated by the Smith-Hughes Act and providing that the sums appropriated in the later act be used to co-operate with the states, under the conditions prescribed by

the earlier act, in paying the salaries of teachers, supervisors and directors of agricultural subjects, and of teachers, *supervisors* and directors of home economics subjects.

While the ruling of the Federal Board requires that supervisors of trade, industrial and home economics subjects, paid in part from the moneys appropriated by the Smith-Hughes Act, be appointed by the state board for vocational education, the ruling does not govern the appointment of supervisors of home economics paid in part from the moneys appropriated by the George-Reed Act or supervisors or directors of agricultural subjects.

By Sections 8 and 10 of the Smith-Hughes Act, the state board is required to prepare plans showing how it is intended that the subsidized work of vocational education is to be carried out in the state. The Federal Board has required that these plans be prepared for 5-year periods. The various state boards since 1918 have shown in their several plans for the administration of vocational education in this State that the work shall be carried out under the direct supervision of the State Board. Since 1922 the board has included in its plans the statement that the State Board of Vocational Education will employ the directors and supervisors of agricultural, trade and industrial and home economics education carried on in this State. This arrangement has always been approved by the Federal Board. The same arrangement has been made between the State Board and the Federal Board for the period beginning July 1, 1932 and ending June 30, 1937. It is submitted that the arrangement made by the State Board with the Federal Board in reference to the employment of persons to be paid in part out of the federal moneys should be upheld if it is possible to do so, since the good faith of the State has been pledged by the legislature to the federal government that the State will co-operate in the administration of the subsidized work in vocational education by and through the State Board of Vocational Education as the administrative agency of the State in that work, and in view of the fact that the State Board, acting as the representative of the State, has promised that the work shall be carried out in a prescribed manner—that is, in accordance with its plans.

The board has not only published in its plans for administration of vocational educational work in this State that *it* will employ the persons engaged in carrying out the subsidized work but it actually has employed or has had employed the persons engaged in that work over a period of fifteen years that the law has been in operation. The board, therefore, has construed the statute as vesting in it the power to appoint the persons whose employment is now in question.

The official minutes of the State Board of Education from December 6, 1917, to the present date reflect the construction placed upon the act in question by the State Board of Vocational Education by the following actions taken by it in regard to the employment of the personnel of the Vocational Department:

- Dec. 6, 1917—Appointment of J. D. Blackwell as Director of Vocation Agriculture, salary fixed; Minutes of State Bd. for Voc. Ed. p. 4
- Dec. 1, 1917—Appointment of Assistant Director of Vocational Agriculture, salary fixed; Ibid., p. 6
- Dec. 10, 1917—Resolution making state superintendent executive officer and defining his duties; Ibid., p. 8
- Jan. 10, 1918—Appointment by Board of Miss Crigler as supervisor of vocational home economics at salary of \$3,000 per year and appointment of N. S. Hunsdon as supervisor of industrial education at salary of \$3,000 per year; Ibid., p. 10
- Aug. 10, 1928—The Board *re-elected* the following vocational directors to their respective positions; Miss Crigler, director of vocational home economics; J. D. Blackwell, director of vocational agriculture; N. S. Hunsdon, director of industrial education; Ibid., p. 17
- Sept. 13, 1918—Board passed resolution directing secretary to write Judge Carl, secretary of the State Council of Defense, informing him that under the Smith-Hughes act the State Board for Vocational Education, has employed N. S. Hunsdon, State Director for Industrial Education, to supervise trade and industrial subjects in the schools; Ibid., p. 22
- Oct. 15, 1918—Secretary reported resignation of Miss Crigler as director of vocational home economics work; appointment by Board of Miss Allie George to fill the vacancy; Ibid., p. 23
- Dec. 11, 1918—Board elected C. L. Davis as Assistant Director of Vocational Agriculture at salary of \$2,800 per year; Ibid., p. 25
- Jan. 13, 1919—Approved by Board of Budget for administration and supervision of Smith-Hughes law for vocational education January 1, 1919, to July 1, 1919, salaries designated; Ibid., p. 28
- May 10, 1919—Board elected Agnes Harris, Deirector of Vocational Home Economics; Ibid., p. 34
- June 10, 1919—Board re-elected Mr. Hunsdon and Mr. Blackwell; Ibid., p. 38
- Sept. 10, 1919—Approval of the appointment of Dorothy Sells, Assistant Director of Industrial Education; Ibid., p. 45
- Aug. 10, 1920—Board instructed Secretary to state to C. L. Davis, Assistant Director of Vocational Agriculture, that the Board desired not to accept his resignation; Miss Blanton was instructed to offer Mr. Davis a salary of \$3,700 per year to remain and take the position of Director of Vocational Agriculture; salaries of the director of Home Economics and director of trades and industries were fixed at \$3,500; Mr. Hines was promoted to the position of Mr. Davis; Ibid., p. 73
- Aug. 26, 1920—Readjustment of salaries of Assistant and Supervisor of Home Economics and Assistant Director of Trades and industries; Ibid., p. 74

- Sept. 15, 1920—The Board approved appointment of J. B. Rutland as Assistant Director of Vocational Agriculture; Ibid., p. 74b
- Aug. 23, 1921—Budget for vocational division approved; Ibid., p. 93
- June 10, 1922—Leave of absence for N. S. Hunsdon and C. D. Davis granted; Ibid., p. 109
- July 13, 1923—Action on selection of J. M. Hall, Director of Industrial Education and J. J. Brown, Assistant Director of Agricultural Education, postponed for later consideration; Ibid., p. 127
- July 21, 1923—Selection of J. M. Hall, Director of Industrial Education approved; Ibid., p. 128
- Jan. 13, 1930—Resolution making the State Superintendent executive officer of the State Board and granting him power to appoint the personnel of the division administering the vocational educational laws subject to the approval of the State Board.

The construction placed upon a statute, the meaning of which is not clear, by the administrative officers charged with its enforcement, is entitled to great weight in the interpretation of the statute, and where the interpretation has been uniformly applied over a long period of time it should be followed unless it is clearly erroneous or against the plain meaning of the statute. Lewis' *Southerland on Statutory Construction* (2d ed.) Sections 473 et seq.

The question with which we are presently concerned is whether the power to appoint persons for whose actions it is responsible was granted to the State Board of Vocational Education by grant of power to co-operate in the administration of the federal act and to do all things necessary to secure for the State the aid tendered by the federal government. The grant of power to the State Board is broad enough to include the power to appoint the persons in question if it is reasonably necessary that it do so in order to secure the aid of the federal government. We are unable to say that the power granted did not include the power in question.

The attention of the writer has been called to Article 2656, Revised Civil Statutes of 1925, which provides, in part, that the State Superintendent "may employ such clerks to perform the duties of his office as may be authorized by appropriations therefor." It is contended that the State Superintendent has the authority to employ the persons engaged in the Vocational Educational Department. Under Article 2656 the superintendent has authority to employ clerks where there are appropriations made for that purpose *and* where such clerks are to perform the duties of *his office*. The appropriations made by the State of Texas to match federal vocational educational funds are not made to the State Department of Education, but are made to the State Department of Vocational Education. The State Superintendent, his assistants, the clerks and other employees in his office are paid out of appropriations made to the State Department of Education. The appropriation made to the State Department of Vocational Education sets out a stipulated sum to match federal vocational education funds with the following proviso:

“Provided that the State Board of Vocational Education shall have the authority to expend for salaries and expenses in administration and supervision out of the funds hereinabove, sums not to exceed \$23,950.00 for each of the fiscal years ending August 31, 1932 and 1933, to match the federal funds and to comply with the provisions of the several acts of the legislature.”

The legislature has therefore indicated that it considered the State Board of Vocational Education as being the administrative head of the State Department of Vocational Education instead of regarding the State Superintendent as head of that department.

In the foregoing paragraphs of this opinion it was pointed out that the State Board has the exclusive power to employ certain of the employees in the Vocational Educational Department, that is, the exclusive authority to appoint supervisors of trade, industrial and home economics subjects where they are paid in part out of the federal funds appropriated by the Smith-Hughes Act. If we are to say that that is the limit of the board's power to appoint, then it is evident that some other officer has the authority to appoint other of the employees in that division.

The federal government saw fit to require that a state board be designated or created to co-operate with the federal government in administering the federal aid in the state. All of the employees of the department of vocational education are ostensibly engaged in carrying out the work which the federal government has assumed to subsidize. The state board is the agency of the state to which the federal government looks for the proper administration of the act of Congress in the state, and the state board is responsible for the proper administration of the subsidized work within the boundaries of the the state. If it be said that the State Superintendent has the power to appoint the personnel of the Vocational Educational Department other than those which the Federal Board requires the State Board to appoint, than the State Board becomes responsible for the actions and judgment of persons not under its control—for the actions and judgment of persons whose qualifications are considered and judged by an officer over whom the board has no control. Should this be our conclusion confusion would necessarily result, and some of the persons who are engaged in the administration of the subsidized work would be responsible to one officer and others of the employees to another officer. We do not believe that such a situation was intended by the legislature to be created.

In view of the long continued construction placed upon the act in question by the State Board in its official capacity as the administrative board charged with the enforcement of the act, and in view of the uniform application which has been made of the construction of the board over the period of fifteen years that the law has been in operation, you are advised that in our opinion the State Board of Vocational Education has the power to employ the personnel of the Vocational Educational Department.

The following resolution of the State Board of Vocational Education was approved and entered on its minutes January 13, 1930:

“BE IT RESOLVED by the State Board for Vocational Education that the State Superintendent of Public Instruction shall be the executive officer

of the State Board for Vocational Education for the purpose of administering all provisions of the Federal and state laws affecting vocational education in this state,

“That the personnel of the division administering said law shall be selected by the executive officer subject to the approval of the State Board for Vocational Education,

“That all employees under said laws shall be under his immediate direction and supervision and he shall approve all items included in the disbursement of the funds set aside for administration expenses and in the operation of the Civilian Rehabilitation division.

“All other disbursements shall require the approval of the State Board for Vocational Education on recommendation of the executive officer and he shall proceed in the performance of his duties in accordance with the rulings of the State and Federal Boards under the provisions of the state and Federal laws for vocational education in Texas.”

Under the above-quoted resolution of the board, the State Superintendent of Public Instruction would have the power to select the personnel of the Vocational Educational Division, subject to the approval of the State Board of Vocational Education.

You have orally requested that this department further advise the State Board of Vocational Education whether it may rescind in whole or in part its order in making the State Superintendent its executive officer with the power to appoint the persons employed in the Vocational Educational Department.

You are advised that the State Board may, at its pleasure, modify its order and divest the State Superintendent of the power to appoint granted to him under the resolution above quoted, and that the board may then assume and exercise the power to appoint the persons employed in the Vocational Educational Department. Until the order above quoted has been modified, the State Superintendent has the power to select the personnel of the division administering vocational education laws and his selections are subject to the approval of the State Board.

Respectfull submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

## OPINIONS RELATING TO TAXES AND TAXATION

Op. No. 2946.

TAXATION—EXEMPTION—INSTITUTIONS OF LEARNING — ENDOWMENT  
FUND—FORECLOSURE SALES.

A conveyance of land, in lieu of formal foreclosure, to an institution of learning in satisfaction of a debt held by such institution for the benefit of its endowment fund is in legal effect a purchase by such institution under foreclosure sale, so as to entitle the institution to hold said property exempt from taxation under the provisions of Section 1 of Article 7150, Revised Civil Statutes, as amended by Chapter 124. Acts, Regular Session, Forty-second Legislature for a period of two years.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 21, 1934.

*Honorable Geo. H. Sheppard, State Comptroller of Public Accounts,  
Capitol Station, Austin, Texas.*

DEAR SIR: We are in receipt of your letter of recent date in which you ask for an opinion of this department upon the following inquiry:

The facts submitted in connection with your question are that Ben. F. Stone, as independent executor of the will and trustee of the estate of Mattie R. Coggin, deceased, under date of October 9, 1926, by warranty deed conveyed to Good and D. C. Wooldridge, certain real estate known as the "Coggin Clear Creek Ranch" situated in Brown County, Texas. As a part of the consideration for the conveyance Good and D. C. Wooldridge executed and delivered a series of certain promissory notes of that date payable to Ben F. Stone in annual installments. Ben F. Stone reserved in the deed of conveyance a vendor's lien. In accordance with the will of Mattie R. Coggin these notes became the property of Daniel Baker College of Brownwood, Texas, as a part of its endowment fund. During the month of July, 1932, Good, Wooldridge and wife, together with May Wooldridge, for herself and as administratrix of the estate of D. C. Wooldridge, deceased, reconveyed the property to Daniel Baker College hereinabove mentioned. The minor heirs of D. C. Wooldridge, deceased, were divested of their interest in the property by proceedings in the District Court of Brown County, in the case styled Daniel Baker College vs. William Houston Wooldridge, et al., Cause No. 6257, on the docket of said court.

Daniel Baker College is an institution of learning in this State.

Your inquiry is as to whether or not under the provisions of Article 7150, Revised Civil Statutes of 1925, Daniel Baker College is entitled to hold this real property for a period of two years exempt from the payment of taxes.

You are respectfully advised that in our opinion Daniel Baker

College is entitled to hold the property tax exempt for a period of two years.

We call your attention to the constitutional basis for Article 7150, Revised Civil Statutes, as amended by Chapter 124, Acts, Regular Session, Forty-second Legislature.

Section 2 of Article 8 of the Constitution of Texas, as amended at the general election held November 6, 1928, provides, in effect, after enumerating various other property that the Legislature might by general law exempt from taxation that the endowment funds of institutions of learning and religion, not used with a view to profit, could be exempt from taxation and where land or other property was purchased under foreclosure sales made to satisfy or protect investments of such funds that such property so purchased could be exempt from taxation for a period of two years and no longer.

The Legislature has given effect to the foregoing constitutional provision in the pertinent part of Section 1 of Article 7150, Revised Civil Statutes of 1925, as amended by Chapter 124, Acts, Regular Session, Forty-second Legislature which, in effect, exempts all public colleges, public academies and all endowment funds of institutions of learning and religion, not used with a view to profit, and property that is bought in by such institutions under foreclosure sales in order to protect such endowment funds for a period of two years.

It is a well recognized rule that constitutional and statutory exemptions or property from taxation should be strictly construed. However, this rule does not call for a strained construction that would be adverse to the purpose and intent of the Legislature, but interpretation of such provisions should be reasonable and in accordance with the actual meaning of the language used in order to give effect to the spirit as well as the letter of the law.

Fundamentally, the problem of deciding whether or not Daniel Baker College is entitled to the exemption claimed requires an inquiry into the nature of a foreclosure. This term as it originated, referred to a Chancery proceeding in England whereby the equity of redemption of a mortgagor was cut off or diverted out of him after the legal title had become absolute in the mortgagee. In America, where courts of equity and courts of law are ordinarily combined, as is the case in Texas, a foreclosure refers to a proceeding by which a mortgagor is divested of his claim to the property, which claim is usually designated as the equity of redemption. It is to be noted that in the case before us that the executor, Ben F. Stone, retained legal title to the property involved when the original conveyance was made subject to a vendor's lien. When the notes were transferred to Daniel Baker College this legal title passed from Ben F. Stone to the College as an incident to the debt. What has happened in this case is that Good Wooldridge and his wife, and the heirs of D. C. Wooldridge, deceased, did by the deed of reconveyance to Daniel Baker College satisfy a debt due the College as a part of its endowment fund in lieu of a formal foreclosure. This reconveyance operated as a satisfaction and extinguishment of the debt which was secured by express vendor's lien in the original deed, and deprived the original vendees of all of their remaining interest in the



land, and barred the equity of redemption, thus uniting in the college legal and equitable titles as would have been the case if same had been purchased at a formal foreclosure sale.

The term "foreclosure sale" in a strict sense and as originally used at the common law, applied only to the termination of a proceeding in equity whereby the mortgaged property was subjected to judicial sale in satisfaction of the obligation to secure which the mortgage was given, and had the effect of cutting off the mortgagor's equitable right of redemption. Words and Phrases, Vol. 3, Page 2878, First Edition.

However, in its modern significance the term "foreclosure" applies to any proceeding by which the mortgagor's equity of redemption in the property is forever barred, and not necessarily to a strictly judicial proceeding terminating in the sale of the mortgaged property.

Therefore, the vendor or mortgagee or their assigns may foreclose a mortgage or vendor's lien by accepting a deed from the mortgagor or vendee in lieu of a formal foreclosure either under the terms of the contract or by judicial proceedings, as was the case when the vendees in the original deed reconveyed the property to Daniel Baker College in satisfaction of the lien held by such institution as assignee.

Rightfully understood therefore the sale to the college was one which foreclosed the title and interest in the property which was held by Good Wooldridge and wife and the heirs of D. C. Wooldridge and in legal effect amounts to a purchase at foreclosure sale so as to entitle the college to hold the property exempt from taxation for a period of two years.

It is to be noted that the constitution and statutes do not require a judicial sale but only a "foreclosure sale."

In substantiation of the conclusions reached in this opinion, we would call your attention to Ruling Case Law, Volume 19, Page 516, et seq.; Corpus Juris, Vol. 41, Section 1003, et seq.; Groce vs. Montgomery, 92 So. 412, (Supreme Court, Alabama).

You are further advised that your presumption that the property would be exempt from taxation for the years 1933 and 1934, is, in our opinion correct. It should be understood, however, that the property would be subject to the payment of any unpaid taxes which accrued prior to its acquisition by the college.

Yours very truly,

SCOTT GAINES,  
Assistant Attorney General.

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Op. No. 2923.

GASOLINE TAX—MAIL CARRIERS.

1. Rural Free Delivery mail carriers and persons having contracts with the United States to transport mails on the public highways are not exempt from the payment of the motor fuel tax on gasoline used in such transportation.

2. Construing exemptions in House Bill No. 247, Acts of the Forty-third Texas Legislature.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, June 29, 1933.

*Honorable George H. Sheppard, State Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: This is to acknowledge your recent inquiry to this office which has been referred to me for attention, in which you ask the following question:

"Are owners of automobiles carrying the United States mails on Rural Free Delivery routes, or persons carrying the mails under contract with the United States to transport mails on the public highways of this state exempt from the payment of the motor fuel tax on gasoline used in such transportation under H. B. No. 247, 43rd Texas Legislature?"

In answer to your question we refer you to Section 2, subdivisions (a), (b) and (c) of the bill referred to, which read as follows:

"Sec. 2. (a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. The said tax shall be paid as hereinafter provided upon the first sale distribution or use in Texas.

"(b) The tax shall accrue on the first sale distribution or use, so that a single tax only will be collected on the same gallon of motor fuel, it being intended to impose the tax at its source in Texas, or as soon thereafter as such motor fuel may be subject to being taxed. No person, however, shall be required to pay a tax on motor fuel imported into this State in the tank of a motor vehicle, connected with and which feeds the carburetor or substitute therefor, in quantities of thirty (30) gallons or less, when such motor fuel is actually used in said vehicle, and is not extracted from said tank for sale, distribution or use. Provided, however, that any manufacturer or refiner in this State may, at his option, transfer the tax herein imposed upon the sale of casinghead or natural gasoline to any distributor holding a permit under the terms of this Act by reporting each and every such sale the Tax upon which is transferred, to the Comptroller within five (5) days after making the same, giving full details of such sale, as provided to be given in the form of manifest prescribed in Section 8 (b) of this Act.

"(c) No tax shall be imposed on any motor fuel, the imposing of which would constitute an unlawful burden on interstate commerce and which is not subject to be taxed under the Constitution of the State of Texas and the United States; and provided, that the tax imposed herein shall be in lieu of any other excise or occupation tax imposed by the State or any political subdivision thereof, on motor fuel."

The last quoted subdivision of Section 2 contains all the exemptions set out in this act; and to allow this type of carrier to claim exemptions from the payment of gasoline taxes under the provisions of this act, it would have to be found that by reason of the fact such parties were carriers of the United States mails, that they were such agents or instrumentalities of the United States Government that such payment (1) would constitute an unlawful burden on interstate commerce, or (2) would not be subject to be taxed under the Constitution of the State of Texas and the United States.

In this connection in 6 Ruling Case Law, Section 424, there is found this language:

"On the one hand it is unquestionably settled that the provision of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the law was not intended to prevent a

state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions. It may vary the rates of excises upon various products.*"

Again, in a letter from the United States Post Office Department by Mr. Horace J. Donnelly, Solicitor, addressed to Mr. D. A. Simmons, while an Assistant Attorney General of this state, under date of May 19, 1928, he states as follows:

"I have to advise you that this Department does not assert on behalf of the owners of private vehicles operated under a contract for the carriage of mails exemption from the application of taxes or other state laws."

In a case in which the State of Nebraska sought to levy and collect a tax against a railroad company, which was extending its lines through Nebraska under special concessions granted by Congress to the extent that the United States issued six per cent bonds to complete the lines, granted right of way through public lands "for the purpose of aiding the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," the United States Supreme Court, in holding that the State of Nebraska could properly tax such railroad, held: (Railroad Co. vs. Peniston, 18 Wall. 5.)

"The exemption of agents of the federal government from taxation by the state is dependent, not upon the nature of the agents nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states."

The most recent case found bearing upon this subject is reported from the State of California, Alward vs. Johnson, 281 Pac. 389, decided in 1929. The plaintiff was engaged in the business of operating an automobile stage line between fixed points, traveling over the highways of the state. The greater portion of his time and duties were devoted to the carrying of the United States mails. He sought to avoid a gross receipts tax levied by the state, claiming the Constitution gave him this exemption because the greater portion of his time and duties were given to the carrying of the United States mails. This contention was denied by the State Supreme Court, and affirmed by the United States Supreme Court in 1931, 282 U. S. 509. In affirming the decision of the Supreme Court of California, the United States Supreme Court held in part as follows:

"Not every person who uses his property or derives a profit in his dealing with the government may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of the government within the meaning of the rule. It seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

"Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mail. There was no tax upon the contract for such carriage. The burden laid upon the property employed affected the operation of the government only remotely."

In answer to a similar question to the Attorney General of the State of Illinois, in which the contractor, having a four year contract with the United States government to carry the United States mails from the depot to the post office, sought to exempt himself from the payment of the state motor fuel tax based upon each gallon of gasoline purchased, it was held that such contractor was not entitled to a refund of such taxes. Attorney General's Report of Illinois, 1930, page 219.

We are not unmindful of the case of *Louwein vs. Moody*, 12 S. W. (2d) 989, in which the Commission of Appeals of our state in construing Texas R. C. S. Article 6676, and which statute has since been repealed, held that when the trucks of a contractor for the hauling of the United States mails were painted, marked and used in the specific manner prescribed by the United States Post Office Department and used for no other purpose, they were exempt from the payment of the Texas license plate tax

Our opinion is that under the present exemption now allowed by House Bill No. 247, 43rd Texas Legislature, Rural Free Delivery and other carriers of the United States mails in this state are not exempt from the payment of the gasoline tax as prescribed by our Texas Legislature, unless the United States government is to pay for such gasoline either upon requisition or by reimbursement to the purchaser.

Yours very truly,

V. EARL EARP,  
Assistant Attorney General.

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Op. No. 2941.

STATUTES CONSTRUED—HOUSE BILL NO. 11, REGULAR SESSION FORTY-THIRD LEGISLATURE—TAXATION—TAXES PAID UNDER PROTEST—CLASS ACTIONS FOR RECOVERY THEREOF.

1. Statutes establishing a procedure to compel the refund of a tax paid under protest must be strictly complied with.
2. Where an action for recovery is permitted under such statutes the action is barred unless brought within the prescribed time.
3. In order for one to avail himself of that part of House Bill No. 11, Regular Session Forty-third Legislature, which provides for class actions for recovery of taxes paid under protest, he must be named by the plaintiff in such action or must join therein.
4. One not named in purported class action for recovery of taxes and who does not join therein not entitled to recovery.
5. Every person seeking to recover tax paid under protest in the manner provided by said House Bill No. 11 must either bring suit or properly join in a pending suit within the ninety day period allowed therein.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXA., February 12, 1934.

*Honorable George H. Sheppard, Comptroller of Public Accounts,  
Austin, Texas.*

DEAR SIR: The department is in receipt of the following letter from you bearing date January 24, 1934:

"Section 1, of House Bill 11, Forty-third Legislature, Regular Session, provides as follows:

"Any person, firm or corporation who may be required to pay to the head of any department of the State Government any occupation, gross receipt, franchise, license or other privilege tax or fee, and who believes or contends that the same is unlawful and that such publicofficial is not lawfully entitled to demand or collect the same shall, nevertheless, be required to pay such amount as such public official charged with the collection thereof may deem to be due the State, and shall be entitled to accompany such payment with a written protest, setting out fully and in detail each and every ground or reason why it is contended that such demand is unlawful or unauthorized."

"Section 2 of this Bill provides, as follows:

"Upon the payment of such taxes or fees, accompanied by such written protest, the taxpayer shall have ninety (90) days from said date within which to file suit for the recovery thereof in any court of competent jurisdiction in Travis County, Texas, and none other. Such suit shall be brought against the public official charged with the duty of collecting such tax or fee, the State Treasurer and the Attorney General. The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest as originally filed. The right of appeal shall exist as in other cases provided by law. Provided, however, where a class action is brought by any taxpayer all other taxpayers belonging to the class and represented in such class action who have properly protested as herein provided shall not be required to file separate suits but shall be entitled to and governed by the decision rendered in such class action."

"On or about October 25, 1933 gross receipts tax was paid under protest by purchasers of crude oil to cover that part of the tax that was due by the royalty interest holders.

"One purchaser who has paid such tax filed suit within the prescribed ninety days, thereby preventing this Department's transferring the tax so paid from the suspense fund to the respective funds.

"The question arises,—Will each person, firm, or concern be required to file suit in protest of its individual tax payment within the ninety days; or, will the suit now filed answer for all those who have paid under protest for like cause?"

We also have the following letter from you bearing date February 8, 1934:

"Please refer to my letter of January 24, 1934, in which I requested an opinion regarding the moneys held in suspense funds covering gross receipt tax on which protests were filed at the time of payment.

"Several suits have been filed within the prescribed ninety days, but the question arose, will each person, firm, or concern have to file an individual suit covering the same kind of tax that may have been paid by him; and if the suit is not filed will it be permissible for me to transfer the money paid by those who have not filed suit within the ninety days to the general fund."

We have learned from your Mr. Byrne that the gross receipts tax referred to in your letters is that levied by House Bill No. 154 of the Regular Session of the Forty-third Legislature on crude oil produced within this State.

The first month's production taxable under the provisions of House Bill No. 154 was that of September, 1933, taxes for that month becoming due October 25, 1933. The records in your office show that many producers and purchasers of crude oil in this State accompanied their remittances for such taxes with the protests provided for in House Bill No. 11.

The ninety days given in House Bill No. 11 for the bringing of suit for the recovery of such taxes paid under protest expired, as to the taxes so paid on October 25, 1933, on January 25, 1934. While, as you know, a number of suits were seasonably filed for the recovery of taxes for the month of September paid under protest on or before October 25, 1933, only one such suit purports to be brought in behalf of any one other than the plaintiff named therein. This is the suit of S. B. Edwards against The Texas Company, the Comptroller, the Treasurer and the Attorney General, filed in the Ninety-eighth District Court of Travis County on November 15, 1933. The plaintiff's petition in the Edwards case contains the following allegation:

"This action is instituted not only in behalf of plaintiff herein, but also for the use and benefit of all persons or corporations who own royalty interests in oil and gas in Texas and who have protested against or object to the payment of occupation taxes thereon, *and who may join herein.*"

We are indeed doubtful, from a study of the petition in the Edwards case and of the prayer for relief therein, whether the suit is one for a recovery of taxes paid under protest. As we construe the petition the suit is brought solely for the purpose of restraining future collections and no recovery of taxes paid under protest is sought. We are not greatly concerned with that, however, since the issue will soon be decided by the Court in which the suit is pending.

What we are concerned with is that part of the petition which seeks to bring the suit in behalf of "all persons or corporations," etc.

Waving aside any question as to the validity of that part of House Bill No. 11 which permits the bringing of class suits and assuming, at least for the purposes of this opinion, that it is valid, it is certain in our minds that a suit thereunder which does not on its face unmistakably purport to be brought in behalf not only of the plaintiff therein but of all similarly situated with him cannot serve as the basis for a recovery by any one other than the actual plaintiff named therein.

Whether a suit purportedly brought in behalf of others similarly situated with the plaintiff, without naming or attempting to bring before the court as actual parties such others so situated, could warrant a recovery by any one other than the actual named plaintiff is another question and is the question here to be determined.

Statutes establishing a procedure to compel the refund of a tax paid under protest have been upheld generally; but one seeking relief under such statutes must strictly comply with the provisions thereof. Where an action for recovery is permitted under such statutes, the action is barred unless brought within the prescribed time. *Burrill vs. Locomobile Company*, 258 U. S. 34, 42 Sup. Ct. 256, 66 L. Ed. 450; *International Paper Company vs. Commonwealth*, 232 Mass. 7, 121 N. E. 510; *Sperry & Hutchinson Company vs. Mattson*, 64 Utah 214, 228 Pac. 755.

Statutes such as House Bill No. 11 prescribing a limit on the time within which suit shall be brought to recover taxes paid under protest are not statutes of limitations which affect the remedy merely, but are statutes prescribing a condition on which the right to sue depends.

"The rule is well settled in this county that wherever a statute grants a right which did not exist at common law and prescribes the time within which the right must be exercised, the limitation thus imposed does not affect the remedy merely, but is of the essence of the right itself and one who seeks to enforce such right must show affirmatively that he has brought his action within the time fixed by statute; and if he fails in this regard he fails to disclose any right to relief under the statute." (Dolenty vs. Broadwater County, 45 Montana 261, 122 Pac. 919).

Have those for whom S. B. Edwards seeks to bring his suit, whoever they may be, brought suit within the time fixed by statute? Have they "disclosed any right to relief under the statute"? Is the suit of S. B. Edwards even a "class action" in the true sense of the word? We think not.

The type of action which permits the representation of a large number, the class suit, is adopted from the old chancery practice. While its applications have been wide and varied (generally on the principle of the prevention of a multiplicity of suits) the almost universal rule seems to be that this type of action may be brought by one for himself and others similarly situated only when there is a question of *common interest* capable of being settled as to all concerned by the single decree. Pomeroy's Equity Jurisprudence, 3rd Ed., Chapter 2, Section IV; Pomeroy's Code Remedies, 5th Ed., Chapter 2nd, Section 7th; 36 Harvard Law Review, 89.

The codes in those states where the Reformed American Procedure prevails usually contain the following provision:

"When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court one or more may sue or defend for the benefit of the whole."

This in substance is but a reiteration of the prevailing equity principles.

To invoke the above quoted provision of the codes,

". . . in order that a plaintiff may be entitled to sue or a defendant to be sued in the representative character described, the facts showing that the requirements of either case have been complied with must not only exist, but must be alleged by the plaintiff as the very ground and reason for adopting the peculiar form of action permitted by statute. . . . It should be carefully observed that this provision does not create any new rights of action, nor enlarge any of those now existing. The suit cannot be sustained by one as the representative of the many others who merely sue in his name, unless it could have been maintained if all these many others had been legally joined as co-plaintiffs or unless it could have been maintained by each of them suing separately and for himself." (Pomeroy's Code Remedies, paragraph 287).

"In the states which permit such suits by a taxpayer or freeholder generally, there is some conflict of opinion in respect to the question whether one can sue on behalf of others similarly situated with himself. It has been held in Wisconsin that an action cannot be maintained by one taxpayer as the representative of all others in a local district, to prevent

the enforcement of an alleged illegal tax which would be a lien upon real estate, on the ground that the lands owned by the individual taxpayers, and affected by the tax, are distinct and separate parcels and there is no common interest among the owners thereof. The conclusion was that each taxpayer must sue separately." (Pomeroy, op. cit., paragraph 292).

"... now to consider the nature of an action brought by one on behalf of others and its effects upon the rights and duties of those who are represented by the actual plaintiffs. The persons not named in such cases are not parties to the suit unless they afterwards elect to come in and claim as such and bear their proportion of the expenses." Pomeroy, op. cit., paragraph 293).

"... If ... the purpose of the claimant who belongs to the class of persons represented by the actual plaintiff or defendant, be to take a practical part in the controversy or to share the benefit of the judgment which has or may be rendered, his mere act of making the claim, coupled with a willingness to bear his share of the expenses, will be of itself a sufficiently positive and affirmative act to make him a party to the proceeding and entitle him to his personal relief. Even in this case, however, the action may be of such a nature and the judgment of such a character that a separate order or adjudication of the court will be necessary in order to determine the particular rights under the general decree of each party and to award to him a special portion of the general relief." (Pomeroy, op. cit., paragraph 297).

It is clear to us that in order for one to share the benefits of a suit such as that contemplated by House Bill No. 11, he must make himself a party to the suit in order that a specific judgment might be rendered in his favor.

"A suit to recover back is quite different in the grounds upon which a recovery can be had, from a suit to enjoin a tax. In the latter case, each is not only interested in the question involved, but a judgment may be rendered in favor of all as a class, upon substantially the same case, and terminate the litigation. Not so in an action to recover back money paid under duress. In such case the judgment must not only be for each according to the amount due him, but must depend upon whether each as an individual, paid voluntarily or involuntarily." (Trustees of Jackson Township vs. Thoman, 37 N. E. 523, 51 Ohio St., 298).

We are all more convinced that this is the correct rule when we note that House Bill No. 11, after providing that suits brought within its purview must be brought not later than ninety days from the date of the protest, goes on to provide:

"The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest so originally filed."

Could it have been the intention of the Legislature to place upon the State Treasurer, who is holding the money in suspense, the duty of considering each and every protest filed and to vest in him the discretion of determining whether each protest so filed is within the scope of the relief sought in any suit which may have been instituted? Was it the intention to impose upon him the duty and to vest in him the discretion to determine whether the issues raised in the protests so filed are the same as those raised in such suit, or whether any particular protestant is of the same class with the plaintiff? Most assuredly not.

We therefore construe those provisions of House Bill No. 11 relating to class actions to mean, at the most, this and nothing more: one



may bring suit thereunder for himself and for such others as he may properly name as belonging and show to belong to the same class with him, i.e., who have protested payment of the tax upon the same grounds; or, on the other hand, others who show themselves to belong to the same class with the plaintiff may join themselves in his suit.

We think the test of eligibility for participation in the benefits of such a suit is correctly stated in that part of the plaintiff's petition the S. B. Edwards case which declares that the suit is brought not only in behalf of the plaintiff but of all others of his class, "*and who may join herein.*"

You are therefore advised:

(1) Each person will be required to file his suit or to properly join in a pending suit within the ninety days allowed by House Bill No. 11.

(2) All those who paid gross production taxes for the month of September, 1933, under protest and who failed to file suit or to join in a pending suit prior to January 26, 1934, are now barred therefrom, and all moneys in the suspense account represented by payments under protest from such persons who have so failed should by the Treasurer be released from the suspense account and credited to the proper funds.

Yours very truly,

WILLIS E. GRESHAM,  
Assistant Attorney General.

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Op. No. 2902

TAXATION—INCOME—CONSTITUTIONALITY—GRADUATED RATES—RATES,  
INDIVIDUALS AND CORPORATIONS—EXEMPTIONS—STATUTES,  
RETROSPECTIVE EFFECT.

1. Legislature has inherent power to impose income tax, unless prohibited by the Constitution; this power expressly recognized by Article 8, Section 1, Constitution.

2. Income tax is not "tax on property" within the meaning of the requirement that same must be levied ad valorem.

3. Legislature has power to classify subjects of taxation, other than property, provided classification made is reasonable and not arbitrary.

4. Classification of subject of taxation is a legislative function and will not be disturbed by the courts unless the classification be purely arbitrary.

5. Legislature may classify subjects of income taxation according to ability to pay, provided classifications so made are reasonable and not arbitrary.

6. Legislature, in classification of income for purpose of taxation, may levy graduated rates, provided the rate is uniform upon each member of a particular class.

7. Legislature in imposing income tax, may allow reasonable exemptions.

8. An income tax statute would not be unconstitutional because it imposes a different rate upon the income of corporations from that imposed on income of individuals.

9. Income tax statute levying a tax on the entire income for the year in which same was passed and therefore taxing that portion of income accrued prior to passage of statute would not be retrospective in such sense as to render it unconstitutional so far as the year in which it is passed is concerned.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, October 17, 1932.

*Legislative Tax Survey Committee, Austin, Texas.*  
*Attention: Senator Ben G. Oneal, Chairman.*

GENTLEMEN: We are in receipt of copy of tentative draft of the proposed income tax law, submitted in connection with your communication addressed to this department, in which you request to be advised upon the following questions, to-wit:

1. Has the Legislature of Texas, under present constitutional provisions, the authority to levy an income tax carrying graduated rates?
2. Can the income of corporations be taxed at a different rate from that of income of individuals?
3. May the Legislature constitutionally provide certain exemptions of income from taxation?
4. Can the Legislature, in session in 1933, levy a tax on the entire net income for 1933, including that portion of the year prior to the date when the law becomes effective?

In replying to the above, we will consider the questions presented in the numerical order in which they appear.

1.

It is an elementary rule that the Legislature can enact all laws not prohibited, either in express terms or by necessary implication, by either the State or Federal constitution. Cooley, *Constitutional Limitations*, (8th ed.) Vol. 1, 345, 355; 9 *Tex. Juris.* 444, 446, sections 30-32.

It is also fundamental that the validity of a statute is presumed, until it is shown to be clearly unconstitutional, and that all doubts as to its constitutionality will be resolved in favor of its validity. *Smith vs. Patterson*, 232 S. W. 749.

It is further elementary that it is within the power of the Legislature to levy any tax upon any subject of taxation within the State, unless it is prohibited from so doing by constitutional restriction. *Norris vs. City of Waco*, 57 *Tex.* 635, 640; *State vs. H. & T. Ry. Co.*, (Civ. App.) 209 S. W. 820, 822.

As said by Judge Cooley:

"Everything to which the legislative power extends, may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes." 1 Cooley, *Taxation*, (4th ed.) sec. 71, p. 177.

The rule is stated in 26 R. C. L. sec. 12, at page 26:

"The power of taxation is inherent in a sovereign state. The right to tax is not granted by the constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the constitution, it exists without express authority in the fundamental law as a necessary attribute of sovereignty. The provisions of the constitution which relate to the power of

taxation do not operate as grants of the power of taxation to the governments thus set up, but constitute limitations upon a power which would otherwise be without limit."

Therefore the Legislature, unless prohibited by the Constitution, has the power to impose an income tax (Glasgow vs. Rowse, 43 Mo. 479, 491; State vs. Pinder, 7 Boyce (Del.) 416, 108 Atl. 43; Featherstone vs. Norman, 170 Ga. 370, 153 S. E. 58, 70 A. L. R. 449.

The question whether the Legislature has the inherent power to tax incomes is purely academic in Texas, because the power of the Legislature to do so is expressly recognized by Article 8, section 1 of the Constitution of this State. However, the inquiry whether the Legislature may levy a graduated income tax, raises the question whether a tax on income is a tax upon property within the meaning of the word "property" as used in section 1, article 8 of our Constitution, and must, therefore, be laid in proportion to value. In consideration of that question, we must consider the nature of an income tax.

Cooley defines "income tax" as "one which relates to the product or income from property, or from business pursuits," but states that "taxable income may result from other sources." 4 Cooley, *Taxation*, (4th ed.) sec. 1741.

Even in the absence of express constitutional recognition of authority of the Legislature to levy income taxes, it is a conclusion supported by the weight of authority that a tax upon income is not a tax upon property, or at least is not such a tax as to be included in the constitutional limitations imposed on property taxes; but in some cases, either because of the peculiar wording of constitutional provisions or otherwise, the contrary has been held. 4 Cooley, *Taxation*, (4th ed.) sec.s 1743 and 1751; Black, *Income and Other Federal Taxes*, (3rd ed.) sec. 44; 31 Corpus Juris, 397 (sec. 2-B); State vs. Tax Commission, 161 Wis. 111, 152 N. W. 848; Featherstone vs. Norman, supra, and cases cited.

The Constitution of this State, in section 1, article 8, expressly declares that "all property in this State, whether owned by natural persons or corporations, shall be taxed in proportion to its value" (evidently alluding to ad valorem taxes); the following provisions of the section declare that "the Legislature may impose a poll tax," and "it may also impose occupation taxes," and that "it may also tax incomes."

The Constitution having expressly recognized the power of the Legislature to impose occupation taxes, upon both natural persons and corporations doing business in this State, and placing no limitation whatever upon the power to do so, except that no occupation tax shall be levied upon pursuits, agricultural or mechanical, and save that contained in section 2 of article 8, requiring that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, it is well settled in this State that occupation taxes are not taxes on property within the meaning of that word as used in the constitutional limitation that property shall be taxed in proportion to its value, although the tax may be levied upon the value, extent or magnitude of business done.

Napier vs. Hodges, 31 Tex. 287;  
 Albrecht vs. State, 8 Tex. App. 216, 34 Am. R. 737, 742;  
 Pullman Palace Car Co. vs. State, 64 Tex. 274, 275;  
 Texas Co. vs. Stephens, 100 Tex. 628, 103 S. W. 484;  
 Producers Oil Co. vs. Stephens, (Civ. A.) 99 S. W. 157;  
 (Writ of error refused)  
 M. K. & T. Ry. Co. vs. Shannon, 100 Tex. 379, 100 S. W. 138, 144;  
 State vs. Stephens, 4 Tex. 137.

It is submitted that the same is true with reference to an income tax, and that an income tax is not a tax on property within the meaning of the Constitutional requirement that property shall be taxed in proportion to its value, because the Constitution expressly recognizes taxation of property and taxation of incomes as two separate and distinct methods of taxation. Art. 8, sec. 1, supra.

This point was expressly decided in the State of Wisconsin, where the constitutional limitations upon the legislative power to tax property are very similar to those of our Constitution, and where the constitution expressly recognizes the power of the Legislature to tax incomes. *State vs. Frear*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L. R. A. 1915B 569, 606.

It is therefore our opinion that an income tax is not a tax on property, within our constitutional requirement that taxation of property shall be in proportion to its value, and that the Legislature in levying an income tax is not required to levy same in proportion to the property value of the income taxed.

The Constitution of this State requires that "Taxation shall be equal and uniform", and it is well settled in the decisions of the courts of this State that all character of taxes fall within this limitation.

*Taylor vs. Boyd*, 63 Tex. 533;  
*State vs. Stephens*, 4 Tex. 137;  
*Napier vs. Hodges*, supra;  
*M. K. & T. Ry. Co. vs. Shannon*, supra;  
*Texas Banking & Ins. Co. vs. State*, 42 Tex. 636, 639.

It must be conceded, therefore, that if the Legislature has the power to levy a graduated income tax, same must be in compliance with the requirement of the Constitution that taxation shall be equal and uniform.

As shown by Judge Cooley, the Legislature has full power with reference to taxation, except as limited:

- (1) By express provisions of the Federal or State Constitution;
- (2) By limitations created by contract;
- (3) By inherent limitations:
  - (a) on the power to tax for private purposes,
  - (b) on the power of state governments to tax federal agencies, and on the power of the federal government to tax state agencies, and
  - (c) on the power to tax property outside of the territorial limits of the government levying the tax. Cooley, *Taxation* (4th ed.) secs. 59, 86.

Since the inherent limitations on the power of the Legislature in regard to taxation are universally recognized, and must be observed with reference to the imposition of all taxes, and since no question

concerning limitations created by contract has been presented, we will, in order to more briefly consider the subject of our inquiry, pretermitt any consideration of those questions in this opinion, and will confine our discussion to consideration of the express constitutional limitations on the taxing power of the Legislature.

The constitutional restrictions that all property in this State, whether owned by natural persons or by corporations, other than municipal, shall be taxed in proportion to its value, and that taxation shall be equal and uniform, place property in one class, and there can be levied but one rate upon all species of it.

Lively vs. M. K. & T. Ry. Co., 102 Tex. 5 45, 120 S. W. 852, 121 S. W. 1149;  
Norris vs. City of Waco, supra;  
Pullman P. C. Co. vs. State, supra;  
Featherstone vs. Norman, supra.

The makers of the Constitution having placed property in one class for purposes of ad valorem taxation, and also having expressly recognized the power of the Legislature to impose an income tax, and having placed no limitation upon the power to do so, other than to require that such tax be equal and uniform, the Legislature has ample authority to impose an income tax, subject to the limitation that same be equal and uniform.

In the absence of constitutional restriction, the Legislature would have the inherent power to classify, as it saw fit, the subjects of taxation for the purpose of imposing an income tax. Since the only limitation placed by our Constitution upon this inherent power of the Legislature (excepting limitations on property taxation) is that taxation shall be equal and uniform, it is only necessary for us to consider the extent to which this limitation curtails the power of the Legislature to classify the subjects of taxation, other than property.

Since the Constitution has laid down on rule by which the uniformity and equality it requires is to be secured, it is the duty of the Legislature to ascertain and determine how it may best be accomplished. Texas Banking & Ins. Co., vs. State, supra. In this regard, the courts of this State have held that it is "within the undoubted powers of the Legislature to make reasonable classifications of the subjects of taxation", other than property. Stuard vs. Thompson, (Civ. App.) 251 S. W. 277, 281; Solon vs. State, 54 Tex. Cr. R. 261, 114 S. W. 349; Gulf States Utilities Co. vs. State, 46 S. W. (2d) 1018, 1027 (Civ. App. error refused); Dallas Gas Co. vs. State, 261 S. W. 1063 (Civ. App. error refused).

With reference to the power of the Legislature to make classifications of the subjects of taxation, other than property, where the Constitution requires taxation to be equal and uniform, the Texas cases in which the validity of statutes imposing occupation taxes was involved, under the provisions of the Constitutions of this State from 1845-1876, are peculiarly applicable. The history of this litigation is briefly presented by the court in Dallas Gas Co. vs. State, supra, at pp. 1066-1067:

"The first decision on the question of occupation taxes we find in this State was rendered by the Supreme Court of Texas, in 1846 (see Aulanier

vs. Governor, 1 Tex. 653), in which the constitutionality of a liquor license was assailed. That was under the Constitution of 1845. In that Constitution (article 7, sec. 27) the following provision on the subject of taxation occurs:

“Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax, and to tax all persons pursuing any occupation, trade, or profession; provided that the term “occupation” shall not be construed to apply to pursuits either agricultural or mechanical.’

“This provision of the Constitution was carried forward in haec verba in the Constitutions of 1861, 1866, and 1869. *It will be noticed that this language does not expressly authorize the Legislature to classify occupations for purposes of taxation.* In 1871 the Legislature levied and provided for collection of an occupation tax in various amounts on numerous occupations, including the following:

“From every person or firm dealing in stocks or bills of exchange in any city or town exceeding 5,000 in population, an annual tax of \$250.00; and from any such person or firm in any city or town of less than 5,000 inhabitants, an annual tax of \$50.00.’ Acts of 1871, chap. 52, sec. 6.

“This act was attacked as violative of the provision of the Constitution of 1869 that ‘taxation shall be equal and uniform throughout the State’. In an opinion rendered in 1875, shortly before the convention which framed our present Constitution met, our Supreme Court, speaking through Mr. Justice Moore, laid down the following:

“The particular question for our determination in this case is, whether the law levying the occupation tax for which this suit is brought, violates the constitutional requirement of equality, in a tax levied upon persons pursuing any occupation, trade or profession. What rule of practice can be found which is strictly applicable to such a tax? Surely it is not that of a definite sum to be paid by every one upon whom it is levied. Scarcely one could be devised more unequal or less uniform for the just and fair apportionment of its burthen among those upon whom it is imposed. The tax thus levied which would be ruinous upon one occupation, would be the merest trifle upon another. The same might also be the result if no discrimination could be made between parties engaged in the same general class of occupation. A just and reasonable discrimination in the levy would seem to approach nearer an uniform and equal apportionment of the burthen of the tax among those upon whom it is levied than any other. As the Constitution has laid down no rule by which the uniformity and equality it requires is to be secured, it is the duty of the Legislature to ascertain and determine how it may best be accomplished.

“It has not been made to appear to the court, that it has failed to do so by the law levying occupation taxes. Unless it had, we cannot say the law is in violation of the Constitution. It conforms, with but slight and not very material deviations, to long and uniform usage in the levy of taxes of this character, under our former Constitutions, containing the same restrictions as these which it is supposed to violate. And it is but reasonable to suppose, that these provisions were retained in the present Constitution in view of their receiving the same practical construction as had been previously given them.’ Texas Banking & Insurance Co. vs. State, 42 Tex. 640.

“In another opinion on this subject at the same term of that court, by the same justice, the court used the following clear and concise language:

“Equality and uniformity of taxes on occupations, to the approximate extent of which it is reasonably attainable, is required by the Constitution, and is an essential element in the power of taxation. But discrimination in occupations and classifications of them, so far as it has been made to appear to us, seems to be a reasonable and proper rule applied by the Legislature for the purpose of apportioning such taxes with equality and uniformity. Until it is shown that the Legislature has clearly exceeded

the limit of their authority and disregarded the restrictions by which it should be controlled, evidently the court cannot interfere.' *Blessing vs. City of Galveston*, 42 Tex. 660.

"The appellant has set out in its brief an interesting article published by the *Galveston News*, in 1875, written by the attorney for the appellant in the *Texas Banking & Insurance Co. Case*, while the constitutional convention was in session, discussing at length the Supreme Court's opinion in that case and appealing to the convention to amend the Constitution so as to prevent in the future any such classification of occupations for purposes of taxation. While interesting, the article is clearly biased, and if it influenced the convention at all, the result was, as shown by sections 1 and 2 of article 8 of the present Constitution, to extend the scope of occupation taxes, and to recognize the power of the State, and that of the county, city, and town to classify occupations for that purpose.

"Classifications of occupations for purposes of taxation has been repeatedly recognized under our present State Constitution and under the Constitution of the United States as strictly a legislative function. \* \* \*"  
(Italics are the writers'.)

While it is to be observed that the Legislature is not expressly authorized to classify the subjects of taxation for the purpose of imposing an income tax, yet it must further be observed that before 1876, the same was true of all taxes other than those upon property, (Article VII, section 27, Constitution of Texas, 1845; *Ibid.*, Constitution, 1866, Article XII, section 19, Constitution, 1868); while the framers of the Constitution of 1876 expressly authorized the Legislature to classify occupations for purposes of taxation (section 2, article 8), this was not a grant of new power to the Legislature, but simply operated as an express recognition of an existing power. In fact, in case of all taxes other than those upon property and those upon incomes, the courts of this State have uniformly held that the Legislature has the inherent power to classify the subjects of taxation. *Stuard vs. Thompson*, supra; *Solon vs. State*, supra (poll taxes); *Texas Banking & Ins. Co. vs. State*, supra; *Blessing vs. City of Galveston*, supra, (occupation taxes). The question of the power to classify the subjects of income taxation has never been considered by the courts of this State.

However, in view of what has been said in the foregoing paragraphs of this opinion, we think it is undoubtedly within the power of the Legislature to classify, as it may deem expedient, the subjects of taxation for the purpose of levying and collecting an income tax, so long as the classifications made are reasonable and not arbitrary.

Has the Legislature the power in imposing an income tax, to classify the subjects of taxation according to the ability of the taxpayers to bear the burden of taxation? In the absence of constitutional restriction, as has been heretofore noticed, the Legislature can classify the subjects of taxation other than property, and may likewise subclassify them. Where the Constitution does not make a classification of the subject of taxation, and the Legislature has the power to classify subject to the requirement that the tax imposed be equal and uniform, the Legislature is vested with wide discretion and the courts will not hold a classification made by the Legislature invalid, unless it is clearly unreasonable or arbitrary. *Texas Banking & Ins. Co. vs. State*, supra.

In South Dakota, the constitutional restrictions upon the power of the Legislature, with reference to taxation, are very similar to

those limitations contained in our Constitution. In passing upon the validity of a graduated inheritance tax, attacked as being in violation of the Constitution of that State, the Supreme Court, in the case of *Re McKennan's Estate*, 27 S. D. 136, 130 N. W. 33, Ann. Cas. 1913D, 745, 33 L. R. A. (N. S.) 606, said:

"It is clear from all these decisions that the Legislature may make any proper classification of recipients of inherited estates, for the purposes of such taxation, that it chooses, so long as there is equality and uniformity between those within and constituting each separate class. It also follows that, if the Legislature has the right to classify on some proper recognized basis, it is not within the judicial province of the courts to say what such classification shall be, so long as the Legislature is within the limits of such proper basis. In other words, the courts will not 'race opinions' with the Legislature as to which might create the better law."

In other words, whether a particular classification would be invalid as lacking in the equality and uniformity required by the Constitution, would depend upon whether the classification made is reasonable and not arbitrary. The classification of the subjects of taxation by the Legislature is largely a question of policy to be determined by that body, in the exercise of wide discretion, where it has the power to classify, and its determination will not be disturbed by the courts unless clearly arbitrary. 9 Texas Juris. 559, sec. 121.

It is the purpose of the requirement that taxes be equal and uniform, that the *burden* of taxation shall bear equally upon the taxpayers. *Texas Banking & Ins. Co., vs. State*, supra. It would seem, therefore, that where the Legislature has the power to classify, any classification it might make which would distribute the *burden* of taxation equally and uniformly upon the subjects of taxation could not be said to violate the equality and uniformity clause of the Constitution.

The theory of a graduated income tax is to distribute the burden of taxation according to the ability of the taxpayer to bear that burden. *Shaffer vs. Carter*, 252 U. S. 37, 51, 40 Sup. Ct. 221, 225, 64 L. Ed. 445. It is submitted, therefore, that the Legislature of the State of Texas has the power to classify persons for the purpose of imposing an income tax, with reference to their ability to pay, and that the classification so made by the Legislature would be valid, unless the same is clearly unreasonable or arbitrary. This method of classification is not regarded as unreasonable or arbitrary by the United States Supreme Court. *Shaffer vs. Carter*, supra; *Lawrence vs. Tax Commission*, 52 Sup. Ct. 556.

Has the Legislature the power to impose different rates of taxation upon the several classes of persons which it has segregated according to the amount of income the members of the class receive annually?

The constitutional requirement that taxation be equal and uniform is, as has been pointed out, the only limitation upon the power of the Legislature in regard to the levying of taxes upon subjects of taxation, other than property. The equality and uniformity requirement is met when the rate of tax imposed upon any given class of subjects is the same upon each member of that class. *Cooley, Taxation*, (4th ed.) vol. 4, sec. 1752. p. 3486; *Texas Co. vs. Stephens*, supra; *Norris vs.*



City of Waco, *supra*; State vs. G. H. & S. A. Ry. Co., 120 Tex. 173, 97 S. W. 71 (reversed on other grounds, 210 U. S. 217); Brooks vs. State, 58 S. W. 1032 (Civ. App.).

Therefore, having reached the conclusion that a tax on income is not a tax on property in the sense that term is used in our Constitution, and that for this reason a tax on income is not required to be laid ad valorem, and having reached the further conclusion that the Legislature in exercising its power of classification, may segregate persons according to the amount of income annually received, for the purpose of income taxation, subject to the constitutional limitation that the rate of taxation shall be the same upon all members of a particular class, it is our opinion, and you are advised, that the Legislature may impose a graduated income tax under the Constitution of the State of Texas.

## 2.

With reference to the question of the authority of the Legislature to levy an income tax, with separate and distinct rates applicable to natural persons and corporations, we think the rule is correctly stated in 4 Cooley on Taxation (4th ed.) sec. 1752, that "There may be a separate classification with different rates, etc., of individuals and corporations", for the purpose of imposing an income tax. This proposition is also sustained by the following authorities:

26 R. C. L. sec. 117, p. 143;  
 Black on *Income and Other Federal Taxes*, (3rd) sec. 44, and cases cited;  
 Robertson vs. Pratt, 13 Hawaii, 590;  
 State vs. Frear, *supra*;  
 Stanffer vs. Crawford, 248 S. W. 581, 585 (Mo.);  
 Featherstone vs. Norman, *supra*, and cases cited therein;  
 Lawrence vs. Tax Commission, *supra*.

## 3.

The Legislature having the power to classify the subjects of taxation other than property, and likewise to subclassify them, it is well settled that the Legislature may provide exemptions of certain of the classes created, subject to the limitation that the classification so made and the exemption granted is based upon reason and is not arbitrary. Therefore, we are of the opinion, and you are advised, that an income tax statute would not be unconstitutional because it exempts incomes under a certain amount.

26 R. C. L. sec. 124, p. 152;  
 4 Cooley, *Taxation*, (4th ed.) sec. 1752, p. 3487;  
 Stuard vs. Thompson, *supra*;  
 Solon vs. State, *supra*;  
 State vs. Pinder, *supra*;  
 Featherstone vs. Norman, *supra*.

Answering your question with reference to the power of the Legislature, in session in 1933, to levy an income tax on the entire net income for the 1933, including that portion of the net income received during that portion of the year prior to the effective date of the law imposing said tax, we adopt the language of H. C. Black, in his work "Income and Other Federal Taxes", (3rd ed.) found in sec. 22 of that work:

“On general principles and irrespective of explicit constitutional limitation, a statute imposing an income tax may subject to taxation the income of the citizen for the whole of the current year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year’s income is treated and considered as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year’s income, it is not retrospective in such a sense as to render it unconstitutional.”

We think this proposition is sustained in this State in the case of *Cadena vs. State*, 185 S. W. 367, 368. (Civ. A., error refused); *Fly*, C. J., speaking for the Court of Civil Appeals, said, in part:

“Laws authorizing taxes are not retrospective so far as the year in which they are authorized is concerned.”

Yours very truly,

GAYNOR KENDALL,  
Assistant Attorney General.

SCOTT GAINES.  
Assistant Attorney General.

## MISCELLANEOUS OPINIONS

Op. No. 2927

CONSTITUTIONAL LAW — AVAILABLE SCHOOL FUND — APPORTIONMENT  
AND APPLICATION—PAYMENT OF DEFICITS—SCHOOLS  
AND SCHOOL DISTRICTS.

1. The Constitution (Sections 3 and 5, Article 7) does not prohibit the use of available school funds raised one year to discharge the unpaid balance of an apportionment made for the support and maintenance of the public free schools for the previous year.

2. Under the present statutes, the unpaid balance of an apportionment for the previous year must be absorbed and paid off before payments can be made on an apportionment subsequently made for an ensuing year.

3. The State Board of Education in making the apportionment for the ensuing school year, in the exercise of sound business judgment and wise discretion, should estimate the amount of a deficit anticipated in the payment of the apportionment for the current school year.

4. Having determined the probable amount of a deficit anticipated in the payment of the apportionment for the current school year, the State Board of Education, in making the apportionment for the ensuing year, should not consider as available for appropriation to the support and maintenance of the public free schools for said ensuing year those anticipated revenues which will be required to pay off the balance of the apportionment for the current scholastic year remaining unpaid at the end of said year.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, July 27, 1935.

*Hon. Nat M. Washer, President, State Board of Education, San Antonio, Texas.*

DEAR SIR: We are in receipt of your letter of the 17th ultimo, in which you, as President of the State Board of Education, request on behalf of the Board the opinion of this Department in regard to "whether the total deficit for the three preceding years must be absorbed and deducted from the amount available for the use of the public schools for the scholastic year next ensuing."

In order to make more intelligible the conclusions we have reached in regard to your inquiry, and in order that there be no misunderstanding as to the questions which are answered herein, it will be necessary in the beginning of this opinion to recite certain facts which though not presented in your letter, we assume give rise to your inquiry, and which we deem material to its determination. Under the Constitution and statutes of this State, certain sources of revenue are set aside as a special fund, known as the State available school fund, for the support and maintenance of the public free schools of this State. It is provided by statute that the State Comptroller shall estimate the revenue which will probably be derived each year from all said sources, and based upon the said estimate, the State Board of Education is required, on or before the first day of August of each year, to apportion among the several counties and school districts constituting separate school organizations, according to the scholastic population of each, the revenues available for the support of the

schools for the ensuing year. The State Board, for the scholastic year 1930-31, made a per capita apportionment of \$17.50; subsequently, for the school year 1931-32, it made a per capita apportionment of a like sum, and, for the school year 1932-33, made an apportionment of \$16.00 per capita. The per capita apportionment made for these years were the largest in the history of the State, notwithstanding the fact that at the time these apportionments were made, the State and the Nation were in the throes of the most severe financial depression in their histories. The effect of this action on the part of the State Board upon the condition of the State available school fund is tersely told in the 27th Biennial Report of the State Department of Education (Bulletin No. 314, State Department of Education), in the following language:

"On August 31, 1931, the close of the fiscal year 1930-31, the State available school fund showed a deficit for the first time since 1922. The deficit on that date was \$1.50 per capita on the basis of 1,562,427 scholastics, a total of \$2,343,640. This deficiency occurred in spite of the fact that on September 1, 1930, the balance to the credit of the State available school fund was approximately \$2,600,000.

"At the close of the next school year, August 31, 1932, after the remainder of the State apportionment for the preceding year and \$14.00 of the current apportionment had been paid, there was a deficit of \$5,486,964 (\$3.50 per capita) on the basis of an enumeration of 1,567,704 scholastics.

"You will note that, with a balance of something over \$1.50 per capita to the credit of the State available school fund at the beginning of the scholastic year 1930-31, the State was able to pay by the close of the year only \$16.00 of the apportionment of \$17.50, and that, on the basis of the same apportionment, it was able to pay within the period of the next scholastic year only \$15.50; that is, the balance of \$1.50 for 1930-31 and \$14.00 of the 1931-32 apportionment. In other words, for each year of the 1930-32 biennium the available revenues were sufficient to pay an apportionment of \$14.50 and \$15.50 respectively. In this connection it should be noted, however, that for the two-year period the delinquency in the State ad valorem school tax was \$6,380,000.

"For the support of its public schools in 1932-33, the State is obligated to pay an apportionment of \$16.00. However, it is apparent that after liquidating the deficit in last year's apportionment, \$5,486,964 (\$3.50 per capita), the State will not be able to pay, on the basis of current revenues and collections, more than \$13.00, and on August 31, 1933, will face a deficit in the available school fund of from \$5,000,000 to \$5,500,000; that is, from \$3.00 to \$3.50 per capita.

Under the statutes (Article 2903 R. C. S.), the scholastic year begins on September 1 of each year and ends on the 31st day of August the following year. Therefore, the present scholastic year (1932-33) does not expire until August 31, 1933, and therefore, no deficit exists in reference to the payment of the apportionment for the current year, and no deficit can accrue until the expiration of the fiscal year, and can, at this time, only be anticipated. It will be observed from a reading of the statements quoted from the Biennial Report of the State Department of Education, and the records of the Comptroller and of the State Department of Education bear out the statements in that regard, that the apportionment for each scholastic year has been paid off in full; and further, that when the apportionment was not paid in full during the scholastic year for which it was made, by reason of the insufficiency of the revenues in the available fund during that time, the unpaid portion of the apportionment for each such year

was discharged out of the first revenues collected from any source and placed to the credit of the available fund, although they may have been collected during the year ensuing that for which the apportionment was made. There is, therefore, no deficit in the State available school fund accumulated from previous school years, and in view of the fact that the State Board is required to make the apportionment on or before August 1st of the present year for the ensuing year, there will not be, at the time the Board meets to set the apportionment for the next scholastic year, any deficit in the available school fund of the State for the present school year.

Your inquiry must, in view of the above facts, resolve itself into two questions, to-wit: (1) Can the unpaid balance of an apportionment of the State available school fund for one scholastic year be paid out of revenues raised and placed to the credit of said fund for the ensuing year? (2) Must the State Board, in estimating the revenues available for the support of the public free schools and in making the annual apportionment thereof, take into consideration a deficit anticipated in the payment of the apportionment for the current year and make allowances for the payment of said deficit out of funds collectible for the ensuing scholastic year?

(1) In order to determine and answer the first of the above questions, it will be necessary to first determine whether there is any inhibition contained in the Constitution of the State which would prohibit the payment of an unpaid balance of an apportionment for any one year out of the revenues raised and credited to the available school fund of the State for the ensuing year. The Constitution sets aside certain bonds and other assets and constitutes and denominates said assets the permanent school fund of the State; it provides that the actual income derived from the permanent fund, together with the taxes provided for and set apart by Section 3 of Article 7, in addition to all other revenues thereunto applied, shall constitute an available school fund. Section 5 of Article 7 provides that "the available school fund shall be applied annually to the support of the public free schools," and that "the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in such manner as may be provided by law."

A careful examination of the language of the Constitutional provisions above referred to will disclose that, while the Constitution provides for the annual raising of revenue to supply the State available school fund, there is not contained therein, either in expression or spirit, any inhibition against the use of funds raised one year for the payment of an appropriation of the State available fund made for the support and maintenance of the public free schools for a previous year. *Culberson vs. Gilmer Bank*, 50 S. W. 195. The sections referred to were manifestly not designed to provide the details of operation with reference to the application of the available school funds, except to require that same be applied each year to the support of the public free schools, but merely furnish the source from which the necessary revenue for the support and maintenance of the public free schools could be derived. *Ibid.* The provision that "the available school fund shall be applied annually to the support of the public free schools" does not mean that the revenue raised one year can only

be applied to the support of the public free schools for that year, but requires that the revenues accruing during the year shall be annually distributed to the various counties according to their scholastic population, and applied to the support of the public free schools "in such manner as may be provided by law."

In view of our opinion that there is no Constitutional prohibition against the payment of an unpaid balance of an apportionment for one year out of the revenues raised and placed to the credit of the State available school fund for an ensuing year, and in view of the Constitutional direction that the available school fund of the State shall be applied each year to the support of the public free schools in the manner prescribed by law, our attention is directed to the statutes prescribing the manner of applying the State available school fund. Article 2823, R. C. S. 1925, defines what shall be the available school fund, providing that:

"Besides other available school funds provided by law, one-fourth of all occupation taxes and one dollar poll tax levied and collected for the use of the public free schools, exclusive of the delinquencies and cost of collections; the interest arising from any bonds or funds belonging to the permanent school fund, and all the interest derivable from the proceeds of the sale of land heretofore set apart for the permanent school fund which may come into the State Treasury; all moneys arising from the lease of school lands, and such an amount of State tax not to exceed thirty-five cents on the one hundred dollars valuation of property, as may be from time to time levied by the Legislature, shall constitute the available school fund, which fund shall be apportioned annually to the several counties of this State, according to the scholastic population of each, for the support and maintenance of the public free schools."

Article 2834, R. C. S. 1925, provides that "the Comptroller shall keep a separate account of the State available school fund arising from every source, and shall, on or before the meeting of the State Board on or before the first day of August of each year, make an estimate of the amount of available school fund to be received from every source, and to be available for the succeeding scholastic year, and report the same to said Board."

Article 2665 provides:

"The State Board shall, on or before the first day of August in each year, based on the estimate theretofore furnished said Board by the Comptroller, make an apportionment for the ensuing scholastic year of the available State school fund among the several counties of the State, and the several cities and towns and school districts constituting separate school organizations, according to the scholastic population of each; and thereupon the secretary shall certify to the treasurer of each such separate school organization the total amount of available school fund so apportioned to each; which certificate shall be signed by the president, countersigned by the Comptroller and attested by the secretary."

The provisions of Article 2835 require that:

"The Comptroller shall, on the first working day of each month, certify to the State Superintendent the total amount of money collected from every source during the preceding month and on hand to the credit of the available school fund, and shall draw his warrant on the State Treasurer, and 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 schools, for

the amount stated in, and upon receipt of, the certificate therefor issued to him on the first day of each month by the State Superintendent and shall register such warrants and transmit them to the State Treasurer."

Article 2663 provides that:

"On the first of each month, the State Superintendent shall prorate to the several counties, cities and towns and school district constituting separate school organizations, according to the scholastic population of each, the available school money collected during the preceding month and then on hand as shown by the certificate issued that day to him by the Comptroller, and shall thereupon certify to the Comptroller the total sum prorated to each; and such certificate shall be authority for the Comptroller to draw his warrant in favor of the Treasurer of each such county, city and town or school district for the amount stated in such certificate. He shall receive from the State Treasurer all warrants so drawn, and shall transmit such warrants to the respective treasurer in favor of whom they are drawn."

Finally, permit us to call your attention to Article 2837, R. C. S. 1925:

"The State Treasurer shall receive and hold as a special deposit all money belonging to the available school fund, and keep an account of the same. He shall register every warrant drawn by the Comptroller on such fund in favor of the treasurer of the available school fund of any county, city, town or school district having control of its public schools, and transmit such warrants to the State Superintendent. On presentation to him for payment properly endorsed, he shall pay such warrants each in the order in which presented. He shall not, under any circumstances, use any portion of the permanent or available school funds in payment of any warrant drawn against any other fund whatever."

Reading the statutes above quoted in the light of their bearing upon the determination of the problem before us, it will be observed that the Legislature has provided that on or before the meeting of the State Board on or before August 1st of each year, the Comptroller shall make an estimate of the probable amount of revenues which will be collected from all sources feeding the available school fund, and, further, to estimate what portion thereof shall be available for the support and maintenance of the public free schools for the succeeding scholastic year. Based upon the estimate of the Comptroller, the Board is required to make an apportionment of the revenues which will be available for the support and maintenance of the public free schools for the ensuing scholastic year.

The Constitution specifies the purpose for which the available school fund may be used; the State Board is empowered to make an apportionment of the estimated available revenues coming into the available school fund. When the Board has made the apportionment, the disbursing officers of the State available fund are authorized to pay out the moneys in said fund to the *amount* prescribed by the apportionment and in the manner prescribed by law. The fact that the making of the apportionment authorizes the disbursing officers of the State to pay out the available school funds to the amount of the apportionment for the specific purposes for which fund is set aside, makes it apparent that the making of the apportionment completes an appropriation of the available fund to the extent of the amount apportioned. *Webb County vs. Board of School Trustees*, 65 S. W. 878, 880; *Jernigan vs. Finley*, 90 Tex. 205, 38 S. W. 24.

The statutes authorize the local boards of school trustees to make contracts with teachers and bind the State to pay for their services, subject to the limits of the amount appropriated for the scholastic year. In making such contracts, the local boards of school trustees are the authorized agents of the State to purchase such services and to obligate the State available school fund therefor to the amount appropriated to the district from said fund for the scholastic year for which the contracts are made. We do not want to be understood as saying that local boards of school trustees can create a deficiency debt against the funds to be apportioned to it for succeeding years; they cannot, in making contracts for any one year obligate the State available fund in excess of the amount appropriated to the district from said fund for said year: the statutes expressly prohibit such obligations. Art. 2749, R. C. S. 1925; Collier vs. Peacock, 93 Tex. 255, 54 S. W. 1025; Stephenson vs. Union Seating Co., 62 S. W. 128; Warren vs. School District, 288 S. W. 159. But we do intend to say that where the local boards of trustees enter into a contract which is within the amount of the apportionment for that year, the obligation hereof is a valid obligation against the State available school fund up to the full extent of the apportionment made for the particular year. Culberson vs. Gilmer Bank, supra. The scholastic year begins on September 1st, whereas the apportionment for the year is made on or before the first day of August; at the time the apportionment is made, therefore, the year's revenue has not all been collected, and the full amount apportioned for that year, as the past three years have clearly shown, may not always be realized during that fiscal year. If in that event, the teachers' salaries for that year or a portion thereof cannot be paid out of the revenues for a subsequent year, then their services for that time must go unremunerated. We cannot believe that such a result was intended by the Legislature in the enactment of the statutes relative to the apportionment and application of the State available school fund; nor can we see how the statutes are capable of any such construction.

The statutes above quoted require that on the first day of each month the State Comptroller shall certify to the State Superintendent of Public Instruction the total amount of money collected from every source during the preceding month and on hand to the credit of the available school fund; upon receipt of such certificate, the State Superintendent is required to prorate to the several counties, cities and towns and school districts constituting separate school organizations, according to the scholastic population of each, the available school funds collected during the previous month and then on hand, as shown by the Comptroller's certificate; and the State Superintendent is further required thereupon to certify to the Comptroller the amount of said funds prorated to each such school organization or county, city or town. The certificate so prepared by the State Superintendent is the authority for the State Comptroller to issue his warrant upon the State Treasurer in favor of the treasurer of the school district, or of the county, city or town, for the amount stated in the certificate; the Comptroller turns the warrants over to the State Treasurer for registration; the Treasurer is required to register the warrants so drawn and to hand them to the State Superintendent for transmission to the local treasurers in whose favor the same are drawn.



It will be observed that all of the acts required in the distribution of the State available school fund, after an apportionment has been made, are purely ministerial acts. *Jernigan vs. Finley*, supra. The performance of these acts is not made dependent upon the raising of sufficient revenue to discharge the apportionment during the fiscal year for which the apportionment is made; their performance, until the apportionment is discharged in full, is predicated only upon the condition of the State available school fund, that is, whether any appreciable amount of money has been deposited in said fund during the preceding month. Therefore, until the whole of an apportionment is paid off and discharged, money credited to the available school fund are obligated to its payment, and a subsequent apportionment cannot be paid until the total amount of the prior apportionment is paid.

You are, therefore, respectfully advised that, in our opinion, the unpaid balance of an apportionment not only can be, but, under present statutes, must be absorbed and paid off before warrants can be issued in payment of an apportionment subsequently made.

(2) We come now to a consideration of the second question which, to our minds, arises from the inquiry which you have submitted to us. In the foregoing paragraphs of this opinion we have stated that we think that, when the State Board of Education has in good faith made an apportionment for a given scholastic year, there remains nothing to be done except for the disbursing officers of the available school fund, i. e., the State Superintendent, the State Comptroller and the State Treasurer, to perform the ministerial duties of paying out the moneys monthly deposited to the credit of the available school fund until the full amount of the apportionment is paid off and discharged.

Under present statutes, as we have heretofore pointed out, it is made the duty of the Comptroller to make, on or before the meeting of the State Board of Education on or before the first day of August of each year, an estimate of the revenues which will be available for the support and maintenance of the public free schools for the ensuing school year. In view of the fact that the unpaid balance of an apportionment for the previous year must be paid off and discharged before moneys will be available for the payment of an apportionment subsequently made, good business judgment dictates that, in estimating what amount of the revenues which probably will be collected and paid into the available school fund during the ensuing year will be available for the support and maintenance of the public free schools for the said year, the Comptroller would estimate the probable amount of a deficit anticipated in the payment of the apportionment for the then current year, and deduct the same from the sum total of the amount of revenues which he estimates will be collected and paid into the available school fund during the ensuing year.

Based upon the amount of revenues which the Comptroller estimates will be available for appropriation for the support and maintenance of the public free schools for the ensuing year, the State Board of Education is authorized to appropriate those revenues to the support of the said schools for the ensuing school year, apportioning the funds available for that purpose among the several counties, and among the several separate school organizations according to the

scholastic population of each. But in determining the amount of revenues that will be available for the support and maintenance of the public free schools for the ensuing scholastic year the State Board should not consider as available for appropriation for that purpose that portion of the revenues which it is estimated will be raised and deposited in the available school fund but which will be subject to the payment of a deficit occurring in the payment of the apportionment previously made for the then current school year.

As we have heretofore pointed out, the scholastic year begins September 1 of each year and ends on the 31st day of August following; the State Board, however, is required to make the apportionment for the ensuing school year on or before the 1st day of August of each year. When the State Board meets to fix the apportionment for the coming school year, there will exist no actual deficit in the payment of the apportionment heretofore made for the current year; it can only anticipate that at the end of the fiscal year a deficit will exist in the payment of said apportionment. In view of the fact that there will be no actual deficit existing in the payment of the apportionment for the current year at the time the State Board meets to fix the apportionment for the ensuing year, the amount of the deficit anticipated can only be estimated. Since the amount of the probable deficit involves a question of opinion based upon existing facts relative thereto, the State Board acting in good faith and in the exercise of a wise discretion and sound business judgment, should determine the amount of the said anticipated deficit, it should not consider as available revenues which may be appropriated to the support and maintenance of the public free schools for the ensuing year, that portion of the revenues which probably will be collected but which will be required to pay off the deficit anticipated.

Respectfully submitted,

SCOTT GAINES,  
Assistant Attorney General.

GAYNOR KENDALL,  
Assistant Attorney General

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Op. No. 2952

INSURANCE — PREFERRED STOCK — CORPORATIONS.

1. An insurance company organized upon a stock-plan basis under the laws of this State has the inherent power to issue preferred stock.

2. An insurance company organized upon a stock-plan basis under the laws of the State of Texas has the power to convert common stock into preferred stock, or increase its capital stock and issue preferred stock by complying with Article 1330, Revised Civil Statutes of Texas, 1925, as amended by Acts of the Regular Session of the Forty-second Legislature, Page 78.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, June 22, 1934.

*Hon. R. L. Daniel, Chairman, Board of Insurance Commissioners,  
Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your recent communication, addressed to Attorney General James V Allred, wherein you

request an opinion as to whether or not an insurance company operating as a stock insurance company in Texas has the power to issue preferred stock. The pertinent portion of your communication reads as follows:

"Please advise this Department at your earliest convenience whether or not stock insurance companies incorporated under the laws of this State may issue both common and preferred stock.

"This question is occasioned by the fact that the Federal legislation recently enacted has permitted the Reconstruction Finance Corporation to purchase new issues of preferred stocks of insurance companies under certain conditions and some of our Texas corporations are interested in securing increased capital through the issuance of preferred stock to the Reconstruction Finance Corporation."

The preferred stock of a corporation is generally understood to be that class of stock issued under contractual or statutory authority by a corporation, which entitles the holder thereof to a priority in the dividends or earnings of the issuing corporation over common stockholders. *Taft vs. Rhode Island Company*, 8 R. I. 310, 5 Am. Rep. 575.

Insofar as we have been able to ascertain after diligent research, we find no constitutional or statutory authority under the laws of this State expressly authorizing an insurance corporation to issue preferred stock. Neither do we find any express constitutional or statutory authority prohibiting the issuance thereof by a corporation conducting an insurance business or desiring to conduct an insurance business within the State of Texas. While there is some conflict of authority under the decisions of courts, the weight of authority seems to hold that in the absence of any express inhibition, a corporation at its inception may by contract issue preferred stock. *Continental Trust Co. vs. Railway Co.*, 86 Fed. 930; *Lockhart vs. Van Alstyne*, 31 Mich. 76; *Warren vs. King*, 108 U. S. 389; *Cratty vs. Peoria Law Library Association*, 210 Ill. 516, 76 N. E. 707; *McGregor vs. Home Insurance Company*, 33 N. J. Eq. 181; *Thompson on Corporations*, 3rd Ed., Vol. 5, p. 422.

The authority last above mentioned lays down the rule as follows:

"It is now generally conceded that in the absence of any prohibition in the laws of the State under which a corporation is organized, or where there is no charter regulation on the subject, *a corporation may at or before the time of its organization classify its shares of stock and may provide for a preference of one class over another.*"

After a corporation has been organized, it seems to be well settled that it cannot issue preferred stock except by consent of all the common stockholders or unless it has such express authority granted it under the laws of the State wherein it is incorporated. *Banigan vs. Bard*, 134 U. S. 291, 53 L. ed. 932; *Bigbee & Packet vs. Moore*, 121 Ala. 379, 25 Sou. 602; *Kent vs. Minnesota Company*, 78 N. Y. 159; *Thompson on Corporations*, 3rd Ed., Vol. 5, p. 422.

As hereinabove stated, we find no specific authorization under the laws of this State granting to a corporation organized in the State of Texas the express authority to issue preferred stock when such corporation is organized. We believe, however, the Legislature of this State has recognized the inherent power of a corporation organized under the laws of this State to issue preferred stock at its inception,

because at the Regular Session of the Forty-second Legislature an Act was passed specifically permitting a corporation organized under the laws of this State to increase its capital stock and issue preferred stock, or convert its common stock into preferred stock, upon a two-thirds vote of its outstanding stock with voting privilege.

This particular statute reads as follows:

"The Board of Directors or other managing officers of a corporation may increase its authorized capital stock, including the issuance of preferred stock, which stock shall have such rights, powers, privileges and preferences as are now authorized by law, when empowered to do so by a two-thirds vote of all of its outstanding stock with voting privileges, at a special or regular meeting called for that purpose by complying with the provisions of Article 1308, and/or Article 1538-D, as the case may be. Par value stock, issued or unissued, may be converted into preferred stock in the same manner and subject to the same limitations as no par stock may be so converted under Article 1538-H, Revised Civil Statutes of 1925.

"Upon such increase or conversion of stock being made in accordance with such provisions and certified to the Secretary of State by the Directors, and, if the increase has been made in accordance with law, he shall file such certificate; and thereupon, the same shall become a part of the capital stock of such corporation. Such certificate shall be filed and recorded in the same manner as the charter. All preferred stock heretofore authorized to be issued, or issued, or stock converted into preferred shares, by vote of two-thirds of the outstanding stockholders, is hereby ratified, legalized and validated. (As amended Acts 1931, 42nd Leg., p. 78, ch. 51, sec. 1.)"

This Act of the Legislature is a portion of Title 32, Chapter 3, Revised Civil Statutes of 1925, and specifically amended Article 1330, Revised Civil Statutes of 1925, which is a portion of the Chapter hereinabove mentioned. It is true that this particular Chapter of the statutes deals generally with corporations other than insurance companies, but under and by virtue of the provisions of Article 4715, Revised Civil Statutes of 1925, which deals with insurance companies, it is provided: "The laws governing corporations in general shall apply to and govern insurance companies incorporated in this State insofar as the same are not inconsistent with any provision of this Title." (Referring to Title on insurance companies).

We have not found any specific provisions of the insurance laws inconsistent with the general laws dealing with the issuance of preferred stock or the conversion of common stock into preferred stock by corporations other than insurance companies organized under the laws of this State.

In view of the conclusions hereinabove reached, it is our opinion, and you are so advised, that an insurance company organized under the laws of this State may, at its inception, create in its capital set-up—that is, an insurance company organized upon a stock-plan basis—preferred stock, and that one organized without preferred stock may convert its common stock, or a portion thereof, into preferred stock, or increase its capital stock and issue preferred stock by complying with the provisions of Article 1330, Revised Civil Statutes of 1925, as amended by the Acts of the Regular Session of the Forty-second Legislature, Page 78.

Sincerely yours,  
SIDNEY BENBOW,  
Assistant Attorney General.

## Op. No. 2948.

AUTOMOBILES — REGISTRATION — DEALERS' PLATES — RESIDENTS —  
 NONRESIDENTS — STATUTES CONSTRUED — ARTICLE 6686 AND  
 AMENDMENT 40TH LEGISLATURE, PAGE 296 — ARTICLE  
 827B, PENAL CODE (VERNON'S SUPPLEMENT)—ACTS  
 41ST LEGISLATURE, FIFTH CALLED SESSION,  
 CHAPTER 18, SECTION 5

1. Article 6686, as amended by the 40th Legislature, Chapter 211, page 296, authorizes a dealer, as defined in the statutes, to temporarily operate a motor vehicle from place of purchase to his place of business in this State under a dealer's license, that temporary movement being a necessary part of a temporary operation for demonstration for the purpose of sale.

2. Nonresident dealers may not lawfully operate vehicles into and across this State under a dealer's license plate, but such vehicles must be registered for the current year in the State or county of the owner's residence.

OFFICES OF THE ATTORNEY GENERAL,  
 AUSTIN, TEXAS, March 29, 1934.

*Mr. L. G. Phares, Chief State Highway Patrol, Austin, Texas.*

DEAR SIR: This refers to yours of September 20 and the writer's acknowledgement of October 5, and will in part sustain the opinion of October 5 and will in part overrule and change that opinion.

In your letter above referred to, you state that for the past few months there have been many convoys of motor vehicles passing through the State or coming into this State from points in the East; that some of these vehicles are new, having been purchased by dealers in the eastern markets who drive them to their places of business in Texas or to points in some other States west of the State of Texas.

You ask that we advise you as to whether or not you are right or wrong in your interpretation of Section B, Chapter 212, General Laws, Regular Session of the 40th Legislature, in allowing a Texas dealer to operate a motor vehicle from the Texas State line to his place of business with a cardboard number plate attached.

Your interpretation of the act is especially set forth in a letter to the various Captains of the Highway Patrol dated August 29, and in that letter you point out that all motor vehicles, trailers and semi-trailers that are operated upon our highways are required to be registered, and that the act especially provides that a dealer's metal plate cannot be used on a car on the highways for any purpose except for the purpose of demonstrating a vehicle for the purpose of sale. With this interpretation we agree.

Article 6686, as amended by the 40th Legislature, Chapter 211, page 296, provides that any manufacturer or dealer in motor vehicles in this State may, in lieu of registering the vehicle when he wishes to show or demonstrate such vehicle on the highways, apply for registration and secure a general distinguishing number, which is the metal plate to which you refer, and which may be attached to any motor vehicle which he sends temporarily upon the road. Clearly, however, this act does not permit the use of this distinguishing plate for any purpose other than for the purpose of demonstration for the purpose of sale, and we quote a portion of the act as follows:

“A dealer, within the meaning of this article, means any person, firm or corporation engaged in the business of selling automobiles, who runs them upon the public highways or streets for demonstration or sale; and this act shall not be construed as permitting the use of a dealer's license or number plate on any vehicle for any other purpose than demonstration for the purpose of sale.”

It is clear, therefore, that this dealer's license plate or distinguishing number is permitted to be used on a motor vehicle only for the purpose of demonstration for the purpose of sale. It seems, however, that this statute is sufficiently broad to permit a dealer in this State, as defined in the statute, to use his dealer's license plate or distinguishing number on a vehicle when operating the vehicle over the highways of this State from the place of purchase to the dealer's place of business, and especially in that getting the vehicle from the place of purchase to the dealer's place of business is an integral and necessary part of the total selling scheme. It is, of course, impossible to show a vehicle or demonstrate the same for the purpose of sale unless the vehicle has first been brought to the dealer's place of business; and it occurs to us, therefore, that operating the vehicle temporarily upon the highways in bringing it from the place of purchase to the dealer's place of business is as necessary a part of the temporary operation upon the highways as any other temporary operation for the purpose of demonstration for the purpose of sale.

After carefully reading and studying the statute quoted hereinabove and other pertinent statutes since the writer's letter to you of October 5, we are convinced that the statute is entirely broad enough to be susceptible of the interpretation which we are now giving it, and any other interpretation than that which we are not giving it would lead to absurdity in some instances at least.

You further state in your letter to the various Patrol Captains that you have had a great deal of correspondence recently from different out of state concerns who transport their automobiles through this State, and that in each and every instance you have advised them that they could not operate a vehicle over our highways, when transporting it from one point to another, unregistered or with a dealer's plate attached. We quote from the letter referred to as follows:

“Under our reciprocity laws, I believe that these vehicles (referring to vehicles transported through this State to another State) would have a right to operate through this State if properly registered in some other State. I am also of the opinion that a Texas dealer should be permitted to transport an unregistered car into this State with a temporary cardboard number attached, as provided for in Section B, Chapter 212, General and Special Laws, Regular Session, Fortieth Legislature.”

With the first sentence of the quoted portion of your letter we agree, but our agreement is based upon your use of the words, “if properly registered in some other State.” If those vehicles are properly registered they are registered for all purposes for the current year, and unless so registered they would not be permitted to operate in this State because Article 827B, Penal Code, 1925 (Vernon's Supplement), in which is included Section 5 of the Acts of 1930, 41st Legislature, Fifth Called Session, Chapter 18, page 141, especially provides that no nonresident owner of a motor vehicle, trailer or semi-

trailer shall operate any such vehicle, or cause or permit it to be operated upon the public highways of this State, either before or while it is registered under this section, "unless there shall at all times be displayed thereon the registration number plates assigned to said vehicle for the current calendar year by the county or State of which such owner is a resident \* \* \*."

You will see from the quoted portion of the act that any kind of dealer's license plates or distinguishing numbers or plates, other than those regularly issued for regular use upon the highways of the county or State of which the owner is a resident and for the current year, could not lawfully be used on the highways of this State.

It is our judgment that under the laws of this State, as they now are, a nonresident owner of a motor vehicle, whether he be a dealer or a manufacturer, or some other person, is not permitted to drive or operate a motor vehicle, trailer or semi-trailer upon the highways of this State unless such motor vehicle, trailer or semi-trailer is registered for the current calendar year in the county or State of which such nonresident is a resident, or unless such motor vehicle, trailer or semi-trailer be registered in this State. The same reasoning and interpretation of the statute as applied to resident dealers is not applicable when applied to nonresidents, their operation in this State not being at any time nor in any sense an operation, under our statute, of demonstration for the purpose of sale, and especially as not being authorized under the statute referred to requiring registration in the State or county wherein the owner resides, other than the State of Texas, "for the current calendar year by the county or State of which such owner is a resident."

It is our opinion, and you are so advised, that any manufacturer or dealer within this State, may under the above interpretation of the statute, temporarily operate a motor vehicle, trailer or semi-trailer upon the highways of this State in bringing the same from the place of purchase to the dealer's place of business with only the dealer's license plate or distinguishing number attached thereto, that temporary operation being an integral and necessary part of the operation for demonstration for the purpose of sale within the intent of the statute.

Yours truly,

T. S. CHRISTOPHER,  
Assistant Attorney General.

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Op. No. 2945-A

INSURANCE — CONTRACTS — HOSPITALIZATION.

1. A contract to furnish hospital and medical services either by the obligor or to indemnify the obligee for any such expenditures for such services, constitutes a contract of insurance.

2. A corporation incorporated under the laws of the State of Texas for the purpose of operating a hospital has no authority to issue a contract of insurance wherein such hospital agrees to furnish hospital and medical services, or to indemnify an assured against any loss or expenditure for such services at any other hospital.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 27, 1934.

*Hon. R. L. Daniel, Chairman Board of Insurance Commissioners,  
Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your communication under recent date, addressed to Attorney General, James V. Allred, which has been referred to the writer for consideration. The material part of your communication reads as follows:

"A number of hospitals in this State are selling to individuals contracts which provide, in consideration of stipulated monthly payments, private rooms in, and the usual service rendered by, the hospital in the event of injury or illness of the holder while the contract is in force. The contracts issued by these institutions, which are similar, appeal to us as health and accident insurance which are losses which may be insured against under the laws of this State. (See H. B. 647, Acts 43rd Legislature.)

"Will you kindly advise us whether or not a contract of the kind herein referred to can legally be issued in this State by any individual, group of individuals, or a corporation other than an insurance company?"

"We are attaching hereto a copy of one of these policies for your consideration."

We shall not attempt to set forth herein the policy which you have submitted in its entirety, but will merely give the substance of same, which is as follows:

That in consideration of the premium of \$12.00 per annum the hospital agrees to furnish the certificate holder certain hospital and medical services for a period not to exceed twenty-one days, said services being more particularly described as follows: \$5.00 private room, operating room service, meals, routine medicines, dieticians services, hypodermics, urinalysis, blood count, ambulance, services of intern, surgical supplies, graduate nurse supervision, emergency hospital care, services of general duty nurses, which the hospital further agrees will be furnished by it to the certificate holder by the main hospital if admitted to such hospital, free of any charge other than stipulated premiums.

It is further agreed, however, by the hospital that in the event it is necessary for the holder of such certificate to be admitted to a hospital outside of the city where the contracting hospital is situated, the contracting hospital agrees to pay for the services rendered by any other such hospital to the certificate holder. The certificate further provides that the hospital shall only be required to furnish such services in the event the certificate holder is personally liable for such services. The certificate contains a further provision which we deem pertinent to your inquiry which reads as follows:

"It is agreed that, as a part of the consideration for the issuance to me of the certificate hereby applied for, I irrevocably assign payment provided in the certificate for me to any hospital or ambulance company respectively rendering me the services stipulated herein, and I authorize and direct said payments to be made."

Under the facts as furnished by your department, as we interpret the same, there are two questions presented. First, whether or not such contracts constitute contracts of insurance, and, second, if so,



does a corporation incorporated to conduct and carry on a hospital have the power, under its charter, to issue such contracts of insurance?

We have no statute in this State generally defining what shall constitute a contract of insurance. Therefore, we must look to the leading lexicographers and decisions of the courts in order to ascertain whether or not the contract here under consideration constitutes a contract of insurance.

Cooley's Briefs on Insurance, 2nd Edition, Vol. 1, page 6, define an insurance contract as "an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

Couch's Cyc of Insurance, Vol. 1, page 2, defines a contract of insurance to be such contract as "an undertaking by one party to protect the other party from loss arising from named risks for the consideration and upon the terms and under the conditions recited."

As was held by Judge Leddy, speaking for the Commission of Appeals of the State of Texas, in the case of Southern Surety Company vs. Austin, Banking Commissioner, 17 S. W. (2d) 774, whether or not a contract is one of insurance is to be determined by its purpose, effect, contents and import, and not necessarily by the terminology used, and even though it should contain declarations to the contrary. (Citing Allen vs. Motorists Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19, at page 23.)

In the case of National Auto Service Corporation vs. State, 55 S. W. (2d) 209 (writ of error denied) the Court of Civil Appeals at Austin, in an opinion written by Judge Baugh, had under consideration a purported service contract similar to the one here under consideration, which issued membership certificates and, among other things, provided therein as follows:

"The corporation issued to its members a 'membership certificate', which provided, among other things, that for annual dues of \$25 it would cause to be repaired in its membership garages during that year any damage to the members' automobile caused by accident not less than \$7.50, nor more than \$250.00. A certificate for a maximum repair charge not to exceed \$500 was also issued for an annual charge of \$45. The certificate also contained certain provisions limiting liability of the company, as to notice, expulsion, and non-assessment of members, etc., not pertinent here, and the following clause: 'It must be clearly understood that this is not insurance, as the corporation never pays its members any money, as indemnity except to repair any damage to member's automobile at the corporation's authorized repair shop as hereinabove provided.'"

The appellant in this case contended that the certificate issued by it constituted a contract for service and was not a contract of insurance. The court overruled this contention and held that the contract constituted one of insurance, and in disposing of this question made the following observation:

"In the instant case we think it clearly appears that the purpose of the contract made by appellant was for a fixed consideration to indemnify the holder of the certificate against loss resulting from accidental damage to his car within the limits fixed by the certificate, and that it constituted an insurance contract under the rules above announced."

The Court, in its opinion, cites the case of *Allen vs. Motorists' Alliance*, 29 S. W. (2d) 19, by the Court of Appeals of Kentucky, with approval, wherein that court held that a contract by a corporation to furnish attorneys to defend owners of motor vehicles against any suits brought against such owners arising out of the operation of any motor vehicle covered by such certificate, to be a contract of insurance.

The Supreme Court of Minnesota, in the case of *Physicians Defense Company vs. O'Brien*, 100 Minn. 490, 11 N. W. 396, and the Circuit Court of Appeals of the United States in the case of *Physicians Defense Company vs. Cooper*, 199 Fed. 576, both held that a contract to defend physicians against suits brought for malpractice constituted a contract of insurance. There are other cases, however, which seem to apparently take a contrary view, namely: *Commonwealth vs. Provident Bicycle Association*, 178 Pa. 636, 36 Atl. 197; *Physicians Defense Co. vs. Laymon, Sec. of State*, 73 Oh. St. 90, 76 N. E. 567.

The authorities also seem not to be in accord on the question of whether or not a contract providing for the payment or furnishing of burial expenses is in the nature of an insurance contract. However, the majority of such cases seem to hold that such a contract constitutes a contract of insurance. *State vs. Willett*, 171 Ind. 296, 86 N. E. 68; *Fikes vs. State*, 87 Miss. 251, 39 So. 783; *Smith vs. Bullard*, 61 N. H. 381; *Renschler vs. State*, 90 Oh. St. 363, 187 N. E. 758; *Oklahoma Southwestern Burial Association, vs. State*, 63 A. L. R. 704; *Sisson vs. Prata Undertaking Co. (R. I.)* 141 Atl. 76; *State vs. Globe Casket & Undertaking Co.* 82 Wash. 124, 143 Pac. 878.

The defense raised in all of these cases is to the effect that the contract is a service contract and not a contract of insurance, which contention, as hereinabove reflected by some of the decisions, has been sustained. We believe, however, that the majority of the cases hold that such contracts constitute contracts of insurance, but, be that as it may, we think the question has been settled by the courts of this State in the case of *National Auto Service Corporation vs. State*, supra, wherein the Court of Civil Appeals at Austin expressed the view that such a contract constituted one of insurance, which holding was evidently approved by the Supreme Court of this State because a writ of error was denied. We wish to frankly state that we do not see any distinction between a contract to furnish hospital and medical services, such as the one here under consideration, and one to repair or cause to be repaired a person's automobile, or one to furnish legal services. If we are correct in this observation, which we think we are, then we must necessarily hold that the contract here under consideration constitutes a contract of insurance.

We shall now proceed to answer your second question, which is, if the contract here under consideration constitutes a contract of insurance, does a corporation incorporated under the laws of this State to operate a hospital have the authority to issue such contracts of insurance?

It has long been the public policy of this State that no corporation shall include more than one purpose in its charter unless specifically provided by statute. *Johnson vs. Townsend*, 103 Tex. 122, 124 S. W. 417; *Ramsey vs. Todd*, 95 Tex. 614, 69 S. W. 135.

Under the laws of this State authorizing a corporation to be formed

for the purpose of operating what is commonly known and understood to be the business generally conducted by a hospital, we find no specific authority authorizing such corporation to issue contracts of insurance, nor do we think such corporation would have such incidental or implied power. It is also our view that if an individual or group of individuals should conduct, or should the same now be conducting, the business of issuing contracts to furnish hospital services, such as the contracts here under consideration, that the same would be in violation of the laws of this State because, under the Acts of the Regular Session, 43rd Legislature, page 420, an individual or group of individuals is expressly prohibited from engaging in the business of insuring others against those losses which may be insured against under the laws of this State.

It is therefore our opinion and you are accordingly advised that the contracts which you have submitted to this department for consideration constitute contracts of insurance, and that any corporation organized for the purpose of operating a hospital, or any individual or group of individuals which may be issuing the same is doing so in violation of the laws of this State.

Very truly yours,

SIDNEY BENBOW,

Assistant Attorney General.

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Op. No. 2944

ARTICLE 1314, R. C. S., 1925, CONSTRUED — EXTENT TO WHICH A CORPORATION MAY CHANGE, ALTER, OR AMEND THE PURPOSE  
CLAUSE OF THE ORIGINAL CHARTER.

1. The sentence in Article 1314, "No amendment or change violative of the Constitution or laws of this State or any provision of this title or which so changes the original purpose of such corporation as to prevent the execution thereof, shall be of any force or effect," construed to mean such amendment or change shall not be of any force or effect unless such amendment or change is germane to the original purpose or charter of such incorporation.

2. The question of whether such amendment or change is germane to the original purpose or charter depends upon the facts in each particular case.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 17, 1934.

*Hon. W. W. Heath, Secretary of State, Austin, Texas.*

DEAR SIR: Your letter of March 10th addressed to the Honorable James V. Allred, Attorney General, is as follows:

"A new question, so far as my knowledge goes, has been raised by some gentlemen presenting an amendment to a charter of a corporation. R. S., Article 1314 covers the question of amendments. The last sentence of said Article is as follows:

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

"It has been the custom of this office for years to allow amendments to

be filed, changing and altering the original purpose clause of a corporation's charter. Under the above provision, which is not very clear in its meaning to me, the construction is certainly reasonable that an amendment could not be filed changing the original purpose clause.

"I shall appreciate it if you will, at your earliest convenience, give me an official opinion informing me as to whether or not I am authorized to file an amendment to a charter which changes or alters the original purpose clause, and if so, to what extent can the original purpose clause be changed by amendment."

We believe the construction to be placed upon the last sentence of said Article 1314 to which you particularly refer can best be determined by reference to statutes relating to the same subject as they have appeared in the various enactments when the matter has from time to time engaged the attention of our Legislature. Article 573 of the statute of 1879 was as follows:

"No amendments or changes violative of the constitution or laws of this State, or of any of the provisions of this title, shall be of any force or effect; and no amendments or changes shall be of any force or effect which are not germane to the original purposes or charter of incorporation, and calculated to carry out and effect the same."

This wording remained unchanged in the statute of 1895. In 1903 the statute was changed to read as follows:

"Art. 1135. Amendments, what void and what valid.—No amendment or change violative of the constitution or laws of this state or any of the provisions of this title shall be of any force or effect; amendments or changes may include additional purpose for which private corporations may be incorporated to that contained in its original or amended charter, as are specified in subdivision 72 or article 1121; but such amendments which so change the original purpose of such corporation as to prevent the execution thereof shall be of no force or effect."

Reference to subdivision 72 of Article 1121 discloses that the same Legislature thereby made provision for the inclusion of more than one "purpose" in charters for corporations engaged in the milling, ice, heating, refrigeration, and canning business, etc. In 1925 the sentence to which you refer, in Article 1314, is the same as it was in the 1895 statute, except for a different arrangement of the words, and the provision concerning subdivision 72 of Article 1121 was omitted.

In your letter and also in conversation with you, you indicate your main difficulty with the statute is in the determination of its meaning in the use of the words, "prevent the *execution* thereof," and, that you are therefore uncertain as to whether corporations may now amend or alter their charters so as to permit them to engage in businesses not included in the "purpose clause" of their original charter.

We have found the subject of "amendments of charters" is dealt with in the text books almost entirely with respect to the powers, and the limitation of the powers of states to bring about changes in charters of corporations already in existence, by the enactment of laws restricting or prohibiting them from engaging in activities which were authorized under their original charters, and also with respect to the number of stockholders or directors whose assent is necessary to the acceptance of the charter or of the performance of conditions imposed by such later legislation. See Thompson on Corporations. Secs.

395 to 443, R. C. L. Vol. 14, Sec. 88 to Sec. 96, Corpus Juris, Secs. 160 to 205, pages 160 to 199. But little is said with respect to the authority of corporations to bring about such a change voluntarily, or at the instance of the corporation, and there are but few decisions on that point. This is evidently because most corporations include within the original purpose clause in the first instance every activity authorized by the statute, and that by reason thereof, any change would therefore violate the general rule which prohibits a corporation from engaging in businesses which are covered by two or more subdivisions thereof. See notes under 4, page 447, Vol. 3, Vernon's Revised Civil Statutes, 1925, and cases cited. 10 Texas Jurisprudence, pages 622 to 625, Secs. 31 and 32, and cases cited, including "Opinions of Attorney General, Biennial Report 1912-14-332." The latter is an opinion by our present Chief Justice, Honorable C. M. Cureton, while First Assistant Attorney General, to which we refer you, in which he determined whether under the statute then in effect, a cotton oil mill corporation might so amend its charter as to also include the operation of cotton gins, there being a separate subdivision under which the latter might be incorporated.

We would rest this opinion upon it, but for the fact that your letter requests an opinion concerning the operation and effect generally of a certain sentence of Article 1314. His opinion is devoted principally to a discussion of the effect of the amendment of 1903 above referred to and as to whether subdivision 72 of Article 1121 as so amended would permit such a change in said charter. No mention is made of the precise point to which you refer, or of that article of the statute. In that opinion he ruled that such an amendment could not lawfully be made. This is the only conference opinion found among those of the various Attorneys General of this State. You are also referred to letter opinion written to Honorable Jane Y. McCallum, Secretary of State, January 28, 1932, by Honorable Neal Powers, Assistant Attorney General. The substance of said opinion is to the same effect, but it deals with the question of whether a corporation having for its purpose clause, one of the subdivisions of the statute, might completely substitute another and different subdivision thereof as its purpose clause, the kind and character of work being entirely dissimilar in the two instances. Though Mr. Powers disposes of the question by a construction of Article 1314 to which you refer, his opinion relates to the right to make an absolute and complete change in the purpose clause. Since your letter has reference to a change or alteration only, in the original purpose clause, it, like Judge Cureton's opinion, will probably not entirely suffice. In said letter opinion, Mr. Powers refers to State ex rel Steubenville Gas & Electric Co. vs. Taylor, 44 N. E. 513, an Ohio case. As is stated by him, the corporation was chartered for the purpose of engaging in manufacturing and furnishing gas and electricity. The proposed amendment would authorize it to acquire, operate, lease and maintain a street railway. Section 3238a of the laws of that State reads as follows:

"\* \* nor shall any corporation by amendment change substantially the original purpose of its organization."

The Court held the proposed amendment would violate the portion

of Article 3238a above quoted. We think the inhibitions contained in Article 1314 of our statute are designed to protect stockholders in, as well as the creditors of, corporations chartered thereunder by thus limiting their activities to those expressed in their original charters, making certain to the stockholders that their funds will not be devoted to purposes other than those named in the original charter, under which their contracts for subscriptions for stocks were made with the corporation. Such inhibitions also constitute an assurance to the creditors that whether prompt payment of obligations to them will be made will not depend upon the success or failure of any activities except those included in the purpose for which such corporation was originally formed, and under which they have dealt with it as such.

Under Sec. 59, 10 Texas Jurisprudence, page 663 & 664, we find the following:

“The power of amendment of its charter of a corporation organized under the general corporation law does not extend to an amendment which alters the terms of the preorganization contract of an original subscriber for stock. Nor does the statutory power of amendment permit a corporation to take powers other than those that may be taken by an original charter.”

Citing cases. This work was, of course, published since the date on which Article 1314 became effective, and no distinction is made between the present statute and the previous one. The present statute to which you refer (Article 1314) contains the sentence:

“No amendment \* \* which so changes the original purpose of such corporation as to prevent the execution thereof, shall be of any force or effect.”

The work cites, *In Re Western Bank & Trust Co.*, 163 Fed. 713, opinion by Federal Judge Meek, who quotes the 1895 statute which contained the sentence,

“No amendments \* \* shall be of any force or effect which are not germane to the original purpose of charter of incorporation, and calculated to carry out and effect the same.”

Sec. 202, 14 Corpus Juris, page 194. is as follows:

“Substitution of New Charter. The alteration of a charter may be as lawfully made by the substitution of a new charter as by an amendment of the old, provided such substituted *charter is germane and necessary to the objects and purposes for which the company was organized; \* \**”

A leading case in this State on the construction to be placed upon purposes clauses in which there appear two or more distinct businesses, is *Johnson vs. Townsend*, 124 S. W. 417, opinion by Justice Williams of the Supreme Court. In that case the corporation's main business was that of mining. The charter followed subdivision 34 of the statute, which reads as follows:

“To transact any manufacturing or mining business, and to purchase and sell goods, wares and merchandise used for such business.”

The Secretary of State having refused to file the charter, this mandamus suit was instituted. We quote from the opinion:

“It was the contention of the relators that the mention of both manufacturing and mining in one subdivision of the statute authorizes the formation of corporations for both purposes without any limitation \* \* On the

other hand, respondent contends that manufacturing and mining are distinct businesses, the transaction of which by one corporation is not authorized by the provision referred to permitting an incorporation for the one 'or' the other. We do not fully agree with either contention."

He then directs attention to the use of the words "business" and "purpose" in the statute and that relator's construction would authorize the corporation to engage in businesses and for one or more purposes. Quoting further from said opinion,

"We think the character of the statutory provisions is such as to exclude the construction that the transaction of two distinct businesses of manufacturing and mining are here provided for. On the other hand, there may be a business of both manufacturing and mining, in which the operations are so related as to constitute an entirety. The products of the mine may be sold in their crude state, or may be manufactured into many different articles, and these may be sold or devoted to their various uses. \* \* A charter must specify the purpose for which the corporation is created \* \* with sufficient clearness to enable the Secretary of State to see that the purpose specified is one provided for by the statute, and to define with some certainty the scope of the business or undertaking to be pursued."

The opinion then refers to the fact that relators have procured patents on equipment and devices used in the mining business, and have manufactured them, and have more than they needed in their mining business, have been engaged in selling some of them, and says:

"It seems plain that the business of manufacturing for sale, tools, etc., for mining is as distinct from the business of mining as the business of manufacturing for sale farming implements would be from farming. \* \* We hold that the right is given by subdivision 14 to incorporate for 'a business' consisting of manufacturing and mining, but not for two businesses, one of manufacturing and the other of mining."

Though the Court did not in that case construe or mention Article 1314, having reference to amendments of charters, no room is left for doubt that such statutes are to be strictly construed limiting the activities of corporations to one activity or business. We can hardly imagine an amendment of a charter for purposes not "germane" to, or which would "prevent the execution of" an original charter which would not have the effect to authorize activities or businesses other than those authorized under such original charter.

We do not believe any set or rigid rule can be laid down by which you may determine whether a proposed amendment of a charter may be granted or refused in all instances, but that in each case your approval or disapproval of the filing of same should depend upon whether activities intended to be carried out thereunder would have been authorized by the original charter.

It is readily seen that unless the activities of a corporation are to be restricted to the purposes for which it is originally formed, such corporation might in violation of its contract with its subscribers and in fraud of its creditors so change, alter, or amend its charter from time to time as to shift the character of its business from one type of business to another, and also evade the provisions of the statute requiring the payment of filing fees, making the proper showing as to its assets and liabilities, amount of stock subscribed and paid for, and, in fact, probably every provision of the statute governing original incorporators.

It is our further opinion that in view of the decisions and authorities hereinbefore referred to, and the wording of the statutes on the same subject in effect before the enactment of the statute of 1903, which contains the words, "prevent the execution thereof," that said words refer to the words, "the original purpose," and that the construction to be placed upon said words should be given the same effect as the previous statute on the subject, and that no amendment, change, or alteration of the purpose clause of the original charter should be permitted which is not germane to the original purpose or charter of such corporation, or which would authorize the conduct of or activity in any business whatsoever which could not have been engaged in thereunder.

The purpose of the original bill making the change in the working of this statute in the respect pointed out was, as is disclosed by the emergency clause thereof and the house journal of that session of the Legislature, solely in order to enable small corporations which had theretofore been chartered for milling and ginning business to thereafter also engage in the manufacture of ice, gas, heat and light. It is as follows:

"Section. 3. Whereas, there are now many small corporations in the State, incorporated under the provisions of the private incorporate act, which include two or more of the purposes mentioned in Article 650a; and whereas, since this incorporation, the Supreme Court has recently held, in effect, that such incorporations are illegal; and whereas, there is a public necessity that small corporations, incorporated for milling and ginning purposes in the small towns of the State, should be allowed to manufacture, in connection therewith, ice, gas, heat and light; therefore an emergency and imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days is created; and it is so suspended; and that this Act take effect and be in force from and after its passage; and it is so ordered."

We find nothing therein indicating an intention to change the whole law regulating corporations in the matter of amendment of their charters, from what it had been since the year 1879, and we therefore do not believe such change in the statute, from the words, "germane to and calculated to carry out and e(a)ffect the same," to the words, "prevent the execution thereof," should be so construed.

We find the word "execution" to be defined, in Corpus Juris, p. 278 as follows:

"The word execution includes the performance of every act required to give the instrument validity or to carry it into effect."

In Words and Phrases as follows:

"Execution as used in a will \* \* does not apply to the act of signing and publishing it, but of *carrying it into effect*."

In Webster's New International Dictionary as follows:

"To follow out or through to the end; to carry out or into complete effect; to complete; to finish; effect; perform; as to *execute* a purpose. To enforce."

Having determined the words "execution thereof" refers to the words "original purpose," we believe a reasonable construction of the use of those words is that there is no difference in the two statutes in this respect. We also conclude the "*original purpose*" is the



thing to be “*executed*,” because if such construction is not to be placed on their use, the statute would have omitted the words “original purpose.”

We do not mean to say by this opinion that the Legislature may not pass laws enabling corporations to so amend their original charters as to include acts which were not germane to such charters. This act undoubtedly did permit such an amendment of the original charter of any corporation organized under this particular subdivision of the statute, but we hold it effected no others. Neither do we hold that corporations may not be permitted to so amend their charters if originally incorporated under a subdivision of the statute if such subdivision *provides* for the adoption of *two or more* of the purposes enumerated therein, as did this statute after being so amended, but that in all other circumstances they may be amended only in line with our conclusion above expressed.

Yours very truly,

H. D. BISHOP,  
Assistant Attorney General.

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Op. No. 2940

STATUTES CONSTRUED — CHAPTER 37, ACTS FIRST CALLED SESSION,  
43RD LEGISLATURE — RELIEF COMMISSION — PROXIES —  
OFFICERS — DELEGATION OF POWERS.

1. Chapter 37, Acts, First Called Session, 43rd Legislature, creating Texas Relief Commission, construed as to power of members to delegate power by proxy.

2. An officer to whom a discretionary power is entrusted cannot delegate the exercise thereof to other persons.

3. A member of the Texas Relief Commission, being vested with discretionary power, cannot delegate to another member the right to cast his vote and represent him at meetings of the Commission.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, February 10, 1934.

*Texas Relief Commission, Austin, Texas.*

GENTLEMEN: You have certified to the Attorney General's Department the following:

“Can a member of the Texas Relief Commission by written proxy delegate to another member the right to cast his vote and represent him at meetings of the Commission?”

Section 11 of Chapter 37, Acts, First Called Session, 43rd Legislature, provides for the creation of the Texas Relief Commission, provides for the appointment of its members and prescribes their terms of office. It is made the duty of the Commission to “administer” all funds made available to said Commission by the Federal government, and all funds made available by the State for the employment, rehabilitation and relief of the unemployed. The Commission is entrusted with the selection of means and methods for the accomplish-

ment of the purposes for which the moneys entrusted in its hands are made available. The duties of the Texas Relief Commission are almost entirely of a discretionary nature, the Commission being limited only as to purposes—not as to means or methods for accomplishing those purposes.

It is well settled by the authorities that an officer, to whom a discretionary power is entrusted, cannot delegate the exercise thereof to other persons. *State vs. Reber*, 226 Mo. 229, 126 S. W. 397; 46 C. J. p. 1033, Section 291.

As pointed out, the powers of the Texas Relief Commission are almost entirely discretionary powers. The members of that Commission are public officers, and to the extent that they participate in the decision of questions before the Commission, they are engaged in the exercise of powers granted to that body. A member of the Commission could not, therefore, delegate that portion of the powers which he is entitled to exercise to a person not a member of the board. Nor would it, we think, be permissible for one member to delegate his authority to another member. 2 *McQuillin on Municipal Corporations*, Volume 1, Section 394; 2 *McQuillin on Municipal Corporations*, Volume 2, Section 519.

Article 14 provides that a majority of any legally constituted board or commission, unless otherwise specially provided, shall constitute a quorum for the transaction of business. If it should be held that one member of a board could delegate to another the powers entrusted to him, then there would be nothing to prevent such member from acting for all.

It is, therefore, my opinion that a member of the Texas Relief Commission cannot by written proxy delegate to another member the right to cast his vote for and represent him at meetings of the Commission.

Very truly yours,

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2938

COMPTROLLER'S DEFICIENCY CERTIFICATES: ASSIGNMENT AND  
ASSIGNEE: OFFSETS AND DEFENSES — STATUTES  
CONSTRUED—STATE DECISIONS: FEES OF OFFICERS.

1. Deficiency certificates issued by the Comptroller of Public Accounts are not negotiable instruments within the contemplation of the law merchant. (*Articles 5932, R. C. S., 1925, et seq.; Speer vs. State* 58 S. W. (2d) 95; *Lasater vs. Lopez*, 110 Tex. 179, 217 S. W. 373; *Stratton vs. Commissioners' Court*, 137 S. W. 1170.)

2. Deficiency certificates, though not negotiable, are subject to assignment. (*Article 569, R. C. S., 1925; Leach vs. Wilson County*, 62 Tex. 331.)

3. Deficiency certificates, being non-negotiable instruments, are subject to all defenses and equities existing prior to assignment or attached to the original transaction, even in the hands of an assignee for value, who took the same without notice of its defects.

4. Under the Statutes of this State, the Comptroller is prohibited from paying any obligation of the State to any person indebted to the State, or to his agent or assignee, regardless of the time when said indebtedness arose, and irrespective of the good faith of the assignee in taking the assignment.

5. The decision of the Supreme Court in *Rochelle vs. Lane*, 105 Tex. 350, 148 S. W. 558, is not a rule of property affecting the liability of the State on deficiency certificates issued prior to its reversal: the doctrine, *stare decisis*, has no application to decisions relating to the compensation of public officers, since no contractual rights are involved.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, JANUARY 3, 1934.

*Hon. George H. Sheppard, Comptroller of Public Accounts,*  
*and*  
*Hon. George B. Simpson, State Auditor, Capitol.*

GENTLEMEN: Recently, you requested of the Attorney General an opinion with reference to the following questions, which I am taking the liberty of paraphrasing from your several letters:

(1)

Where deficiency certificates have been issued by the State Comptroller, covering accounts of various officers, and later, on audit of such accounts, it is discovered that the officer in whose favor said certificate was drawn was, by reason of other accounts, indebted to the State at the time the certificate was drawn or that he has since become indebted to the State, and said indebtedness remains an undischarged liability.

(a) Is the State liable for the full amount of such deficiency certificate where same was purchased by an assignee for value and without notice of the indebtedness of the officer to the State?

(b) Would the liability of the State be changed if such deficiency certificate were issued and assigned prior to the reversal of the decision of *Rochelle vs. Lane*, 105 Tex. 350, 148 S. W. 558 by the case of *Rogers vs. Lynn*, State Auditor, and *Sheppard, Comptroller*, 121 Texas, 467, 49 S. W. (2) 709?

(2)

Are the State Auditor and State Comptroller required or authorized to audit claims of an official back of the claim covered by the deficiency certificate before approving the same for payment from an appropriation requiring the approval of such certificates by both the State Auditor and the State Comptroller, or must their audit be confined to the claim covered by the certificate?

Article 1033, C. C. P., 1925, provides that 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 the costs claimed to be due them by the State in felony cases tried at that term, and prescribes the form in which such accounts shall be prepared. Article 1034, C. C. P., 1925, provided that said bills should be presented to the district judge, required him to examine the same, inquire into the correctness thereof, and to approve the same, in whole or in part, or to disapprove the same, in whole or in part, as the case might require; it further provided that the bill, together with the action of the judge with reference thereto, should be entered on the minutes of the court, and that, upon the rising of the court, the clerk should make a certified

copy of the bill from the minutes of the court, and the action of the judge thereon, and send the said copy by registered letter to the Comptroller.

Article 1035, C. C. P., 1925, provided that upon the receipt of such claim, and the certified copy of the minutes of the court relative thereto, the Comptroller should carefully examine the same, and, if correct, should draw his warrant in favor of the officer entitled to the same. The article further provided that:

"If the appropriation for paying such accounts is exhausted, the Comptroller shall file the same away, if correct, and issue a certificate in the name of the officer entitled to the same, stating therein the amount of the claim and the character of the services performed. \* \* "

(Articles 1034 and 1035, supra, were amended by Chapter 143, Acts Regular Session, 43rd Legislature, but insofar as this opinion is concerned, no material change was made in the provisions of the statutes.)

Deficiency certificates issued under the authority of the above statutes are made out in the following form:

"No. \_\_\_\_\_ COMPTROLLER'S DEFICIENCY CERTIFICATE \$ \_\_\_\_\_  
 (Original) Austin, Texas \_\_\_\_\_, 19 \_\_\_\_\_  
 THIS CERTIFIES THAT \_\_\_\_\_ has  
 filed a claim in this office for services, fees felony cases  
 \_\_\_\_\_ County of \_\_\_\_\_  
 \_\_\_\_\_ DOLLARS.  
 The appropriation being exhausted no warrant can issue. This certificate  
 is issued in accordance with the provisions of Art. 1134, Code Criminal  
 Procedure of 1920.  
 Appropriation No. \_\_\_\_\_

Comptroller.

This Deficiency Certificate can not be paid until the Legislature makes appropriation for the same."

### 1.

In order to answer the first of your inquiries, it is requisite that we determine at the outset whether deficiency certificates issued under the authority of the above statutes are "negotiable" instruments within the meaning of the Uniform Negotiable Instruments Act (Title 98, R. C. S., 1925), because of certain characteristics which the law assigns to those instruments which it declares to be negotiable.

Article 5932, R. C. S., 1925 provides that:

"Sec. 1. An instrument to be negotiable must conform to the following requirements:

"1. It must be in writing and signed by the maker or drawee.

"2. It must contain an unconditional promise or order to pay a sum certain in money.

"3. It must be payable on demand, or at a fixed or determinable future time.

"4. It must be payable to order or to bearer, and

"5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. \* \* "

"Sec. 4. \* \* An instrument payable upon a contingency is not negotiable,

and the happening of the event does not cure the defect.”

It is apparent that a deficiency certificate in the form of the above does not meet the statutory requirements of negotiable instruments, in that said certificates do not contain an unconditional promise or order to pay, that same are not payable on demand or at a fixed or determinable time in the future, and, further, that same are payable only upon the contingency of a subsequent legislative appropriation therefor. (See letter opinion, J. A. Stanford, Jr., Assistant Attorney General, to Senator J. W. E. H. Beck, July 8, 1931.)

Moreover, the courts have ever held that warrants and like evidences of indebtedness on the part of the State and the political subdivisions of the State are not negotiable instruments, unless legislative provisions expressly makes them so. *Speer vs. State*, 58 S. W. (2) 95, 97 (Tex. Cr. App. 1933); *Lasater vs. Lopez*, 110 Tex. 179, 217 S. W. 373; *Stratton vs. Commissioners' Court of Kinney County*, 137 S. W. 1170 (Tex. Civil App.); 11 Tex. Juris. p. 665, Sec. 118; *Scott County vs. Advance-Rumley Thresher Co.*, 288 Fed. 739, 36 A. L. R. 937, and note, 36 A. L. R. 949, et seq. Deficiency certificates, warrants and like instruments are orders of the government upon itself; they are not intended to have, and do not possess the qualities of commercial paper, but are merely convenient methods for the transaction of the fiscal affairs of the State between the officers empowered to authorize payment of claims against the State, and those officers empowered to disburse public moneys in satisfaction of such claims. *Stratton vs. Commissioners' Court of Kinney County*, supra.

For the reasons above assigned, we are of the opinion that deficiency certificates are not negotiable instruments within the contemplation of the law merchant.

(a)

Articles 569 and 570, R. C. S. 1925, respectively, provide that:

“The obligee or assignee of any written instrument are not negotiable by the law merchant, may by assignment transfer all his interest therein to another.

“The assignee of any instrument mentioned in the preceding article may sue thereon in his own name. He shall allow every discount and defense against the same which it would have been subject to in the hands of any previous owner before notice of the assignment was given to the defendant.  
\*\*\*\*\*”.

In *Leach vs. Wilson County*, 62 Tex. 331, the Supreme Court held that, under the statutory provisions above quoted, a county warrant is the subject of assignment; we think that the statute also permits the assignment of deficiency certificates. Further, under article 570, supra, the obligation of the instrument would be subject to all the defenses and equities existing prior to assignment or attached to the original transaction, even in the hands of an assignee for value, who took without notice of such defects. *Stratton vs. Commissioners' Court of Kinney County*, supra. The State, as the maker of a non-negotiable instrument certainly may assert defenses which are available to the maker of any non-negotiable instrument: the holder of a deficiency certificate, whether in good faith or not, cannot demand

from the State more than is legally due upon the claim or claims on account of which the certificate is issued. *Speer vs. State*, supra.

The legislature was not content to allow the State only those defenses which it accords to all makers of non-negotiable instruments; with reference to the obligations of the State, the legislature has further provided that:

“No warrant shall be issued to any person indebted to the State, or to his agent or assignee, until such debt is paid.” (Art. 4350, R. C. S., 1925; 42nd Legislature. Italics ours.)

In the light of the provisions of the statute last cited, we think there is no question but that the State and its officers may refuse to pay any person indebted to the State, or his agent or assignee, until the debt is paid, irrespective of the time of the accrual of the indebtedness to the State. Had the legislature intended to limit the provisions of the above statute to indebtednesses arising prior to assignment of a claim against the State, it would not have been necessary to have enacted said statute: the State could have asserted that defense under other statutes referred to herein. It is not to be presumed that in enacting article 4350, supra, the legislature merely intended to repeat what it had previously said; it is rather to be assumed that some additional meaning was intended to be conveyed thereby. Inasmuch as said statute is unlimited in its prohibition, it is our opinion, and you are accordingly advised, that it forbids the payment of any obligation of the State in the hands of an assignee of any person indebted to the State, whether said indebtedness arose either out of the transaction out of which the obligation arose, or out of a prior or subsequent transaction, and irrespective of the good faith of the assignee in taking the assignment.

(b)

You ask whether the liability of the State would be changed were the deficiency certificate in question issued and assigned before the Supreme Court overruled the principles announced in *Rochelle vs. Lane*, supra. In that case it was held that the action of the district judge in examining and approving accounts of officers in accordance with the provisions of article 1034, C. C. P., 1925, was judicial in character, and that in view of section 1, Article II of the Constitution of Texas (dividing the powers of government), the action of the district judge in regard to the examination and approval of such accounts could not be reviewed by the Comptroller or any other executive officer of the State government.

It is not infrequently stated in court opinions and legal texts that after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and that a change of decision is to all intents and purposes the same in its effect on such contracts as an amendment of the law by legislative enactment. *Sudbury vs. Board of Commissioners of Monroe County*, 157 Ind. 446, 62 N. E. 45, 48; *Mountain Grove National Bank vs. Douglas County*, 146 Mo. 42, 47 S. W. 944. Unless it can be said that the State

is liable upon deficiency certificates as contracts to pay the particular sums stated on the face thereof, and further, that the decision of *Rochelle vs. Lane*, supra, is a rule of property insofar as the liability of the State thereon is concerned, it is clear that there would be no basis of differentiation between certificates issued before and those issued after the reversal of the *Lane* case.

The questions here involved, however, have no reference whatever to the title or transfer of property, or to matters of contract. Public office is not held under grant or contract: public office is a public trust, and is accepted *cum onere*. *Anson Jones vs. Shaw and Swisher*, 15 Tex. 577; Opinions of the Attorney General of Texas, No. 2900 (written October 5, 1932, to J. W. E. H. Beck, Chairman, Senate Investigating Committee), and cases cited therein; Throop, *Public Officers*, secs. 18-19. Likewise, an officer's right to compensation does not grow out of a contract between him and the government, and he is entitled to compensation, not by force of any contract, but only because the law attaches it to the office he holds, as an incident to the office. Throop, *Public Officers*, sec. 443; *Anson Jones vs. Shaw and Swisher*, supra. It has been held, therefore, that the doctrine *stare decisis* has no application to decisions relating to the compensation of public officers, since contractual rights are not involved (*Sudbury vs. Board of Commissioners of Monroe County*, supra; *Mountain Grove National Bank vs. Douglas County*, supra); we think these decisions unquestionably sound.

We are of the opinion, therefore, that the decision in the *Lane* case, supra, is not to be regarded as a rule of property affecting the liability of the State upon deficiency certificates issued prior to its reversal. In this conclusion, we think we are sustained, in effect, by the judgment of the Supreme Court of Texas in the case of *Rogers vs. Lynn and Sheppard*, supra: in that case, the relator sought a writ of mandamus against Sheppard, Comptroller, and Lynn, State Auditor, to compel them to approve and pay two accounts against the State, evidenced by two deficiency certificates issued August 2, 1929, and July 28, 1930, respectively. The respondents answered that the accounts under which the certificates were issued were tainted with fraud, and that the State did not in fact owe the amounts claimed. Relator contended that, inasmuch as the accounts had been approved by the district judge in accordance with the provisions of Article 1034, C. C. P., 1925, the respondents were foreclosed, under *Rochelle vs. Lane*, from attacking or questioning the validity of the accounts so approved and presented for payment. The following excerpt is taken from the opinion of the court:

"In the beginning of the discussion of the above question we are compelled to admit that, under the holding in *Rochelle vs. Lane*, supra, the order of the district judge in approving these and prior claims has the force of a judgment finally binding on the State and these respondents as to both questions of law and of fact. We are further of the opinion that, if such decision is to be adhered to, these respondents are left with no alternative but to approve these accounts and issue warrants in payment thereof. \* \* \*"

In the following paragraphs of the opinion, the court overruled the decision of *Rochelle vs. Lane*, and rendered judgment refusing the writ of mandamus. It is apparent that, if the *Lane* case must be regarded as a rule of property, the Supreme Court should have issued the writ prayed for by relator, inasmuch as his claims accrued and were approved by the district judge prior to the reversal of said case.

We do not believe that the holding in the case of *Montgomery County vs. Talley*, 169 S. W. 1141 (Civ. App.; Error Refused), in any way militates against the conclusions which we have reached herein. In that case it was decided that the obligation to pay an officer the compensation *allowed by law*, was, insofar as past services were concerned, a contractual obligation within the protection of the constitutional prohibition against the enactment of laws impairing the obligation of contracts. But an officer can acquire no contractual right to demand from the State fees for services he has not performed, nor to demand fees not allowed by statute: these are the only questions which could be raised by your inquiry.

We are of the opinion, therefore, that question 1(b), above, should be answered in the negative, and so answer the same.

As hereinabove pointed out, Article 3450, prohibits the issuance of a warrant to any person who is indebted to the State, or to his agent or assignee, until such debt is paid. We have interpreted said statute, herein, as forbidding the payment of any obligation of the State to any person indebted to the State or to his agent or assignee, regardless of the time when said indebtedness arose, and irrespective of the good faith of the assignee in taking the assignment.

As we construe Article 4350, *supra*, the Comptroller would be prohibited from issuing a warrant to any officer, his agent, or assignee, in payment of a deficiency certificate, where said officer is, by reason of other accounts, indebted to the State, although the accounts upon which said certificate was issued were in all respects regular and valid.

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

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Op. No. 2937

FOREIGN CORPORATIONS—PERMITS—OWNERSHIP OF REAL PROPERTY—  
DOING BUSINESS IN TEXAS.

Where a foreign corporation acquires deeds of trust and/or vendor's lien notes secured by real property in Texas, such foreign corporation may foreclose such notes in the courts of this State, or as provided for in the deeds of trust purchase the property securing such indebtedness at foreclosure sale, and do all things necessary to preserve said property and collect the rents therefrom, and resell the property, and such transactions will not constitute doing business in the State of Texas in contemplation of Article 1529, Revised Civil Statutes, 1925.



OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, November 29, 1933.

*Hon. W. W. Heath, Secretary of State, Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your recent inquiry to Attorney General, James V. Allred, which has been referred to the writer for consideration, wherein you request an opinion upon the following set of facts:

Where a foreign corporation with the charter power to do a life insurance business and has the incidental power to make loans on notes secured by vendor's lien on real estate, and/or by deeds of trust, and has the incidental power to foreclose such loans and take title to the property underlying such liens, and in pursuance of such powers purchases such notes without the State of Texas, the same being secured by property being situated in Texas, and said insurance company subsequently has to bring suit in the courts of the State of Texas through its duly authorized agents to foreclose such vendor's lien notes, or to foreclose under the terms of the deeds of trust, and purchases said property at such foreclosure sales, and thereafter, in order to preserve said properties has some agent in Texas to make the necessary repairs to such property and rent and collect rents thereon until such property can be disposed of, is it necessary for such foreign life insurance companies to take out a permit to do business in Texas? In other words, where a foreign life insurance company purchases outright, or loans its money on notes, such notes being secured by property situated in Texas, and all of said transactions take place without the State of Texas, does the enforcement within the courts of this State, or by foreclosure under the terms of the deeds of trust, collection of said notes and the purchase of any property situated in Texas securing payment of said notes, and the owning, renting and preservation of said property until the same can be disposed of by such corporation within the State of Texas, constitute doing business in the State of Texas by such foreign life insurance company?

When a foreign corporation desires to transact and carry on business within the State of Texas, it is necessary for it to comply with certain conditions precedent before it is entitled to such privileges in this State. In this connection we wish to especially call your attention to Article 1529, Revised Civil Statutes of Texas, 1925, which reads as follows:

"Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State, or of any territory of the United States, or of any municipality of such State or territory, or of any foreign government, sovereignty or municipality, desiring to transact or solicit business in Texas, or to establish a general or special office in this State, shall file with the Secretary of State a duly certified copy of its articles of incorporation; and thereupon such official shall issue to such corporation a permit to transact business in this State for a period of ten years from the date of so filing such articles of incorporation. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes."

In the event any foreign corporation transacts or carries on its business within the State of Texas without complying with the above article of the statutes, it is subjected to the penalties imposed in Article 1536, Revised Civil Statutes of Texas, 1925, as amended by Acts, 1931, 42nd Legislature, page 264, the same reading as follows:

"No such corporation can maintain any suit or action, either legal or equitable, in any court of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed its articles of incorporation under the provisions of this Chapter. If any corporation shall transact intra-state business in Texas without first having obtained a permit under the provisions of this chapter such corporation shall forfeit to the State of Texas not less than One Hundred (\$100.00) Dollars nor more than Five Thousand (\$5000.00) Dollars for each month or fraction thereof it shall transact such business without a permit as required hereunder, to be recovered in a suit to be brought by the Attorney General in Travis County, Texas, and the State shall have a lien on all properties of the corporation for said penalties and any corporation may be enjoined by the Attorney General when transacting such business without a permit as required hereunder."

We find no provision under the statutes of this State wherein the Legislature has attempted to define what constitutes doing business within the State of Texas by a foreign corporation. Therefore, we are necessarily compelled to look to the decisions of the courts in the absence of such statutory law. This question involves a fact issue and we must, of necessity, look for cases as nearly analogous as possible to the one here under consideration with reference to facts in order to arrive at an intelligent conclusion.

The rule seems to be well settled, not only by the courts of this State but in other jurisdictions, that the mere collection in a state by a foreign corporation of a debt due it or the adjusting or compromising of such debt, even though suit has to be brought upon same within the state, does not constitute doing business within contemplation of the statutes above mentioned. *Security Company vs. Panhandle National Bank* (Sup. Ct. Tex.) 57 S. W. 22; *Norton vs. W. H. Thomas*, 93 S. W. 711; *Nelson vs. Detroit Security & Trust Company*, 56 S. W. (2nd) 860; *Sullivan vs. Sheehan*, (C. C.) 89 Fed. 24.

In the case of *Security Company vs. Panhandle National Bank*, supra, the plaintiff, a corporation organized under the laws of the State of Connecticut, not having a permit to do business in the upon property in Texas. Default was made in the payment of the State of Texas, acquired in that state a bond secured by a mortgage bond and the plaintiff brought suit upon the bond in the District Court of Wichita County and obtained a judgment upon same, together with a decree ordering the sale of the mortgaged property for satisfaction of the debt. It was contended in this case that the plaintiff had no standing in the courts of Texas for the purpose of bringing suit upon its debt and to foreclose the underlying lien because it was a foreign corporation and had been doing business in Texas and had not taken out a permit as required under what is now Article 1529, Revised Civil Statutes, 1925. The court, in disposing of this question, in a very able opinion written by Chief Justice Gaines, had the following to say:

"When, however, the obligation had matured, the plaintiff in error brought suit and obtained a judgment upon it in this State. In the adjustment of its demand, it then entered into a negotiation which resulted in the extension of the debt, and the execution of the new security out of which the present controversy arose. The purpose of the statute was probably two-

fold,—one, to protect the people of the State from irresponsible foreign corporations, by affording the means by which they could readily ascertain such information in reference to them as is ordinarily afforded by their charter; the other, to place them upon the same footing as like domestic corporations, by requiring them to pay a like fee for a permit to do business, as is required of a domestic company for filing its charter. See Rev. St. art. 2439. It is to be presumed, therefore, that the business had in view in making the requirement was the ordinary business of the company,—the business it was organized to pursue, and which its charter empowered it to pursue. Had it been intended to prohibit a foreign corporation from collecting, extending, adjusting, or bringing suit for a debt contracted elsewhere, it would have been easy to have made that intention plain. If it was the purpose of article 745 to deny the corporation the comity which is usually extended throughout the states of the Union, of bringing suits in the courts of this State, article 746 was wholly unnecessary. On the other hand, that article shows that such was not the purpose. It, in effect, merely denies the right of a foreign corporation to bring suit upon any cause of action arising after it has done business in the State without a permit; thus showing that it was regarded that bringing a suit in court was not doing business, within the purview of article 745. If bringing suit to collect a debt be not doing business, within the meaning of the provision in question, how can the adjustment of a debt be such business?"

Judge Gaines further, in the course of the opinion, quoted with approval from a Minnesota case which construed a statute of the state of Minnesota similar to the Texas statute here under consideration, the following:

"The Minnesota statute referred to by counsel providing for the conditions upon which foreign building and loan associations may transact business in this State and prohibiting under penalties the transaction of business by such foreign corporations unless those conditions have been complied with, *I think necessarily refers to the ordinary business of such associations.* Without complying with those conditions such foreign corporations would not have the right by its officers or agents to come into this State and solicit subscriptions for its stock or solicit loans. *The same rule applies to any foreign insurance company where similar conditions are required to be complied with before it shall do business in this State, and the business referred to is its ordinary business of insurance.* But companies of either of these kinds, if not transacting their ordinary business in this state, and not privileged to transact their ordinary business in this state, not having complied with these conditions of the Minnesota statute, would not be prohibited by any proper interpretation of such statute, from investing in the bonds of the state or of municipal or other corporations of the state nor from enforcing such bonds."

In line with the decision of the Supreme Court in the case just above discussed, the Commission of Appeals of the State of Texas, in the recent decision of *Nelson vs. Detroit Security Company*, supra, in discussing the application of Article 1529, Revised Civil Statutes, 1925, to foreign corporations, speaking through Judge Leddy, made the following observations:

"Finally, it is insisted that defendant in error was not authorized to bring this suit because it failed to allege and prove that it had complied with the statutes of this state (Rev. St. 1925, art. 1529 et seq.) requiring a foreign corporation desiring to transact business in this state to obtain a permit. A permit to do business is only required when a foreign corporation desires to transact in this state the business authorized by its charter. The cause of action involved in this suit did not arise or grow out of the transaction of any business in this state by defendant in error. Under the rule of comity prevailing between states it was privileged, without obtain-

ing a permit to do business, to use our courts to enforce an obligation made and to be performed in the state of its domicile. *Cruncleton vs. Chicago Portrait Co.* (Tex. Civ. App.) 16 S. W. (2d) 851; *Crisp vs. Christian Moerlein Brewing Company* (Tex. Civ. App.) 212 S. W. 531; *Lee vs. Galena-Signal Oil Co.* (Tex. Civ. App.) 8 S. W. (2d) 1051; C. J. 14A, sec. 3983, and authorities there cited.

"It has been rightly held that the bringing of an action by a foreign corporation to collect a debt contracted in another state does not constitute doing business within the meaning of the statutory provisions prohibiting such corporations from doing business without complying with the conditions prescribed by such statutes. *Security Company vs. Panhandle National Bank*, 93 Tex. 575, 57 S. W. 22; *Texas Land Co. vs. Worsham*, 76 Tex. 556, 13 S. W. 384; *Cooper vs. Ft. Smith, etc., R. R. Co.* 23 Okl. 139, 99 p. 785; *Creteau vs. Foote, etc. Glass Co.* 40 App. Div. 215, 57 N. Y. S. 1103.

Under the above decisions we think there should not be any doubt but what, under the facts stated in your inquiry, a foreign life insurance corporation would have the right to bring suit in this state upon such vendor's lien notes and would also have the right to adjust or compromise any matters arising out of the debts created by such vendor's lien notes without taking out a permit to do business in the State of Texas as provided under Article 1529, Revised Civil Statutes, 1925.

We shall next consider the power of a foreign corporation to take title to real property in Texas, and in the event it be determined that such foreign corporation can take title to real property in Texas, then whether or not it has the right to preserve, protect, rent and collect rents on the same until such time as it may be disposed of without taking out a permit to do business in the state as required under the provisions of Article 1529, Revised Civil Statutes, 1925.

The public policy of the State of Texas, as expressed by the Legislature in Chapter 4 of the Revised Civil Statutes of 1925, limits, and in certain instances prohibits, the acquisition of land in this state by private corporations. Under these provisions of the statutes private corporations which are chartered for the main purpose of acquiring land by purchase, lease, or otherwise, are prohibited from acquiring land in the State of Texas. However, corporations organized for the purpose of leasing, purchasing, selling or subdividing land in incorporated cities are excepted. Corporations, however, are permitted to purchase and acquire land in the state where the same is necessary in the use of such corporations' business, and are also permitted to acquire land in order to liquidate any indebtedness owing such corporations. Any land, however, acquired by such corporation in liquidating their debts must be disposed of within fifteen years after the acquisition of the same. Subject to the limitations hereinabove expressed, there is no express provision, under the statutes of this state, prohibiting a foreign corporation from acquiring and holding land in the State of Texas in payment or liquidation of debts owing such corporation. The decisions of this State seem to hold that a foreign corporation may acquire land in this State in liquidation of its debts and receive rents therefrom, and that the holding and renting of such property within the State of Texas does not constitute doing business in the State in contemplation of Article 1529, Revised Civil Statutes

of 1925. *Wilson vs. Peace*, 85 S. W. 31; *Lakeview Land Company vs. San Antonio Traction Company* (Sup. Ct. Tex.) 66 S. W. 766.

In the case of *Wilson vs. Peace*, supra, a foreign corporation acquired certain real property in Texas, rented the same, made an assignment of the rentals and suit was brought for the collection of the same. The defendants set up the facts and alleged a recovery should not be had on the ground that the corporation was a foreign corporation doing business in Texas and had not complied with the laws of this State by obtaining a permit and, therefore, had no standing in court. In disposing of this contention Judge Speer, speaking for the Court of Civil Appeals, had the following to say:

"The court erred in sustaining these exceptions because it is neither directly alleged nor does it appear from the allegations of the answer that the American Tribune New Colony Company was doing business in the State of Texas. It is only where a foreign corporation desires to do business in this State that it is required to apply for and obtain from the Secretary of State a permit to do business in this State."

In the case of *Lakeview Land Company vs. San Antonio Traction Company*, supra, a foreign corporation acquired a contract and certain real estate from a Texas corporation, and such foreign corporation had not qualified and taken out a permit to do business in the State of Texas. Suit was brought by the foreign corporation against the domestic corporation for damages arising out of the contract. The domestic corporation set up the defense that the foreign corporation had theretofore transacted business in Texas in violation of the statute requiring such foreign corporation to take out a permit and, by reason thereof, had no standing in court. Judge Brown, speaking for the Supreme Court of Texas, in overruling this defense used the following language:

"There is no law in Texas which prohibits corporations created in other states to purchase and hold land and personal property in this State if authorized by their charters or the laws under which they were created. The charter of appellant conferred that power; therefore the title to the land and contract vested in appellant. 6 *Thompson, Corporations*, Par. 793. The purchase in this case was made outside of this State and did not constitute 'transaction of business within the state' as expressed in Arts. 745, 746, Revised Statutes (now Articles 1529 and 1536, Revised Civil Statutes, 1925). *Security Trust Company vs. Panhandle National Bank*, 93 Texas 575, 57 S. W. 22. The purchase of land and contract under the facts alleged did not violate any law of this State."

The rule, as above expressed, seems to be in harmony with the leading text writers and decisions of other jurisdictions. *Fletcher Encyclopedia Corporations*, Vol. 9, page 9995; *Broadway Bonding Company vs. Fidelity Printing Company*, 170 S. W. 394 (Mo.); *Chicago Title Trust Company vs. Bashford*, 120 Wis. 281; *Sullivan vs. Sullivan Timber Company*, 103 Ala. 371; 25 L. R. A. 543; *Louisville Property Company vs. Mayor and City Council* (Tenn.) 84 S. W. 811; 14A *Corpus Juris*.

*Fletcher on Corporations*, supra, states the rule in the following language:

"Nor is a foreign corporation prevented, merely because it is foreign, from owning real estate or from enforcing and protecting its rights in

reference to property so owned by it in the state. And the care and protection of unused property or payment of taxes which are a charge thereon, and the payment of which is essential to the preservation of the title to the owner, is held to not constitute doing business in the State. Nor is a foreign corporation doing business within the meaning of a statute requiring a foreign corporation desiring to do business in the state to file a copy of its articles of incorporation and secure a permit by reason of its ownership of a farm in the State, and the lease thereof, and the assignment of the rents and profits accruing under such lease." (Citing *Wilson vs. Peace* (Tex. Civ. App.) 85 S. W. 31).

In view of the above authorities it is our conclusion, under the facts stated in your inquiry, that a foreign life insurance corporation may foreclose in the courts of this State or under deed of trust at a trustee's sale, notes secured by liens on real estate situated in Texas, where such notes were acquired in transactions without the State, and subject to the statutory limitations hereinabove mentioned, may purchase the real estate securing payment of such notes at such foreclosure sale and have the power to hold such property and receive the rents therefrom, and do all other things necessary to protect and preserve the same, as well as resell and collect the purchase price, and that such transactions would not constitute doing business in the State of Texas within contemplation of Article 1529 and 1536, Revised Civil Statutes, 1925, of the State of Texas.

We do not want this opinion to be construed, however, to the effect that all foreign corporations would be exempt from complying with the provisions of the above mentioned articles of the statute, and especially corporations organized for the primary purpose of loaning money, dealing in notes secured by liens on real estate, and those corporations organized primarily for the purpose of dealing in real estate.

Very truly yours,

SIDNEY BENBOW,  
Assistant Attorney General.

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Op. No. 2933

UNIVERSITY OF TEXAS — TRAVELING EXPENSES, OFFICERS AND AGENTS  
— BOARD OF REGENTS (Powers of) — CONSTITUTIONAL LAW —  
WORDS AND PHRASES (Public Purpose).

1. Officers and agents of the University of Texas are entitled to reimbursement for traveling expenses incurred by them, where such expenses are incurred in the discharge of some duty imposed upon them by or under the authority of statute, if there is statutory authority for the reimbursement of such officer or agent, and if the Legislature has appropriated money to pay such claims.

2. Expenditures from appropriations made in favor of the University of Texas must be made upon order of the Board of Regents, and the Comptroller is authorized to issue warrants in payment of accounts against such appropriations only upon vouchers approved in the manner prescribed by Article 2594, Revised Civil Statutes, 1925.

3. The Board of Regents of the University of Texas has the power to prescribe the duties to be discharged by officers and professors of the University, and the duties prescribed by the Board are the official duties of

such officers and agents; but the Board is without power to authorize or require of an officer or employee of the University the performance of an act for a private purpose.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, October 1, 1933.

*Dr. H. Y. Benedict, President, University of Texas, Austin, Texas.*

DEAR SIR: Your letter of recent date, addressed to the Attorney General, has been received and referred to the writer for attention and reply. The pertinent part of your letter presents the following inquiries:

"1. Precisely under what conditions may a representative of the University take a trip approved by the Board of Regents and be reimbursed out of University funds for the traveling expenses incurred?

"Under this question I should like to bring out several points:

"(I-a) Just who, in addition to the Regents or officers subject to the Regents, is to determine whether such a trip is in line of regular duty? It is obviously highly desirable that both the authority of the State Comptroller and of the Regents be so clearly defined that no uncertainty exists. Section 2, Chapter 284, page 631, of the General Laws of the 42nd Legislature, Regular Session (part of the Appropriation Bill) provides that 'no item in this appropriation shall be used for traveling expenses outside of the State except upon the approval of the governing board for the particular institution'. Has the State Comptroller any discretion in this matter or is he bound by statute? Have the Regents, subject of course to statute, any discretion?

"(I-b) Is any distinction to be made between such trips taken within the State of Texas and such trips taken to points outside of the State?

"(I-c) Should there be a distinction made between traveling expense accounts paid out of legislative appropriations from the General Revenue Fund and similar expense accounts paid out of our special funds?"

The questions above quoted deal generally with the same subject-matter, and will be considered and answered in connection with each other, rather than treated separately; however, we will attempt, as nearly as it is practicable to do so, to conform to our answers to the order in which the questions were presented. It will be impossible, of course, to answer specifically the first question submitted; since it is a general question, it can be answered only in a general way.

An officer or agent of the State is allowed only such compensation and emoluments as are expressly conferred upon him as remuneration for the discharge of his official duties as an agent of the State *McCalla vs. City of Rockdale*, 112 Tex. 209; 246 S. W. 654. It logically follows that any public officer or agent who demands mileage fees or expenses must point out some statute authorizing its allowance. *Leckenby vs. Post Printing and Publishing Co.*, 65 Colo. 443. 176 Pac. 490. And where a duty requiring an expenditure of money is imposed upon a public agent, and no provision is made to defray same, he is deemed to be repaid for the expenses incurred in the discharge of such duty by whatever compensation is allowed and paid to him for his services as such public agent. *People vs. McCullough*, 143 Ill. App. 112. It follows, therefore, that in order for an agent of the University to be entitled to reimbursement for traveling expenses incurred by him, there must exist statutory provision for the allowance and payment of the same.

Where provision is made for the allowance and for the payment of the traveling expenses of a public agent, it is necessarily implied that the provision is only for the payment of traveling expenses incurred by him in the discharge of his official duties; the State cannot reimburse him for expenses incurred for private purposes. (Art. 1, Sec. 3; Art. 8, Sec. 3, Const. of Texas.) The powers and privileges, rights and duties granted to and imposed upon public officers and agents are, under our system of government, prescribed and delineated by public laws; it follows that, in order to determine whether a particular transaction constitutes part of the official business of a public agent, one must look to the provisions of the Constitution and to the statutes of the State. *State ex rel. Lamkin vs. Hackman*, 275 Mo. 47; 204 S. W. 513; *State ex rel. Bradshaw vs. Hackmann*, 276 Mo. 600; 208 S. W. 445; *Shanks vs. Commonwealth* (Ky. Court of Appeals) 292 S. W. 837.

In order, therefore, for an officer or agent of the University to be entitled to reimbursement for traveling expenses incurred by him: (1) said expenses must have been incurred in the discharge of some duty imposed upon him by or under the authority of statute, (2) there must be statutory provision authorizing the repayment of the expenses so incurred, and (3) the Legislature must have made an appropriation of public money for the payment of claims and accounts arising under and by virtue of such authorization. (Art. 1, Sec. 3, Const. of Texas; Art. 8, Sec. 6, *Ibid.*; cases cited *supra*.)

In so far as the above stated conditions precedent to the right of officers to reimbursement of traveling expenses are applicable to your questions, we may state that:

(1). An examination of the statutes discloses that there is no specific statutory provision prescribing the duties to be discharged by officers and agents of the University. The Legislature has not assumed to manage and control the University directly, but has delegated the government of that institution to a Board of Regents of nine members. (Art. 2584, Rev. Civ. Stats. 1925.) By Article 2585, Revised Civil Statutes, 1925, the Legislature empowered the Board of Regents to:

“\* \* \* establish the departments of a first class university, determine the offices and professorships, appoint a president, who shall, if they think it advisable, also discharge the duties of a professor, appoint the professors and other officers, fix their respective salaries; and they shall enact such by-laws, rules and regulations as may be necessary for the successful management and government of the University; they shall have power to regulate the course of instruction and prescribe, by and with the advice of the professors, the books and authorities used in the several departments, and to confer such degrees and to grant such diplomas as are usually conferred by universities.”

Having the statutory power to create and determine offices and professorships in the University, and the power to enact and promulgate all such by-laws, rules and regulations necessary for the successful management and government of the University, the Board of Regents, in our opinion, would necessarily have the power to prescribe the duties to be performed by the officers and employees selected to



fill the positions created by the Board. In other words, we think that the Legislature, in delegating to the Board of Regents the power to create positions, necessarily delegated to the Board the power to prescribe the duties to attach to the positions created. In formulating and prescribing the duties to be performed by officers and employees of the University, the Board of Regents exercises delegated legislative powers, and the rules promulgated by it in that regard are of like force as would be an enactment of the Legislature. *West Texas Compress Co. vs. R. R. Co.*, (Tex. Com. App.) 15 S. W. (2) 558, 560; *Foley vs. Benedict*, (Tex. Com. App.) 55 S. W. (2) 805.

In the light of the above statements, it is our opinion that when an officer or agent of the University, holding a position created by the Board of Regents, is engaged in the discharge of a duty imposed upon him and required of him by the Board, the officer or agent is engaged in the discharge of an official duty required of him by law. Of course, the Board of Regents can only authorize or require of an officer or agent of the University, the discharge of a duty legitimately connected with the government or operation of the University as a public institution of higher learning; the Board can neither authorize nor require of officers or employees of the University the performance of an act for a private purpose at the expense of the State. *Terrell vs. Middleton*, (Sup. Ct. of Texas) 191 S. W. 1138.

Whether a particular transaction constitutes a private or a public purpose depends largely upon the nature of the transaction involved, and the purpose for which it is done; within the meaning of the Constitutional provision inhibiting the appropriation of public money for private purposes, appropriations for purposes, which, though public in their aim the result, are not governmental in their nature, are banned. *Wapples vs. Marrast*, 108 Tex. 5, 184, S. W. 180. In the case last cited the Supreme Court of Texas, speaking through Chief Justice Phillips, said:

"As to what is a public purpose within the meaning of Section 3, Article 8 of the Constitution, no better test can be presented than the inquiry: Is the thing to be furthered by the appropriation of the public revenue something which it is the duty of the State, as a government, to provide? *Loan Association vs. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *People vs. Town of Salem*, 20 Mich. 452, 4 Am. Rep. 400. Those things which it is the duty of the State to provide for the people, it is equally the right of the State, by means of public revenue, to maintain. Within this category fall the general instrumentalities of the government, the public schools, and other institutions of like nature. But the State is wholly without any power to levy and appropriate taxes for the support of those things which, either by common usage or because they are in no proper sense the instruments of government, it is the duty of the people to provide for themselves. \* \* \* It is not all things which answer a public need or fill a public want that it is within the authority of the State to furnish for the people's use or support at the public expense."

In the instance of officers and agents of the State, that which is furnished them at the expense of the State, except for use in discharging and carrying out the duties of their offices, or as compensation for services by them performed on behalf of the State, is furnished for a private purpose. Be it remembered, too, that the Legislature has delegated to the Board of Regents only the power to govern the Uni-

versity of Texas; not only, therefore, must the act which they authorize agents of that institution to perform be an act for a public purpose, but it must also be an act legitimately connected with the management or operation of the University, in order that the performance of the act be the official business of an agent of the University.

(2 & 3). Article 6823, Revised Civil Statutes, as amended by Chapter 218, Acts Regular Session, 42nd Legislature, provides that:

“The traveling and other necessary expenses incurred by the various officers, assistants, deputies, clerks and other employees in the various departments, institutions, boards, commissions, or other subdivisions of the State Government, in the active discharge of their duties shall be such as are specifically fixed and appropriated by the Legislature in the general appropriation bills providing for the expenses of the State Government from year to year. When appropriations for traveling expenses are made, any allowances or payments to officials or employees for the use of privately owned automobiles shall be on a basis of actual mileage traveled for each trip or all trips covered by the expense accounts submitted for payment or allowance from such appropriations, and such payment or allowance shall be made at a rate not to exceed five (5) cents for each mile actually traveled, and no additional expense incident to the operation of such automobile shall be allowed.”

You will observe that under the statute above quoted, the various officers and employees of the University of Texas are allowed their traveling and other necessary expenses incurred in the active discharge of their duties, where the Legislature, by specific appropriation, has provided for the payment of the same; provided that for the use of privately owned automobiles reimbursement in the excess of five (5) cents permile is actually traveled is prohibited.

In order to determine whether an officer or agent of the University is entitled to reimbursement for traveling expenses incurred in his official duties, therefore, it is necessary to determine whether the Legislature has made a specific appropriation out of which the same may be paid.

(I-b)

You ask whether any distinction is to be observed between trips made within the State by officers or agents of the University, and trips made without the boundaries of the State. In your preceding question you set out a portion of a rider contained in the appropriation bill for educational institutions for the fiscal years ending August 31, 1932, and August 31, 1933, providing that:

“\* \* \* No item of this appropriation shall be used for traveling expenses outside of the State except upon the approval of the governing board of the particular institution.” (Chap. 284, Acts Regular Session, 42nd Legislature.)

The provision quoted above from the educational appropriation bill for the last biennium, might be construed to indicate that it was the intention of the Legislature that agents of the institutions provided for in the said bill, could be reimbursed for trips made by them within the State, although the same had not been authorized by the governing board of the institution. However, we think that the provision quoted does not add to nor detract from the requirements pre-

scribed by statute in regard to the expenditure of University funds; permit us to call your attention to Article 2594, Revised Civil Statutes, 1925:

*"All expenditures may be made by the order of the board of regents, and the same shall be paid on warrants from the Comptroller based on vouchers approved by the chairman of the board or by some officer of the University designated by him in writing to the Comptroller, and countersigned by the secretary of the board, or by some other officer of the University designated by said secretary in writing to the Comptroller."* (Italics ours.)

Under the provisions of Article 2594, supra, all expenditures made by or on behalf of the University must be made on the order of the Board of Regents of that Institution; expenditures made out of University funds to reimburse officers and agents of the University for expenses incurred by them while traveling in the discharge of their official duties both within and without the State must be made upon the order and by and with the approval of the Board of Regents. Regarding trips made by officers and agents of the University prior to September 1st, 1933, you are respectfully advised that, in our opinion, there is no distinction to be drawn between trips made within and trips taken without the State in so far as the matter of whether such officers or agents are entitled to reimbursement for traveling expenses is concerned. In regard to trips made since September 1st, 1933, or which may be made prior to August 31st, 1935, however, sub-section 22, Section 3 of Chapter 215, Regular Session, Acts 43rd Legislature, provides that:

"No traveling expenses shall be incurred by any employee of any of the institutions, or other agencies of the Government, outside of the boundaries of the State of Texas, and no such expenses shall be paid from State appropriations or out of any local or auxiliary funds by the State Comptroller and/or other disbursing officer or employee of any agency of the Government, until and unless a written statement, signed by the State Comptroller and the State Board of Control, authorizing in advance said trips to be made, shall first have been filed with the State Comptroller, and a signed duplicate thereof filed with the disbursing officer of such respective agency of the Government."

Since September 1st, of this year, therefore, an officer or agent of the University, in order to be entitled to reimbursement for traveling expenses incurred in traveling out of the State, must first have obtained the consent of the State Comptroller and the State Board of Control, in addition to the other requirements above discussed.

(I-a)

You state that it is highly desirable that the authority of the State Comptroller in reference to the payment of expense accounts of officers and agents of the University be so clearly defined that no uncertainty exist in regard thereto. That is rather a difficult assignment. We have discoursed at length the foregoing paragraphs of this opinion in regard to the powers of the Board of Regents concerning the prescription of the duties of officers and agents of the University; and, while realizing the impossibility of our formulating a rule which will

decide all cases and questions which may arise in reference thereto, we have tried to state in general terms, what we think are the rules governing the determination of questions concerning the right of officers and agents of the University to reimbursement for traveling expenses incurred by them.. We believe that we have incidentally discussed the duties of the Comptroller in regard to approving and disapproving claims and accounts presented by University agents for traveling expenses incurred by them. We have set down herein what we believe to be the conditions upon which an officer or agent of the University is entitled to reimbursement for traveling expenses incurred by him; claims and accounts conforming to those conditions, when properly approved, should be paid by warrant of the Comptroller; but, failing in any of these, it is not only within the authority of the Comptroller to refuse payment of said accounts, but it is his duty to do so. .

In order to illustrate the statements made in the foregoing paragraphs of this opinion, we will attempt to apply them to two certain fact situations selected from a supplementary letter in which, at the request of the writer, you have submitted certain additional information not contained in your first letter. Two expense accounts submitted by Dean Ira P. Hildebrand, of the school of law, will, we believe, serve the purpose of illustration, and using them will enable us to shorten this opinion by eliminating the duplication of material facts.

(1) The first of these trips was made on December 12, 1932, by Dean Hildebrand, in order to attend the meeting of the Association of American Law Schools. The Comptroller refused to issue his warrant in payment of the account for traveling expenses incurred by Dean Hildebrand in making the trip for the purpose stated.

The writer is informed that the Association of American Law Schools is a voluntary Association, composed in membership of the higher ranking law schools of the nation. Courts are inclined to look askance at trips made by public agents at the expense of the State, to attend the meetings of voluntary associations, and, where it is not expressly or by the most obvious implication authorized by statute, the courts are uniform in holding that attendance upon such conventions is not official business, and that a public agent is not entitled to be reimbursed for expenses incurred thereby. *Smith vs. Holovtchiner*, 101 Neb. 248, 162 N. W. 630, L. R. A. 1917E, 331; *Waters vs. Bonvouloir*, 172 Mass. 286, 52 N. E. 500; *State ex rel. Bradshaw vs. Hackmann*, supra; *Shanks vs. Commonwealth*, supra. (In the case last cited the authorities in point are extensively reviewed and discussed.)

(a) We find no statute which expressly authorizes the Dean of the Law School to attend the meetings of the Association of American Law Schools. However, as above pointed out, the Legislature has delegated to the Board of Regents the power to prescribe the privileges and duties of the officers and employees of the University, and its orders in that regard are of like force as a statute of similar import. We assume that the Board of Regents authorized the trip in question; its order to that end would be of the same force as a statute,

unless subject to the objection that the trip was authorized for a private or non-university purpose. We do not think it subject to either objection.

The Board is directed by statute to establish the departments of a "first class" university, and in the accomplishment of that result and in the improvement of the departments established, it has broad discretionary powers. The Association has for its purpose the improvement of the standards of its member schools of law, and its actions tend directly to achieve that result, affecting the conducting and management of the school itself rather than by attempting to raise the standards of the member schools through professional improvement of the teachers of each such school. The improvement of the standards of the school of law through membership in the association and by attendance on its meetings, in our opinion, is within the powers of the Board of Regents.

(b) In the appropriation bill providing for the support and maintenance of the University for the fiscal years ending August 31, 1932, and August 31, 1933, (Chap. 284, Acts Regular Session, 42nd Legislature) appears the following item of appropriation:

"For General Maintenance and Miscellaneous items, provided the institutional authorities, in making expenditures from this item, shall be governed as nearly as practicable by the recommendations made by the Board of Control in the Biennial Budget for the years beginning September 1, 1931, and ending August 31, 1933, covering General Maintenance and Miscellaneous items; and provided that a record shall be kept of expenditures as to each department and submitted in the succeeding budget report to the Board of Control . . . . ."

(For the fiscal year ending Aug. 31, 1933) \$90,900.00.

"Provided that the various Boards of Regents or Directors of said educational institutions shall be authorized to make such changes and substitutions within the totals appropriated by General Maintenance and Miscellaneous as may be found necessary the total sum not to exceed the total amount appropriated for such purposes."

An examination of the Budget prepared by the Board of Control for the biennium ending August 31, 1933, discloses that under the heading "General Maintenance and Miscellaneous," certain recommendations were made as to the several purposes and amounts to be expended from an appropriation so headed. It also discloses that the Board of Regents prepared a proposed budget for the University for the Biennium covering the fiscal years ending August 31, 1933, requesting the recommendation by the Board of Control of the appropriation in favor of the University of a certain sum for "General Maintenance and Miscellaneous" items, setting forth the several purposes for which it was proposed that the appropriation so made should be used. Among other purposes for which the Board of Regents requested the making of the "General Maintenance and Miscellaneous" appropriation were certain sums to be expended to defray the office and traveling expenses of the heads of the various departments of the University, and of several other of the officer of the University. Likewise, the recommendation of the Board of Control as expressed in the budget prepared by it, was that a certain sum be

appropriated in favor of the University for "General Maintenance and Miscellaneous" purposes, including, inter alia, the payment of the traveling expenses of several of the officers and heads of departments of the University. It is plain, therefore, that it was intended by the Legislature that traveling expenses of officers and agents of the University might be paid out of the appropriation made by it for "General Maintenance and Miscellaneous" items.

The Board of Regents requested that among other purposes, the sum of \$600.00 per annum of the "General Maintenance and Miscellaneous" appropriation made in favor of the University be used to defray the office and traveling expenses of the Dean of the School of Law; the Board of Control recommended the elimination of this item, but it did recommend the use of the appropriation for traveling expenses for the heads of other departments and of other officers of the institution. The fact that the Board of Control recommended that the appropriation be not used to pay the traveling expenses of the Dean of the School of Law did not bind the Board of Regents not to use the appropriation for that purpose; the Board of Regents was directed to use said appropriation *as nearly as practicable* in accordance with the recommendations of the Board of Control as to the purposes for which it should be used, but the Legislature later in the bill expressly authorized the Board of Regents to make such changes and substitutions within the totals appropriated for "General Maintenance and Miscellaneous" as it found necessary.

Unless the Board of Regents approved the account for traveling expenses of the Dean of the School of Law, it could not be paid; if the Board approved the account as an item of expenditure properly payable out of the appropriation for "General Maintenance and Miscellaneous", we think it had authority to do so, under the very terms of the appropriation bill itself. If the Board of Regents did properly approve the account of the Dean of the School of Law for traveling expenses incurred by him in attending the meeting of the American Association of Law Schools, it is our opinion that the Comptroller erroneously refused to issue his warrant in payment of the account, provided, of course it was drawn against the appropriation item "General Maintenance and Miscellaneous".

(2) On May 1, 1933, Dean Hildebrand went to Washington, D. C., to attend the meeting of the American Law Institute. Upon his return he prepared an account of his expenditures, and presented the same to the Comptroller for payment, but the Comptroller refused to pay the account.

The American Law Institute is a voluntary Association; among its members are outstanding judges of state and federal courts, professors of law and private attorneys. The purpose of the Institute is to restate and to publish that which in the judgment of that illustrious body is, or at least should be, the rules of law which should govern the determination of cases; to discuss problems of law generally, and to set down the rules of law which in the opinion of the members of the Institute are sound. The Institute is in no way concerned with the discussion of problems concerning the betterment, the management

or direction of a university or a school of law; and, while we grant that attendance upon the meeting of the Institute might tend directly to the professional improvement of an agent of the State whose duties involve knowledge of the law, and is, therefore, of indirect benefit to the State, yet attendance upon the meetings of the Institute by such agents does not constitute a public purpose. Nor can we see how the unofficial restatement of what a body of individuals consider to be the correct rules of law is a governmental function; our Constitution has provided for courts to decide cases, and for a Legislature to enact laws. The fiat of the Board of Regents can not make the attendance of an agent of the University upon the meetings of the Institute either a governmental function or a public purpose.

We are, therefore, of the opinion that the Comptroller properly refused to issue his warrant in payment of the account for expenses incurred by Dean Hildebrand making the trip to attend the meeting of the American Law Institute.

(I-c)

In reply to your question whether any distinction should be made between traveling expense accounts paid out of legislative appropriations from the General Revenue fund and similar expense accounts paid out of special funds of the University, you are respectfully advised that in our opinion no distinction obtains between expense accounts to be paid out of appropriations from the general revenue funds of the State, and similar items of expense payable out of special State funds set apart for the maintenance and support of the University. Of course, this is not to be understood as referring to funds donated by individuals to the University for special purposes; such funds may be used for the purposes for which they were donated, unless the conditions of the gift required that the State match the funds so donated with funds of the State.

Respectfully submitted,

GAYNOR KENDALL,  
Assistant Attorney General.

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Op. No. 2932

#### RAILROAD COMMISSION OF TEXAS — OIL AND GAS

1. The conservation laws of Texas create a new offense and prescribe penalties for their violation and remedies for their enforcement. The statutory penalties and remedies are exclusive and no others may be imposed by the Railroad Commission.

2. The sole authority of the Railroad Commission to curtail the production of oil is to prevent waste as defined by law. The Commission cannot curtail production for any other purpose.

3. Where a proration order is promulgated the Commission in allocating the allowable production on a reasonable basis is limited to a consideration of conditions as they exist at the time of the order.

4. The Legislature of Texas cannot confer upon any administrative body the power to create an offense or prescribe the punishment for same.

5. The Commission cannot require an operator to make up excess production, being relegated to its statutory remedies.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, October 21, 1933.

*Railroad Commission of Texas, Austin, Texas.*

GENTLEMEN: This department is in receipt of your letter dated October 17, 1933, reading as follows:

"We are in receipt of the following telegram from Honorable Harold L. Ickes, Secretary of Interior:

"'Railroad Commission of Texas,  
'Austin, Texas.

"'Reports of oil industry indicate that daily average of one million five thousand barrels was produced in Texas during the three week period September ninth to thirtieth while State allowable under administrative order effective September eighth was 975,200 barrels. There appears therefore to have been total overproduction during that period of 615,000 barrels in Texas while administrative order effective October first placed State allowable at 965,000 barrels. This indicates that Texas now is producing an excess of 40,000 barrels daily thus continuing overproduction. Administrative order effective October first requires that overproduction of September allowable be compensated by equivalent under production during October.

"'Expect you will co-operate fully in making this program effective. Have announced to the press today that on November first the full authority vested in me by Article 3, Sections 3 and 4 of the Petroleum Code will be exercised in all states which have not curtailed actual production since September eighth down to the quotas allowed.

(Signed): "'HAROLD L. ICKES,  
'Secretary of Interior.'

"Will you kindly give us a departmental opinion advising if the Commission can require an operator to make up production above the allowable fixed by our orders where the statute provides the penalty for violation of our rules."

We are of the opinion that your question should be answered in the negative.

First. At common law, generally speaking, a person had the right to produce his wells to their maximum capacity, regardless of the injurious effect on the producing structure. In recent years as more and more has come to be learned about the harmful effect of uncurtailed production and the waste which results therefrom, the legislatures of most states have enacted statutes which prohibit the production of oil in such a manner as to constitute waste as defined by those statutes, and have delegated to some administrative body the duty of promulgating rules and orders to carry the general statutes into effect. Texas is one of the states which has enacted such statutes, and here as elsewhere restriction of production to prevent the commission of waste in the production of oil, commonly called proration, is a creature of statute and is in derogation of the rights which all oil producers had at common law.

Article 6014, Revised Statutes, prohibiting the production of oil in such manner and under such conditions as to constitute waste as defined in the statute, was enacted for the first time in 1919. Since that time it has been amended at various sessions of the Legislature, but the prohibition of the statute has been continued in force and at all times the Railroad Commission has been authorized to promulgate



such reasonable rules and regulations as in its judgment were necessary to carry the statute into effect.

Not until the enactment of the statutes of Texas prohibiting the production of oil in such a manner as to constitute waste, authorizing the Railroad Commission to promulgate rules to carry such statutes into effect and prohibiting the violation of such rules by any person affected thereby, and the production of oil by any person in excess of the amount permitted to be produced by the orders of the amount permitted to be produced by the orders of the Railroad Commission, was it an offense in this State to produce oil wells to their capacity and in an unrestricted fashion. In other words, coincident with the passage of these statutes with their amendments and the promulgation of the necessary rules and orders by the Railroad Commission, a new offense was created and it was made unlawful for any person to violate the rules and orders of the Railroad Commission promulgated under the provisions of Title 102, Revised Statutes of Texas, which pertain to the conservation of oil and gas.

It is a fundamental principle that when a new offense is created by statute and methods and measures are prescribed for the enforcement of the statute and for the punishment of those who violate same, that the statutory remedies are exclusive and no others may be resorted to.

The Supreme Court of the United States in the case of *Farmers etc. National Bank vs. Dearing*, 91 U. S. 29, at 35, said:

“Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford vs. Ingersoll*, 3 Hill 38; *First National Bank of Whitehall vs. Lamb*, 57 Barb. 429.”

A similar rule is laid down by the same court in the case of *Yates vs. Jones National Bank*, 206 U. S. 158, at 179, where it is said:

“The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the National Bank Act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.”

The *Farmers National Bank* case just referred to has been cited with approval on this point in many cases. See *United States vs. Babcock*, 250 U. S. 331; *Wilder Manufacturing Company vs. Coin Production Company*, 236 U. S. 175; *Central Stockyards Company vs. Railroad*, 112 Fed. 826; *Wysong & M. Company vs. Bank of North America*, 262 Fed. 131. See also *de la Garza vs. Booth*, 28 Tex. 440, 478, at 483, and 25 C. J. p. 1185, Sec. 91.

The inquiry naturally presents itself as to what penalties and remedies are afforded by the statutes of Texas for violation of the orders of the Commission with reference to oil and gas.

Article 6036 as amended provides in part as follows:

“In addition to any penalty that may be imposed by the Commission for contempt for the violation of its orders, any person . . . . violating any of the provisions of this act or Title 102 of the Revised Civil Statutes of

1925, or any of the rules, regulations or orders of said Commission made in pursuance thereof, shall be subject to a penalty of not more than \$1000.00 for each and every day of such violation . . . . ”

The power of the Commission to punish for contempt or disobedience of its orders is by virtue of the provisions of Article 6024, which undertake to give to the Commission the same power in this regard as the District Court has. By virtue of Article 1911 the District Court is authorized to punish for contempt by a fine not exceeding \$100.00 and by imprisonment not to exceed three days. We express no opinion as to whether or not such power may be validly exercised, but if the Commission may punish for contempt of its orders, it may assess a fine of not exceeding \$100.00 and imprisonment for not exceeding three days.

The Commission is likewise given the authority to cause a suit for injunction to be brought to restrain the violation of its orders (Art. 6049c, Sec. 4) and in certain instances a violation of the orders of the Commission may be ground for the appointment of a receiver (Art. 6049c, Sec. 12; *Ortiz Oil Co. vs. Railroad Commission*, 62 S. W. (2d) 376; *Patton vs. State*, 62 S. W. (2d) 381; *J. D. Wrather et al. vs. State* (not yet reported).)

We nowhere find expressed in the statutes any power in the Commission to undertake to penalize a violation of the orders of the Commission by overproduction by a curtailment of future production of any operator or group of operators pro tanto to cause the overproduction to be made up and to punish for the commission of the offense. Bearing in mind at all times that the conservation statutes of Texas in prohibiting the violation of orders of the Commission in regard to these matters create an entirely new offense which was unknown at common law, and at the same time denounce the penalty for a violation of same and afford alternative remedies for the enforcement of the orders, it seems clear that no other punishment may be affixed and no other remedies may be resorted to.

Second. It must be borne in mind that the Railroad Commission is not vested with any power or duty to curtail the production of oil in this state in any wells or any fields except to prevent the commission of waste as defined by the statutes. Except where waste is being committed or is reasonably imminent, the Railroad Commission has absolutely no right to curtail the production of oil from any well or field. Where either of these conditions obtain and the Commission does, after hearing evidence, enter an order which serves to curtail the production of oil in a common pool, the duty then arises to allocate the allowed production among the various operators on a reasonable basis.

It is our opinion that the Railroad Commission in allocating production among operators in such instance is not authorized to undertake to attempt to equalize withdrawals amongs the various operators by a consideration of any conduct of any of such operators in the past, but its duty is confined to undertaking to ascertain conditions as they exist as of the time that the order is entered, and based upon those conditions to allocate the allowable production among the various producers on a reasonable basis. If the Commission should un-

dertake to equalize withdrawals among various operators based upon past performances so as to place all operators upon a parity, or in effect attempt to partition the oil in the pool, it would in our opinion be exceeding its powers and duties and treading on dangerous grounds. See *Board of Water Engineers vs. McKnight*, 229 S. W. 301.

We believe that in promulgating a proration order at any given time and allocating the production among the various operators affected thereby, the Commission should consider only the producing conditions which exist at the time the order is passed and the past conduct of any operator or any group of operators should not be taken into account.

Third. Article 3, Section 1 of the Constitution of Texas provides:

"The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas'."

We do not believe that the Legislature of Texas has or could authorize the Railroad Commission to create an offense which the statute itself does in clear and unambiguous terms create, nor could the Legislature delegate to the Railroad Commission the power to prescribe the punishment for a violation of the orders of the Commission without a very definite standard being laid down for the exercise of such power. The creation of an offense and the punishment for the violation of same is essentially a legislative function which cannot be constitutionally delegated.

A case in point is *Stephensen vs. Wood*, 35 S. W. (2d) 794, which involved a statute which made it unlawful for any person to have in his possession any seine, net or trawl without a permit issued by the Game, Fish and Oyster Commissioners . . . in or on any of the waters of any of the bays, streams, etc., of certain counties. In sustaining the contention of appellants that the provisions of this statute undertook to vest in the Game, Fish and Oyster Commission authority to determine when certain acts should constitute a penal offense and that they therefore violated Article 3, Section 1 of the Constitution which provides that the legislation of this State shall be vested in the Legislature, the court said:

"This contention of appellants should be sustained. That the Legislature has no power to confer upon a commission, bureau, or agent of the State the power to make a law is well settled in this State, not only by the provisions of Article 3, Section 1 of the Constitution, but by the uniform opinions of our courts. Article 3, Section 1, State Constitution; *Ex parte Leslie*, 87 Tex. Cr. R. 476, 223 S. W. 227, 229; *Jannin vs. State*, 42 Tex. Cr. R. 631, 51 S. W. 1126; 62 S. W. 419, 53 L. R. A. 349, 96 Am. St. Rep. 821; *Stockwell vs. State*, 110 Tex. 550, 221 S. W. 932, 12 A. L. R. 1116; *Ex parte Mitchell*, 109 Tex. 11, 177 S. W. 953; *State vs. Swisher*, 17 Tex. 441; *Crossman vs. Galveston*, 112 Tex. 303, 247 S. W. 810, 26 A. L. R. 1210."

A similar rule is laid down by the Court of Criminal Appeals in the case of *Ex parte Leslie*, 223 S. W. 227, and by the Court of Civil Appeals at San Antonio in *Tuttle vs. Wood*, 35 S. W. (2d) 1061, at 1065.

It is clear that there is no statute which in express terms undertakes to authorize the Railroad Commission to require a producer who

has produced oil in excess of the amount allowed to be produced under the orders of the Commission to curtail his production to make up the overproduction. We think that any attempt by the Railroad Commission to inflict this penalty on such a producer, in addition to the penalties which are expressly imposed on him by law, would be an attempt on the part of the Commission to prescribe an additional penalty for a violation of its orders over and above those already imposed by law, and the action of the Commission would be invalid.

It is our opinion, in view of the foregoing, that the Commission cannot require an operator to make up production above the allowable fixed by your orders, and you are accordingly so advised.

Respectfully submitted,

MAURICE CHEEK,  
Assistant Attorney General.

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Op. No. 2929

RAILROAD COMMISSION—BOARDS—POWER TO ACT OUTSIDE OF TEXAS—  
ARTICLE 6447, R. S., CONSTRUED.

1. Railroad Commission, like other state boards, cannot act in matters involving exercise of judgment and discretion except at formal meeting.

2. The jurisdiction of state officers is generally co-extensive with the territory of the state, and, in the absence of statutory authority, official power can not accompany the person beyond the bounds of the sovereignty which has conferred it.

3. Railroad Commission cannot enter order involving exercise of judgment and discretion at any meeting held outside of the boundaries of the state.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, March 27, 1933.

*Hon. Lon A. Smith, Chairman Railroad Commission of Texas,  
Austin, Texas.*

DEAR SIR: Your letter of March 27, 1933, reads in part as follows:

"On March 23, 1933, as you are aware, the Commission entered an order in its Oil & Gas Docket No. 120, in Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk, Smith and Cherokee Counties, Texas, said order providing for a potential production test of all wells in said field to be made during a two-hour period beginning at 7 o'clock this Monday morning, and a shut-down immediately thereafter; and requiring certain reports to be made as to details of said test.

"Shortly after the order was entered and after two members of the Commission had left the State, it became apparent to the undersigned that to complete the test as contemplated would be hazardous and wasteful, and that many operators could not prepare their equipment for the test according to the terms of the order. Moreover it appeared that much of the equipment in the field, which was designed for slow rates of flow, was inadequate to take care of the oil produced during said test. As a consequence orders were given by the undersigned to suspend the order, pending further instructions by the Commission. It is the desire of the Commission at this time to require practically the same test as was ordered to be made this morning, beginning at 7 o'clock next Thursday morning, March 30, 1933.

"Will you kindly advise as to a proper procedure for the Commission to undertake in order to carry into effect its desire to order such tests to be made at the time indicated? We have in mind particularly the following proposition:

"First. Can the Commission enter a valid order without holding a session at some place within the State at which a quorum of the Commission is present?"

In addition to the above statement, you stated to the writer today in person that about ten o'clock this morning you were in communication with the other two members of the Commission (who are in Washington), and learned from them their desire that practically the same test as was originally ordered be required to begin at 7 o'clock a. m. Thursday, March 30, 1933.

In conference opinion 2060, Book 52, page 431 (Opinions of the Attorney General, 1918-20, p. 775), this department held that a contract signed by two members of the Prison Commission not in a formal meeting and approved by the Governor created no legal obligation. It was there also held that in order to act in matters involving discretion, such boards as the State Prison Board must act at a formal meeting, and we believe the same rule would apply to the Railroad Commission of Texas.

We are not here concerned with the validity of the suspension of the original order by the Chairman after the other two members of the Commission had left the state. The time for the carrying out of such original order (to-wit, the morning of March 27, 1933) has already expired, and the question you present is whether the Chairman, in the absence of the other two members of the Commission, who are beyond the boundaries of the State, and without first holding a session at some place within the State at which a quorum of the Commission is present, can now enter a valid order requiring the same test to be made on March 30th as was originally set for March 27, 1933.

The Railroad Commission of Texas was created, pursuant to constitutional authority, by an act of the Legislature in 1891, page 55; (G. L., Vol. 10, p. 57). As a part of said act, it was provided in what is now known as Article 6447, R. S., as follows:

"Sessions.—The Commission may hold its sessions at any place in this State when deemed necessary."

No statutory authority has been given to the Commission to hold its sessions or meetings elsewhere than in this State.

The jurisdiction of State officers is generally only co-extensive with the territory of the State and, in the absence of statutory authority, official power cannot accompany the person beyond the bounds of the sovereignty which has conferred it. *McCulloch vs. Scott, et al*, State Board of Accountancy (Sup. Ct., N. Car., 109 S. E. 789).

You are therefore respectfully advised that, in our opinion, you, as Chairman of the Commission, in the absence of the other two members of the Commission and without a session having first been held at some place in the State at which a quorum is present, cannot enter a valid order requiring the test originally ordered for March 27th to be made March 30, 1933. Since the making of such an order

involves the exercise of judgment and discretion, it could not be legally made by the Commission at any meeting held outside the boundaries of the State.

Very truly yours,  
 JAMES V. ALLRED,  
 Assistant Attorney General.

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Op. No. 2930.

TAXATION—CONSTITUTIONAL LAW—OIL AND GAS—GROSS PRODUCTION  
 TAX—UNIVERSITY AND PUBLIC SCHOOL LAND—HOUSE  
 BILL NO 154, FORTY-THIRD LEGISLATURE.

1. The tax imposed on production of oil in House Bill 154, General Laws Forty-third Legislature, Regular Session, is an occupation tax on the production of crude oil, and is a liability of the producer thereof.
2. State is not engaged in the occupation of producing oil on University and public school lands.
3. The State is not subject to occupation tax laws unless the intention to include it is clearly manifested.
4. Royalties received under oil and gas leases covering University and public school lands belong to those respective funds and cannot be diverted.
5. House Bill 154 does not include the State.

OFFICES OF THE ATTORNEY GENERAL,  
 AUSTIN, TEXAS, September 26, 1933.

*Hon. George H. Sheppard, Comptroller of Public Public Accounts,  
 Austin, Texas.*

DEAR SIR: This department is in receipt of the following letter from you, under date of August 30, 1933:

"Section 2, Paragraph 6, of House Bill 154 of the Forty-third Legislature reads as follows:

"(6) The tax herein levied shall be borne ratably by all interested parties, including royalty interests; and producers and/or purchasers of oil are hereby authorized to withhold from any payments due interested parties the proportionate tax due."

"There are, within this State, university and public free school lands that have been leased to operators who are producing oil from same.

"The question arises, 'Shall the purchaser or operator of this crude deduct the tax from the royalty interest due the State the same as they will from the other royalty owners?'"

Your question must be answered in the negative for the several reasons set out below:

1. House Bill 154, which is Chapter 162 of the General Laws of the Forty-third Legislature, Regular Session, is a "general revenue act" levying, among other taxes, a certain tax on the production of crude oil within the State.

By the terms of Subdivision 1 of Section 2 of the Act, this tax is clearly and unmistakably an occupation tax; and Subdivision 2 of the same section expressly makes this tax the liability of the producer.

It cannot be said that the State is engaged in the occupation of producing oil, for by the leases under which operator on University

and public school lands produce oil the State has parted with its title to such oil.

Leases from the State covering University and public school lands are made under the provisions of Chapter 4 of Title 86 of our Revised Civil Statutes. Such leases from the State "do not authorize the purchaser to take and use seven-eighths or any other mere fractional part of the oil and gas in the land leased. The purchaser instead buys *all* the oil and gas for a stipulated price, part of the price being measured by the value of a certain fraction of the *produced* oil and gas, which is a very different thing from the value of that fraction of the oil and gas *in place*. The leases convey all the oil and gas in granting the right to find, produce and appropriate all of them, in consideration of the payment of stipulated sums, and also the value of a stated fraction of the oil and gas produced. . . . Like any other seller, the State, after parting with its title, no longer owns that which it has sold. . . ." *Theison vs. Robison*, 8 S. W. (2d) 646.

2. Even though this were not true and the State should actually engage in the occupation of producing oil, we do not believe it could impose an occupation tax on itself. While it is true that in the absence of constitutional prohibition the State may tax itself, the presumption is always against an intention to do so and the State is impliedly immune unless the intention to include the State is clearly manifested. 2 *Cooley on Taxation*, Section 621; 61 S. J. 366.

No such manifestation is to be found in our Constitution or statutes. Rather, it is to be implied from the provisions of Section 1 of Article 8 that the imposition of an occupation tax upon the state is prohibited.

3. Further, the royalties received under oil and gas leases covering University and public school lands belong to those respective funds and cannot, under our Constitution, be diverted to any other fund or for any other purpose. This is too clear, both from the Constitution itself and from the well-known interpretations of it by the courts, to require the citation of authorities.

4. Said Subdivision (6) provided that such tax shall be borne ratably by all "interested parties." The word "party" is synonymous with "person," and these words, in view of public policy, do not include the State unless it is so expressly provided by statute. 6 *Words & Phrases* and cases cited; *Bouvier's Law Dictionary* and cases cited; *City of Louisville vs. Commonwealth*, 62 Ky. 295. Nothing is to be found in House Bill 154, or in any other provision of our statutes, which can bring the State within the meaning of these words. In fact, the word "person" is expressly defined in House Bill 154 and is made to apply to a wide group of entities, but no where is the State mentioned.

5. As above mentioned, the liability for the tax levied by House Bill 154 is upon the producer; and, in our opinion, said Subdivision (6) does not lessen that liability in any degree. As we construe this subdivision, it was the intention of the Legislature to attempt to give to producers of oil only the right to recover, where such recovery is not precluded by Constitutional inhibition or otherwise, the prorata part of the tax mathematically chargeable against other interests in

such production than that of the producer,—a right not heretofore existing under our gross production tax laws.

You are therefore advised that producers of oil from University and public school lands are liable for the full amount of the tax on one hundred per cent of the production, and cannot make deductions therefor from royalty payments.

Very truly yours,

WILLIS E. GREIHAM,  
Assistant Attorney General

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Op. No. 2928.

PENAL LAWS—ARTICLE 6166v, R. S. 1925, COMMUTATION OF SENTENCE FOR CONVICT ON GOOD BEHAVIOR—CONSTITUTIONAL LAW.

1. Under provisions of Article 6166v, R. S. 1925, commutation of sentence of convict for good behavior should be credited annually as convict serves each year of sentence with good behavior.

2. Article 6166v, R. S. 1925, is constitutional and Legislature in enacting same did not invade province of Executive Department in extending clemency to convicts. Commutation statutes are not retroactive and can apply only to sentences imposed after effective date thereof.

3. The object of Penal Code is to clearly define punishment for crime and to reform the offender. Legislature, therefore, has authority to enact commutation statute, which, in effect, becomes a part of the sentence of convict *thereafter* convicted.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, September 19, 1933.

*Board of Pardons and Paroles, State of Texas, Austin.*

GENTLEM: Your letter of August nineteenth, addressed to Attorney General Allred, has been received and referred to the writer for attention and reply. Your letter reads, in part, as follows:

"In the discharge of the many duties that we have as the Board of Pardons and Paroles of the State of Texas, we are daily called upon to make construction of Article 6166v, of our revised statutes, which article was passed at the regular session of the 40th Legislature in 1927, and we now wish to be officially guided by you in order that our construction of this law may be correct.

" \* \* \* \* \*

"We wish to know whether or not we should allow as commutation the deduction for the time that has actually been served by a prisoner or whether we should allow a prisoner commutation that would be allowable on his total sentence.

" \* \* \* \* \*

"It occurs to us that if it is the intention of the law to allow a prisoner commutation on a sentence that he has not in fact earned, that this portion of the law would be violative of Article 4, Section 11 of the Constitution of Texas, which vests the pardoning power in the Governor of the State.  
\* \* \* \* \*"

"1. Is Article 6166v violative of Section 11, Article 4 of the Constitution of the State of Texas and therefore void?

"2. Should the commutation provided for in Article 6166v be calculated upon the basis of the time served by a prisoner, or should it be calculated as to the total sentence imposed upon the prisoner, and in this manner giving him credit for commutation that he has not earned?"



We are in receipt of a letter from the Bureau of Records of the State Penitentiary, in which it is stated that it has been the custom during the entire period of time the penitentiary has existed to enter upon the record of a convict upon receiving him the full commutation allowed by statute upon his sentence.

As an illustration, we might take the case of W. A. Stone, No. 56,344, whose prison record we have before us. Stone was convicted in Tarrant County in March, 1927, and sentenced to ninety-nine years confinement in prison. On April 22, 1933, the Governor commuted the ninety-nine year term to fifteen years. On June 16, 1933, Stone was released and discharged from the prison. On said date his prison record showed that he had actually served six years, three months and eight days; that he had earned and was credited with three years, eleven months and four days over time; and that he had earned as commutation four year, nine months and eighteen days out of a possible (maximum) commutation of a like period. In other words, four years nine months and eighteen days is the maximum commutation possible to earn of a fifteen year sentence.

The case of Pearl Museleman, No. 53,096, convicted in Shelby County in July, 1925, is another fifteen year case. She was discharged from prison on December 22, 1932, and her prison record shows that up to said date she had actually served seven years five months and nineteen days, and that she had earned over time of two years eight months and twenty-three days; she was credited with four years nine months and 18 days commutation, the maximum possible commutation that could be earned under the statute on a fifteen year sentence. The prison record office advises that "since she is discharged she is credited with four years nine months and 18 days commutation time, or the commutation time allowed on a full fifteen year term which is computed by the graduated scale as given in Article 6194."

These cases illustrate the manner and method of crediting commutation as now applied by the prison officials.

In order to answer your question properly it is deemed proper to set out here, briefly, some pertinent statutory provisions

Article 1, Penal Code, 1925, provides:

"The design of enacting this Code is to define in plain language every offense against the laws of this State, and affix to each offense its proper punishment."

Article 2, Penal Code, 1925, provides.

"The object of punishment is to suppress crime and reform the offender."

It will be noted that the design of our penal laws is to definitely affix in plain language a proper punishment for crime; also one object of the punishment affixed is to "reform the offender."

At the Fourth Called Session of the Thirty-first Legislature there was enacted a measure relative to the granting of commutation to convicts. (See Art. 6217, Vernon Sayles Civil Statutes, 1914). This act contains the same and identical provisions with reference

to credits for good conduct as are now contained in Article 6166v, R. S. 1925, *infra*.

In 1927, the Fortieth Legislative at its Regular Session (Chapter 212, p. 298, Reg. Session, 40th Legislature) enacted a law which was formulated with the purpose of providing for the efficient and proper management of the State Prison System. Among the provisions thus enacted was what is now Article 6166v, R. S. 1925, which provides:

“Art. 6166v. Commutation for good conduct.

“In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline, commutation of time for good conduct shall be granted by the manager, and the following deduction shall be made from the term or terms of sentences when no charge (s) of misconduct has been sustained against a prisoner, viz: Two days per month off of the first year's sentence; three days per month off of the second year of sentence; four days per month off of the third year of sentence; five days off per month of the fourth year of sentence; six days per month off of the fifth year of sentence; seven days per month off of the sixth year of sentence; eight days per month off of the seventh year of sentence; nine days per month off of the eighth year of sentence; ten days per month off of the ninth year of sentence; fifteen days per month off of the tenth year, and all succeeding years of sentence. A prisoner under two or more cumulative sentences shall be allowed commutation is if they were all one sentence. For each sustained charge of misconduct in violation of any rule known to the prisoner in any year of the term each commutation allowed for one month of such year may be forfeited, for any sustained charge of escape or attempt to escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited unless in case of escape, the prisoner voluntarily returns without expense to the State, such forfeiture may be set aside by the manager. \* \* \*”

Replies to your question will depend upon a proper construction of the pertinent statutory provisions.

Your first question is whether or not Article 6166v, *supra*, is constitutional. We answer your question in the affirmative. In the case of *Ex Parte Ridley*, 26 L. R. A. N. S. 110, the Court of Criminal Appeals of Oklahoma, said:

“Under our Constitution it is the duty and prerogative of the Legislative Department to define crime, and to fix the maximum and minimum penalty, and to fix by law the kind and manner of punishment and to provide such disciplinary regulations for prisoners, not in conflict with the fundamental law as the Legislature deems best. \* \* \* We are of the opinion upon an examination of the authorities and upon principle, that, an act of the Legislature specifically defining credits for good behavior in existence at the date of the judgment against the prisoner becomes a part of the sentence and inheres into the punishment assessed and is not an invasion of the constitutional prerogative of the Governor.”

We regard the commutation of stence held out to a prisoner by statute to be in the nature of a reward for good conduct and industry, and in no sense is it to be construed as an attempt on the part of the Legislature to exercise the powers of clemency which by our Constitution are vested in the Governor. The provisions are statutory and clearly embrace matters coming within the powers of the legis-

lative department of the Government and are constitutional. Of course such legislation could not be retroactive and would apply only to those cases in which sentences are imposed after the effective date of the Act.

It will be noted that the provisions of Article 6166v, supra, state that as a reward to prisoners maintaining good conduct commutation of time shall be granted by the manager, and "the following deductions shall be made from the term or terms of sentences when no charge of misconduct has been sustained against a prisoner, viz: Two days per month *off of the first year's sentence*; three days per month off of the second year of sentence;" etc.

A reading of this provision reveals the apparent intention of the Legislature to deduct from the respective years of sentence in rotation such allowance as the statute may make for good behavior on the part of the prisoner. In other words, for the first year's sentence the prisoner demeaning himself in a proper manner should be credited with one full year's time after he has served eleven months and six days, and likewise he should be credited with the statutory commutation on his succeeding years service as they are reached.

In the case of *In Re Kress*, 58 Kan. 705, 50 Pac. 939, the Supreme Court of Kansas had before it an application for writ of habeas corpus in behalf of a convict and it was alleged that with commutation allowed by the statute together with time served the prisoner was entitled to discharge from prison, the Court said:

"The question must be solved by the statute which provides that 'every convict whose name does not appear upon such record of reports for violation of the prison rules shall be entitled to a deduction from his sentence of three days per month for the first year or a fraction of a year, six days for the second year, etc. \* \* \*', until his sentence shall expire. L.1891, Ch. 152, Sec. 24. The 'good time' earned by convicts in the State penitentiary as provided for in Sec. 24, Ch. 152, Laws 1891, is computed for and at the end of each calendar month and when the time of *actual* service, together with the good time earned equals the sentence, the convict is entitled to a discharge." (Italics ours).

Beyond any doubt a proper construction of the statutory provision extending commutation to a convict for good behavior must require that the convict actually serve the required portions of the annual periods of his sentence before he is entitled to the periodical credits for good behavior. The actual service is as much a prerequisite to the credits as is his good behavior. It would be paradoxical to say that a convict is entitled to credits for good behavior on any one or more year's of his sentence if in fact he is not required to serve such years. Could his prison conduct be said to be good for any certain period of his sentence if he be not actually serving said period.

The commutation provided by the statute is merely a conditional grant of reward depending upon his maintaining a clear prison record; indeed, the above mentioned article 6166v makes it clear that a convict can and will forfeit all commutation theretofore earned if he violates the statutory provisions. In that event, of course, he must continue to serve his full term of years, less any credits he might earn thereafter.

Suppose a prisoner be granted a parole by the Governor. He is

immediately released upon condition that he conduct himself in a proper and law abiding manner. If he does this the parole would endure until the expiration of his prison sentence. But certainly he could not be entitled to any credits upon the years of his sentence for good conduct while out on parole, because he would not actually have served such years in prison. It would be an unlawful reduction of his prison term to credit him with any commutation on that portion of his sentence during which he is on parole. (*Woodward vs. Murdoch*, 24 N. E. 1047, Sup. Ct. Indiana).

In *Ex Parte Blocker* 193 Pac. 546, the Supreme Court of Colorado, said:

“Under Rev. St. 1908, Sec. 4871, providing for credit for good behavior on criminal sentences of one month for first year, two months for the second year, etc., the credit for each year is to be applied during the year in which it is earned, so that after the fifth year each six months served counts as one year on the sentence.”

Applying the above rule to a fifteen year term as mentioned in your letter, you can readily see that the convict is entitled only to the credits for good conduct as he serves each year of his sentence, and is not entitled to a credit of the maximum possible commutation on his sentence until he has so served and earned it under the provisions of the statute.

After a convict sentenced to fifteen years has served eleven years of his sentence with good behavior, he should be credited with two years, nine months and eight days commutation, leaving a balance of one year, two months and twenty-two days of his term, or four hundred forty-seven days. Under the statute he is entitled to six months commutation for good behavior on his twelfth year. So with continued good conduct he could serve out the one year two months and twenty-two days balance remaining in one-half the time or in seven months and eleven days. Of course, any over time such convict may have earned should be credited to him and his sentence thereby reduced to that extent.

It, therefore, appears that a convict sentenced to a fifteen year term, who serves with good behavior would be required to serve eleven years, seven months and eleven days on his sentence (less any over time credit he may have earned) before he can be legally discharged from the prison.

Your second question is, therefore, answered as follows: the commutation of sentence provided for in Article 6166v. R. S. 1925, should be calculated and credited upon the basis of each year of his sentence served and as the same is served with good conduct and in no event should such credits be calculated or credited on the basis of the sentence imposed upon the convict except as he earns such credits from year to year, as provided by the statute.

Yours very truly,

PAT DOUGHERTY,  
Assistant Attorney General

Op No. 2925.

FEES OF TAX ASSESSOR—CONSTITUTIONAL LAW—TAXATION—HOMESTEAD EXEMPTIONS—SECTION 1-a OF ARTICLE 8—ARTICLE 3937 AS AMENDED—ARTICLE 3938 R. C. S., 1925.

1. Section 1-a of Article 8 of the Constitution, exempting from taxation for state purposes \$3000.00 of the assessed valuation of resident homesteads, is self-executing.

2. Such resident homesteads must be assessed at their full taxable value and the deduction thereafter made from the assessed value.

3. The fees of the Tax Assessor for assessing property in this state are based on the total value of the property assessed, including the homestead exemption, such fees and compensation to be paid in the same manner and under the same circumstances as though Section 1-a of Article 8 had not been inserted in the Constitution, until such time as the Legislature provides otherwise.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, July 12, 1933.

*Honorable Geo. H. Sheppard, Comptroller of Public Accounts, Austin, Texas.*

DEAR SIR: Your letter of June 28th addressed to Attorney General Allred has been received and referred to the writer for attention. Your letter in part reads:

"As there seems to be some confusion among the Tax Assessors of the state as to what fees the County Tax Assessor will be allowed for assessing state taxes for the year 1933, I am writing to ask that you advise me by conference opinion just how the Tax Assessors' fees should be computed by the state for assessing state taxes for the year 1933.

\* \* \* \* \*

"The question that seems to be bothering the Tax Assessors is whether or not their fees for assessing the state taxes will be based on the total value of the property assessed less the value of the homestead exemption under the amendment adopted last November, or whether the fees will be computed on the total value of all property assessed before the deduction is made of the homestead exemption values."

Section 1-a of Article 8 of the Constitution, adopted at the general election on November 8, 1932, exempting from taxation for state purposes \$3000.00 of the assessed valuation of resident homesteads, reads:

"Three Thousand Dollars (3000.00) of the assessed taxable value of all resident homesteads as now defined by law shall be exempt from all taxes for state purposes; nothing herein shall apply within those counties or other political subdivisions now receiving any remission of state taxes, but upon the expiration of such period of remission this section shall become applicable within such counties and political subdivisions."

It is to be noted from a reading of this provision that this amendment is self-executing in that it does not require an act of the Legislature to place its provisions in full force and effect, nor did the Legislature pass any legislation elaborating upon the provisions of Section 1-a, supra. Therefore, in so far as the exemption of homesteads from taxation is concerned, we must look solely to the provi-

sions of this section of the Constitution. Since it uses the words "assessed taxable value," it is apparent that it contemplates the assessment of the property at its full taxable value and thereafter a deduction from the assessed value of \$3000.00, the assessed value of the property remaining after this deduction to be subject to the payment of state taxes.

Article 3937, Revised Civil Statutes, 1925, as amended by Chapter 94, Acts Regular Session 42nd Legislature, relating to the fees to be paid the Tax Assessor, reads in part as follows:

"Each Assessor of Taxes shall receive the following compensation for his services, which shall be estimated on the total value of the property assessed: For assessing the state and county taxes on all sums for the first Two Million (\$2,000,000) Dollars or less, five cents for each One Hundred (\$100.00) Dollars of property assessed. On all sums in excess of Two Million (\$2,000,000) Dollars and less than Five Million (\$5,000,000) Dollars, two and one-half (2½) cents on each One Hundred (\$100.00) Dollars, and on all sums in excess of Five Million (\$5,000,000) Dollars, two and one-fourth (2¼) cents on each One Hundred (\$100.00) Dollars; provided, that in counties in which the population does not exceed Twelve Thousand Five Hundred (12,500) inhabitants, the Assessor shall receive on all sums for the first Four Million (\$4,000,000) Dollars the sum of five (5) cents for each One Hundred (\$100.00) Dollars, and on all sums above such amount, the fee shall be as above stated, one-half of the above compensation to be paid by the state and one-half by the county; \* \* \*."

Article 3938, Revised Civil Statutes, 1925, in part reads:

"The Comptroller, on receipt of the rolls, shall give the Assessor an order on the Collector of his county for the amount due him by the state for assessing the state taxes, to be paid out of the first money collected for that year. \* \* \*."

It appearing that the present provisions of the Constitution and laws require that resident homesteads be assessed at their full value before allowing the Three Thousand Dollar deduction; that under the provision of Article 3937 the compensation of the Assessor is to be estimated on the "total value of the property assessed," and that one-half of this compensation is to "be paid by the state and one-half by the county," it is my opinion and you are so advised that the fees of the Tax Assessor for assessing property in this state will be based on the total value of the property assessed, including the homestead exemption, and that as a matter of fact their fees and compensation will be paid in the same manner and under the same circumstances as though Section 1-a of Article 8 had not been inserted in the Constitution, until such time as the Legislature provides otherwise.

Yours very truly,

HOMER C. DEWOLFE,  
Assistant Attorney General

Op No. 2924

LUNACY HEARING—TRIAL BY JURY—ARTICLES 3193b, 4270, 4271, 5551  
AND 5552 R. C. S., 1925, SECTION 15, ARTICLE 1, SECTION 29,  
ARTICLE 1, CONSTITUTION OF TEXAS.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, June 27, 1933.

*Honorable C. S. Ramsey, County Attorney, San Augustine, Texas.*

DEAR MR. RAMSEY: Your letter of recent date, addressed to Honorable James V Allred, Attorney General of Texas, has been received and referred to the writer for reply, and reads as follows:

“At the request of the County Judge of San Augustine County, Texas, I write you as follows:

“Art. 5551 and 5552 of the Revised Statutes of 1925 provide a certain oath and for certain questions to be submitted to a jury in a lunacy proceeding. Article 3193b, Revised Statutes, 1925, contains provisions regarding a jury.

“In a lunacy proceeding where no jury is demanded by any relative or friend, or any other person in behalf of the alleged insane person, may the trial be held by the Court without a jury?”

Our Civil Statutes provide for three lunacy proceedings: One in Chapter 2 of Title 51 (Arts. 3184-3196) another in Chapter 12 of Title 69 (Arts. 4267-4284), and the last, Title 92 (Arts. 5547-5561). The primary purpose of Chapter 2 of Title 51, is to prescribe the method of admittance of lunatics to the various State Eleemosynary Institutions. Chapter 12 of Title 69, relates principally to the appointment of guardians for the persons and estates of alleged lunatics. Cases filed under Chapter 12 of Title 59 are docketed in the name of the county, as plaintiff, and of the alleged lunatic, as defendant. The State of Texas is not a party to such an action and neither is the State nor society at large primarily concerned in such a cause.

An entirely different purpose is to be served by the lunacy proceedings provided for in Title 92. Here we find that the case is docketed in the name of State of Texas, as plaintiff, and in the name of the alleged lunatic, as defendant. The purpose of this proceeding is to determine whether or not it would be to the best interest of society and the alleged lunatic that he be confined. That this is the purpose is evident from the issues that must be submitted to the jury trying the case. Here the court can enter a judgment of insanity, only in the event that the jury finds both that the defendant is of unsound mind and that it is necessary that he be restrained. *Clark vs. State*, 35 S. W. (2) 488.

Section 15 of Article 1 of the Constitution of Texas reads as follows:

“The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.”

Section 29 of Article 1, *Id.* reads as follows:

"To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

Article 3193b, Revised Civil Statutes, 1925, reads as follows:

"The judge to whom such application for commitment is made, may, if no demand is made for a jury trial in behalf of the alleged insane person, proceed forthwith to determine the question of insanity, and if satisfied that the alleged insane person is insane, may immediately issue and (an) order for the commitment of such person to an institution for the custody and treatment of the insane.

"Upon the demand of any relative or near friend in behalf of such alleged insane person, the judge shall, or he may upon his own motion, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion may name. Upon such day, or upon such other day to which the proceedings shall be legally adjourned, he shall hear the testimony introduced by the parties and examine the alleged insane person if deemed advisable, at some place which may be either in the court house of the county, or at the residence or place of detention of the person named, and render a decision in writing as to such person's insanity. If it be determined that such person is insane the judge shall forthwith issue his order committing him to an institution for the custody and treatment of the insane and other mentally ill persons, or make such other order as is herein provided for; provided in any proceedings under this Act the person alleged to be insane and appearing before the county judge, or any person interested in such person, shall have the right to demand for such alleged insane person a trial by jury, which shall be granted as in other cases, or the county judge may, in his discretion, issue a warrant to the sheriff or his deputy, directing him to summon a jury of six men to hear and determine whether the alleged insane person is insane."

A proper determination of your question depends on whether or not Article 3193b is violative of Section 15, Article 1, which perpetuates or rather continues the right of trial by jury unchanged in the case in which, at the date of the adoption of the constitution, it was then a part of the statute law of the State. All of the Constitutions of the Republic and of the State of Texas have preserved the right of trial by jury in the same language. *Cockrill vs. Cox*, 65 Tex, 669.

While we generally refer to the hearing in a lunacy proceeding as a trial, it is not so in the strict sense of the term. It is merely an inquisition for the benefit of the alleged lunatic, and in truth and in fact, the proceeding bears no close resemblance to either a criminal or civil action. It is of the nature of a civil proceeding so the courts almost uniformly hold as distinguished from a criminal action. However, in *Lindsay vs. Woods*, 27 (Civ. App.) S. W. (2) 263, it was held that a lunacy proceeding is quasi-criminal; but that holding is clearly against the weight of authority.

The constitutional provision that the "right of trial by jury shall remain inviolate" means that it shall not be destroyed or annulled by legislation, or so hampered or restrained as to make the provision a nullity. The Legislature has no right or power to deprive a person of a trial by jury in cases wherein such right is secured to him by the Constitution, either directly or indirectly, and the courts will not up-



hold a statute that would tend to preclude such a valuable right as a trial by jury.

In the State of Texas, both the law and practice in lunacy cases were fully established at the time of the adoption of Section 15, Article 1 of our State Constitution. *White vs. White*, 196 S. W. 508.

At common law a trial upon a charge of insanity was always before a jury. *Buswell on Insanity*, p. 35; *Shumway vs. Shumway*, 2 Vt. 341; *Howard vs. Howard*, 9 S. W. 411.

The right of trial by jury in lunacy inquisitions had been uniformly and universally recognized and firmly established both by practice and by statutes of the State of Texas at the time of the adoption of our present Constitution. Under a well known rule of construction, a right "firmly established" at the time of the adoption of the Constitution, will now be read into that instrument as a matter of right. Our Constitution does not in words guarantee the right of trial by jury in lunacy cases, and the right in such cases is one that comes in by interpretation and adoption, because by statutory provisions and practice it had become established.

We note that the Article 3193b does not in terms deny the right of trial by jury. Notwithstanding the proviso in the act that a jury may be demanded, so far as it provides for a trial without a jury, it is violative of Section 15, Article 1, in conflict with same and, therefore, that portion of same is invalid. It matters not what the nature of the proceeding may be, if in such action the right to a jury trial was universally recognized and had become firmly established when our Constitution was adopted, then the right was perpetuated by the constitutional provision above mentioned.

It cannot be said that a person charged with lunacy, under the statutes in force at the time of the adoption of our State Constitution, could be adjudged a lunatic by any other proceeding than as provided by the statute, and the only way the issue was determined there, was before competent jurors and the judgment that the court rendered depended entirely on the verdict of the jury. In a lunacy case in this State, there is no right of appeal, and the person charged with lunacy, unless given the right in the proceeding by the tribunal before which the inquiry is had, could never have extended to him the right to have the issue of lunacy determined by a jury.

When we consider Article 3193b in the light of pre-existing laws of Texas relating to juries in lunacy cases, one is constrained to conclude that the Legislature has no right to dispense with such juries, and that any attempt to do so is contrary to our judicial system, and obnoxious to our Constitution. We find the following language in *Clark vs. Matthews*, 5 S. W. (2) 221:

"The Constitution and laws of Texas jealously protect the liberties of the citizens of the commonwealth, and throw about each citizen, sane or insane, the safeguard of being heard in person or by attorney, or by both, before a jury of his countrymen. If the rights of any class of persons should be more closely and sacredly guarded than another, it is that unfortunate individual who, rightfully or wrongfully, is charged with having a mind diseased or a reason dethroned. The unfortunate or his friends have the right to insist upon compliance with every form prescribed by

law, which has been enacted for the protection and perservation of his liberty.”

It seems that it might be particularly dangerous and might provoke many embarrassing situations if judges of our County Courts were given legal power to try lunacy cases which involve the liberty of persons. The liberty of a citizen of the State is involved. The issue of insanity should be passed upon by a jury of his peers—a jury of his country.

By the terms of Article 3193b the judge, if no demand for a jury trial is made in behalf of the alleged insane person, may determine the question of insanity, and if satisfied that the alleged insane person is in fact insane then he may immediately issue an order of commitment to the proper institution. It would seem from reading this Article that if a jury trial were not demanded, the right to have a jury to pass upon the issue of insanity is thereby waived.

It is unsound to presume that one who is brought into court charged with luancy can be silence on his own part or that of his friends or relatives, and he might have neither, waive the constitutional right of trial by jury. Waiver is defined as “the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.” *Bennecke vs. Insurance Co.*, 105 U. S. 355-359. It seems to be illogical to say that one in court charged with insanity has the mental capacity to waive this valuable right, as such capacity would be wholly inconsistent with that degree of loss of reason as would warrant one being deprived of his liberty and the management of his own affairs. *Goodwin vs. Boggus, et al*, 53 S. W. (2) 646.

Therefore, by reason of all the foregoing, you are advised that a person can be adjudged insane and committed to an institution for the treatment of insane persons and persons mentally ill only by a lunacy proceeding before a jury and in conformity with Title 92 (Arts. 5547-5561). Such a judgmet and commitment without trial by jury would be repugnant to Section 15, Article 1.

Yours very truly,

EDWARD CLARK,  
Assistant Attorney General

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Op. No. 2921.

CONSTITUTIONAL LAW—COMPENSATION OF COUNTY COMMISSIONERS  
BY SPECIAL ROAD LAWS—COUNTY SCHOOL LANDS AND COUNTY  
AVAILABLE SCHOOL FUNDS—TAX COLLECTOR—DELINQUENT  
TAXES.

1. Expenses incurred by a County in surveying lands held by it for school purposes cannot be paid out of rents derived from said lands; such expenses are properly payable out of the general fund of the County.

2. A provision of a special road law that County Commissioners shall receive a fixed per diem as compensation for the performance of duties regularly imposed upon county commissioners as well as for additional duties imposed upon them under the special road law is in contravention

of Section 56 of Article 3 of the Constitution of Texas as it is an attempt by special law to regulate the affairs of a county not permitted under the Constitution. *Altgelt vs. Gutzeit*, 109 Tex. 123, 201 S. W. 400.

3. Delinquent fees earned by a tax collector can be retained by him when collected only for the purpose of making up his maximum and excess for the year in which the fees were earned, and cannot be applied to his maximum and excess for the year in which they are collected.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, May 29, 1933.

*Honorable E. J. Brooks, County Auditor, Polk County, Livingston Texas.*

DEAR SIR: Your letter of recent date, addressed to the Attorney General, has been received and referred to the writer for reply.

I regret that I have been unable to answer your inquiries before this time, and trust that you will accept my apology therefor.

You submit for an opinion several inquiries which are hereinafter set out and discussed.

#### I.

Your first question reads as follows:

"This, Polk County, owns considerable *school land* in Throckmorton and other counties, in this State, and have been for a number of years collecting rentals on same, both for farming and grazing purposes. A dispute arose as to the boundary of a part of this land, and the commissioners' court, saw fit and did authorize an expenditure of several hundred dollars, to have this land surveyed. Now, should this expense, for surveying, come from the 'general fund', out of which it was actually paid, or from the rents derived from this particular fund?"

Relative to the expenditure of the available free school funds (which, under Art. 2825, R. C. S., 1925, include the proceeds arising from the leasing and renting of school lands granted to the several counties of the State for educational purposes) that portion of Article 2827, Revised Civil Statutes, 1925, material to your inquiry reads as follows:

"The public free school funds shall not be expended except for the following purposes:

"1. The State and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents, when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year."

You are respectfully advised that, in the opinion of the writer, the expenses incurred in surveying the lands held by a county for educational purposes could not, under Article 2827, *supra*, be legally paid out of the rents derived from said lands. The purposes for which these funds may be expended are enumerated and defined in the statute above quoted; those funds may not, therefore, be spent for purposes not enumerated in the statutes.

You are further advised that in the opinion of the writer the ex-

penditure was properly charged to and paid out of the general fund of the county.

## II.

Your second inquiry reads:

"Some few years ago, there was passed, for this Polk County, what is generally termed a *special* road law. Since that time all four county commissioners have been drawing a monthly salary, of \$125.00. Do you think they are legally entitled to this salary?"

The special road law to which you refer (Ch. 76, Acts 1st C. S., 40th Leg.) makes the members of the commissioners' court of Polk County *ex-officio* road commissioners of their respective precincts. stipulates certain duties to be performed by them in that capacity, and in reference to their compensation, provides:

"Sec. 5. Each Commissioner shall receive as compensation for superintending and inspecting the public roads of his precinct, and the performance of duties herein required of him as Road Commissioner, and all other duties imposed upon him as County Commissioner, by law and by order of the Commissioners' Court, six dollars per day, not to exceed one hundred twenty-five dollars per month, said salary to be paid out of the General Fund of the County or orders of the Commissioners' Court, to be paid in monthly installments, and for which each of said Commissioners shall file a report of his work with his claim attached under oath, stating he has faithfully performed the duties of Commissioner, and he was actually employed for the number of days claimed by his report during such month as such road commissioner in superintending and inspecting the roads of his precinct, or attending to other official duties."

Under Section 5 of Chapter 76, above quoted, each of the County commissioners for Polk County would be entitled to six dollars per day for the performance of the duties regularly imposed upon him as county commissioner, in lieu of other compensation for those services, as well as for the performance of the additional duties imposed upon him under the special road law; however, a total compensation of one hundred twenty-five dollars per month is fixed as the maximum to be allowed to any one commissioner for any one month.

On the same day the above mentioned act was passed and went into effect, to-wit, on June 7, 1927, there was also passed a general law governing the salaries of county commissioners (Ch. 46, Acts 1st C. S., 40th Leg.) which was effective on said date. Chapter 46, supra, provides that:

"Section 1, Article 2350 of the Revised Civil Statutes of 1925 is hereby amended so as to read as follows:

"Article 2350. In counties having the following assessed valuations respectively, the county commissioners of such counties shall each receive the annual salaries herein specified, to be paid in equal monthly installments out of the general funds of the county:

	<i>Assessed Valuation</i>	<i>Salary</i>
\$ 6,500,000	and less than \$ 10,000,000	\$1,200.00
\$ 10,000,000	and less than \$ 12,500,000	\$1,500.00
\$ 12,500,000	and less than \$ 20,750,000	\$1,800.00
\$ 20,750,000	and less than \$ 25,000,000	\$2,000.00
\$ 25,000,000	and less than \$ 30,000,000	\$2,250.00
\$ 30,000,000	and less than \$100,000,000	\$2,400.00
\$100,000,000	and less than \$200,000,000	\$3,600.00
\$200,000,000	and over	\$4,200.00

"In counties having an assessed valuation of less than \$6,500,000 each county commissioner shall receive five dollars per day for each day served as commissioner and when acting as ex-officio road superintendent in his precinct, not to exceed one thousand dollars in any year. In counties whose assessed valuation is \$100,000,000 or more, said commissioners shall devote their entire time to the duties required of them by law and such other duties as their commissioners' court may require of them. 'Assessed valuation' means the total assessed valuation of all properties as shown by the tax rolls certified by the county assessor, approved by the Commissioners' Court and approved by the Comptroller for the previous year, provided that nothing herein shall affect any local or special law."

It will be observed that, under the general law governing the salaries of county commissioners, the compensation provided was an annual salary, payable in equal monthly installments, and depending in amount upon the assessed valuation of the county. Under the special road law for Polk County, the Legislature assumed to fix the compensation for the county commissioners of Polk County at a stipulated per diem, not only as compensation for the additional services imposed upon them thereunder, but also to compensate them for discharging the duties regularly imposed upon them as county commissioners in lieu of all other compensation allowed for such services.

The Constitution of Texas (Sec. 56 of Art. 3) provides that:

"The Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law, \* \* \* Regulating the affairs of counties, cities, towns, wards and school districts."

Practically the same question as that which you have presented was considered in the case of *Altgelt vs. Gutzeit*, 109 Tex. 123, 201 S. W. 400. That case involved the validity of part of a special road law for Bexar County (Ch. 77 Local and Special Laws, Reg. Ses. 33rd Leg.) which provides that:

"Each precinct county commissioner shall inspect and supervise from time to time all roads in his precinct, and shall do and perform any and all acts required of him by the Commissioners' Court, and all other duties required of him by law as county commissioner, and shall receive for his services an annual salary of twenty-four hundred dollars (\$2400) per annum, to be paid out of the general fund of the road and bridge fund, or any other available fund or the special road and bridge fund, in monthly installments, and shall be in lieu of all other fees and per diem of all kinds now payable or that may hereafter be allowed by general law."

The Supreme Court, speaking through Chief Justice Phillips, held that insofar as it attempted to fix the salary or compensation of the county commissioners of Bexar County for all official services rendered by them, the statute was invalid as an attempt by special law to regulate the affairs of the county, within the meaning of the constitutional prohibition expressed in Section 56 of Article 3; in that regard the Court said:

"We regard the section a plain attempt to fix the compensation of the Commissioners for all services required of them by law. The amounts payable to county commissioners in return for the discharge of their general duties are fixed by general laws, as they should be. It is provided by article 3870 that they shall each receive three dollars for each day they are

engaged in holding a term of the Commissioners' Court; but shall receive no pay for holding more than one special term of the court per month. By article 6901 as amended by the Acts of 1913, they are constituted supervisors of the public roads of their counties, and their compensation for services as such is fixed at three dollars per day for the time actually employed in those duties, limited to not more than ten days in one month. By section 5 of this special Act these general laws are declared as superseded. It says that the annual salary of \$2400 for each commissioner of Bexar County there provided shall be 'in lieu of all other fees and per diem of all kinds now payable or that may hereafter be allowed by general law'. This simply means that for their general services their compensation shall be no longer as limited by the general law, but shall be as fixed by this law. The salary thus provided for, in other words, was intended to cover, not merely their services having to do with the public roads as required by the Act, but all services required of them by law. Just what relation a local law making provision for a county road system can properly have to the subject of the general compensation of county commissioners, it is difficult to perceive. No doubt the Legislature, in the passage of local road laws, may, within proper bounds, provide compensation for extra services to be performed by those officials where uncontrolled by general laws and required by such local laws and directly connected with the maintenance of the public roads. We are not called upon to determine that question here. But under the guise of such a law it has no authority to legislate upon the subject of their general compensation or to alter the general laws governing it. We think that in what this Act plainly attempted to do. We therefore hold the section in question to be unconstitutional." (References to statutes in this quotation are to the Revised Statutes of 1911).

It is the opinion of the writer that the *Altgelt* case governs the present question. The Legislature not only attempts in the Polk County road law, above referred to, to provide and fix the compensation of the county commissioners of Polk County for the additional duties imposed upon them under said act, but attempts to fix their compensation for all other duties imposed upon them by law at a rate different from that provided by general law, and in lieu of the compensation provided by general law. I am unable to distinguish this provision from the one held in the *Altgelt* case to be in contravention of Section 56 of Article 3 of the Constitution of Texas, and I am, therefore, constrained to advise you that in my opinion Section 5 of Chapter 76, Acts 1st Called Session, 40th Legislature, is unconstitutional and void.

In view of the fact that in my opinion Section 5 of Chapter 76, supra, is unconstitutional, it is further my opinion and you are advised that the salaries of the county commissioners of Polk County were governed from and after June 7, 1927, by the provisions of Chapter 46, Acts 1st Called Session, 40th Legislature, hereinabove set out, instead of by the provisions of the special road law for Polk County.

### III.

Your fifth question is the following:

"During the year 1931, our Tax Collector made practically nothing from his office, while in 1932 he will have an excess fee, and will remit considerable back to the State, over and above the maximum of \$4,250.00 allowed. Is there any way by which he can hold back part of this excess fee and apply same on either the year 1931 or the year 1933, and thereby

bring same up from a loss? Please give me all the information that you can in regard to this, and if you know of any way where the Commissioners' Court could be of assistance to him in this connection, I will appreciate you giving me the advantage of it."

In regard to whether your Tax Collector can hold back a part of his excess fees collected in 1932 and apply the same on either the year 1931 or 1933 to make up his loss for these two years, you are advised that the only possible way that fees collected in 1932 can be used to apply on the maximum and excess of the officer for 1931 is as provided in Article 3892, R. C. S., 1925, as amended by Chapter 20, Acts of the Fourth Called Session 41st Legislature; that is to say, fees earned in 1931 and reported as delinquent in the 1931 report and subsequently collected in 1932, could be retained by the officer to complete his maximum and excess for the year 1931. Fees collected in 1932, whether current or delinquent, if not used in accordance with the provisions of the fee bill for that or prior years, as above mentioned, could in no event be used and retained by the officer for the year 1933. Under the statutes, the excess for 1932 is required to be paid in to the county long before it can be determined the amount of fees which the officer will collect for 1933.

#### IV.

Your sixth question reads as follows:

"Is this Polk County, permitted, in anyway, to reimburse the Commissioner's in any way for the use of their automobiles used in connection with their official work, that is to say so much per month for the use of same. Would the County be permitted to furnish them either gas or oil, for their automobiles, used in connection with their official work, done for the County."

In reference to the question last above mentioned, I am sending you herewith a copy of departmental opinion No. 2241 written by Honorable W. W. Caves, then Assistant Attorney General, to Honorable L. G. King, Nacogdoches, Texas, under date of August 5, 1920. It is the opinion of the writer that the conclusions reached in the opinion, a copy of which is enclosed, are still applicable under present statutes.

I have not discussed herein the third and fourth questions submitted in your letter; these questions will be answered in a separate letter which I will attempt to complete and mail to you in the next few days.

Yours very truly,

GAYNOR KENDALL,  
Assistant Attorney General.

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## Op. No. 2918.

BOARD OF PARDONS—PARDONS, BOARD OF—CONSTITUTIONAL LAW,  
ART. 16, SEC. 30a—STATUTES, ART. 6203, CH. 45, P. 99, ACTS  
1ST C. S. 41ST LEG. 1929, CONSTRUED—OFFICERS, TERMS OF  
OFFICE—APPOINTMENTS TO OFFICE.

1. In enacting Ch. 45, p. 99, Acts 1st C. S. 41st Leg., 1929 (Now Art. 6203, R. S.), Legislature evidently intended to act under authority Sec. 30a, Art. 16, Constitution of Texas, and same will be read into the statute.

2. *Held* that Ch. 45, supra, taken in connection with Sec. 30a, Art. 16, Constitution, clearly reflects intention of Legislature and operated to create statutory Board of Pardons and Paroles of three members, one to be appointed biennially for term of six years after expiration of original terms of two, four and six years made necessary in adjusting terms under the act.

3. Legislature amending law providing for Board of Pardons and creating additional duties had the right to provide that terms of members should be continued until expiration existing terms.

4. A term, or terms of office, means the period of time that the incumbents could have served, or the period of time for which an office might be held.

5. *Held* that existing terms of two members of old Board of Pardons, especially preserved to them by Ch. 45, supra, (Act effective August, 1929) did not expire until inauguration of Governor R. S. Sterling in January, 1931.

6. Prospective or future appointments can be made a reasonable period ahead of time providing the appointing power will continue the same; the appointing power cannot, however, forestall the rights and prerogatives of successors by appointing successors to office expiring after power to appoint has itself expired.

7. Reappointment by Governor Dan Moody in March, 1930, of two members of Board of Pardons held invalid in view of fact that Ch. 45, supra, (effective August, 1929) expressly preserved to such two members their existing terms of office, which would not expire, therefore, until the inauguration of Governor Sterling in January, 1931.

8. Term of Judge Stanhope Henry (who was member of Board in August, 1929, when Ch. 45, supra, became effective) expired in January, 1931, when Governor R. S. Sterling was inaugurated; in view of his reappointment by Governor Sterling in January, 1931, for the "next succeeding statutory term," however, Judge Henry's present term will not expire until January, 1937.

9. The term of James R. Hamilton, who was also member of Board when Ch. 45, supra, became effective, expired in January, 1931, when Governor R. S. Sterling was inaugurated; thereafter Judge Hamilton was holdover but, in legal sense, encroached only upon two year term beginning in January, 1931, and ending in January, 1933; any appointment by Governor Miriam A. Ferguson to succeed Judge Hamilton will be for term of six years, dating from her inauguration in January, 1933.

10. Fact that Governor Moody, in appointing Judge J. O. Woodward as third member of Board in March, 1930, failed to prescribe term of office in message to Senate presents difficult question; but in view of subsequent written designation filed with the Secretary of State by Governor Moody, acquiesced in by his immediate successor, Governor Sterling, and by the Senate and appointees as well, which construction is of great weight, appointment and designation held not invalid.

11. Term of Judge J. O. Woodward as member of Board of Pardons will expire in January, 1935.



OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, April 17, 1933.

*Her Excellency, Miriam A. Ferguson, Governor of Texas, Austin, Texas.*

DEAR MADAM: Your letter of April 17, 1933, reads, in part, as follows:

"I hereby submit the following question to you:

"What are the expiration dates of the terms of office of each of the three members of the Board of Pardons and Paroles, including that of Judge James R. Hamilton, deceased?"

"In connection therewith, I desire to call your attention to Article 6203, Section 1, of the Revised Civil Statutes, of the Acts of the Forty-first Legislature, which provides that:

"Said Board shall be appointed by the Governor, one to serve two years, one to serve four years, and one to serve six years, and at the expiration of the term for which a member of said board has been appointed, his successor shall be appointed."

"I wish to also call your attention to Section 21, of said Article 6203, which was passed by the same session of the Legislature as a part of the same Act as Section 1, above quoted; said Section 21 provides:

"The members of the Board of Pardons now serving when this Act takes effect shall constitute two members of the Board of Pardons and Paroles, and shall continue in office as such for the full term for which they have been heretofore appointed."

"A reply at the earliest possible time is requested for the reason that Judge James R. Hamilton, one of the members of said Board, has died, and I do not wish to fill the vacancy until I am advised as to the expiration dates of the terms of office."

The answer to your question depends upon a correct construction of the pertinent provisions of the statute, viewed in the light of Section 30a of Article 16, Constitution of Texas, and other related statutory and constitutional provisions.

Under the Constitution, the power to grant reprieves, commutations of punishment and pardons in all criminal cases, except treason and impeachment, is reposed solely in the Governor. (Art. 4, Sec. 11, Const. of Texas). The Legislature first provided for the establishment of a board of "pardon advisers" in 1893. Neither the original act of 1893, nor any subsequent amendment, until 1929, definitely fixed the terms of office of the members of this board. From the records of the Secretary of State, however, it appears that, with the exception of the administration of Governor Pat M. Neff (1921-1925), when there was no Board of Pardons, the members of the Board have been biennially named and appointed during each regular session of the Legislature by the incoming Governor.

On January 20, 1927, apparently in keeping with this custom, Governor Dan Moody appointed Honorable Joseph D. Sayers and Honorable George E. Christian to this board. On December 22, 1927, Honorable Stanhope Henry was appointed to succeed Mr. Christian, who had resigned.

On January 7, 1929, Governor Moody reappointed Ex-Governor Sayers and Mr. Henry. Thereafter, on June 17, 1929, the Governor appointed Honorable James R. Hamilton for the unexpired term of Governor Sayers, deceased.

The provisions of Article 6203, set out in your letter, were enacted at the 1st called session of the 41st Legislature in 1929, as a part of chapter 45, page 99. By the provisions of this act a Board of Pardons and Paroles was created, to consist of *three* members, to be appointed by the Governor; "one to serve two years, one to serve four years, and one to serve six years, and at the expiration of the term for which a member of said board has been appointed, his successor shall be appointed." (Sec. 1.) As disclosed by your letter, Section 21 of the act preserved to the two members of the Board then in office (Messrs. Henry and Hamilton) the full term for which they had been theretofore appointed.

The quoted provisions of Chapter 45, (Providing for terms of two, four and six years), were evidently enacted under authority of Section 30a of Article 16 of the Constitution of Texas, which reads as follows:

"Sec. 30-a. The Legislature may provide by law that the members of the Board of Regents of the State University and boards 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 (6) years, one-third of the members of such boards to be elected or appointed every two (2) 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."

The cardinal rule of all statutory construction is to ascertain the intent of the Legislature. It is reasonably clear that, in the passage of this act, the Legislature intended to operate under Section 30a, Article 16, of the Texas Constitution, and this part of the Constitution would therefore, be read into the act so as to give it force and effect. *Callaghan vs. McGown*, 90 S. W. 319 (Writ refused).

In *Russell vs. Farquhar*, 55 Texas 630, reiterated in *State vs. Wells*, 61 Texas 562, the Supreme Court of Texas stated the general rule thusly:

"A thing within the intention is within the statute, although not within the letter and a thing within the letter is not within the statute, unless within the intention."

It is clear that the Legislature, in creating this new board, upon which it imposed additional duties, intended to act in accordance with Section 30a of Article 16. For, as was said by the Supreme Court of Montana in *Marcellus vs. Wright et al*, 202 Pac. 381 (384):

"And unless the time fixed by statute is so plainly at odds with that prescribed in the Constitution as to be wholly inconsistent with it, it is the duty of the Court to give it such a construction as will enable it to have effect. Or to go a little farther, when the conflict between the Act and the Constitution is not clear, the implication must always be that no excess of authority has been intended by the Legislature, and that the seeming difference can be reconciled."

We are of the opinion, therefore, that Chapter 45, Acts 1st called session, 41st Legislature, taken in connection with Section 30a, Article 16, of the Constitution, clearly reflects the intention of the Legislature and operated to create a statutory board of three mem-

bers, one to be appointed biennially for a term of six years after the expiration of the original terms of two, four and six years made necessary in adjusting the terms under the act.

This act became effective August 21, 1929. At that time the then Governor (Moody), under the terms of the act, could have appointed one member of the Board but he failed to do so; and Judge Hamilton and Judge Henry (whose full terms had been preserved to them by Sec. 21 of the act) constituted the Board until March 20, 1930, at which time the Governor reappointed them and added Judge J. O. Woodward as the third member of the Board. All three were confirmed by the Senate shortly thereafter at the 5th called session of the 41st Legislature (S. J. 1930, pp. 360, 361 and 368).

In his message submitting these appointments to the Senate on March 20, 1930, Governor Moody did not designate the terms of any, or either, of them—that is, as to whether they should serve for two, four or six years. However, on January 12, 1931, just prior to retiring as Governor, he filed a letter with the Secretary of State designating the terms of said members, as follows:

J. O. Woodward, six year term, to expire 1935.  
James R. Hamilton, four year term, to expire 1933.  
Stanhope Henry, two year term, to expire 1931.

At the time of the appointment of Judge Hamilton and Judge Henry on March 20, 1930, and at the time of the written designation filed with the Secretary of State on January 12, 1931, however, the two named incumbents were entitled as a matter of legal right, by the plain terms of Sec. 21, to hold their terms of office *until January 18, 1931*, when R. S. Sterling became Governor of Texas. The Legislature had the right to provide that the terms of the then incumbents of the Board should be so continued. *Popham vs. Patterson* (Com. App.), 51 S. W. (2d) 680-684. The Legislature had created an entirely new board, with many additional duties placed on the members. The effect would have been to abolish the tenure of those then serving, had it not been for Sec. 21. *Cowell vs. Ayers* (Tex. Sup.), 220 S. W. 764.

Unquestionably the provision of Section 21—"The full term for which they have been heretofore appointed"—meant the uncompleted terms which Judge Hamilton and Judge Henry could have served had it not been for the passage of the new act. A term, or terms of office, means the period of time that the incumbents could have served, or the period of time for which an office might be held (Rep. Atty. Gen'l., 1914-1916, p. 512, and authorities there cited.) The Legislature can abolish a statutory office at will (*Cowell vs. Ayers*, *supra*), or it can, as it did by Sec. 21, in enacting a new law continue the terms of the incumbents for the unexpired portion (*Popham vs. Patterson*, *supra*).

Clearly the terms preserved to the incumbents by Sec. 21 of the act of 1929 were the existing terms of Judge Henry and Judge Hamilton, which would have expired in January, 1931, when Governor Moody retired and Governor Sterling was inaugurated; in other words, the terms that ended with the outgoing Governor and began with the

incoming one. That these terms did not expire until the inauguration of Governor Sterling in 1931 is apparent from the fact that the appointing power has from the beginning regarded and treated the terms of incumbents of the Board as being for two years, beginning in January of the incoming Governor's term. The act of 1929 was passed by the Legislature with knowledge of this construction and custom. There can be, therefore, no reasonable doubt as to what was meant by Sec. 21, especially in view of the rule that a special section in an act controls a general section. *Callaghan vs. McGown*, 90 S. W. 319-322 (Writ refused), and cases cited.

Since, therefore, Sec. 21 of the act of 1929 clearly preserved to Judge Henry and Judge Hamilton the full terms to which they had been appointed (expiring in January, 1931), the question logically follows as to whether the action of Governor Moody in appointing them on March 20, 1930, was valid. These two appointments were made before the term of Governor Sterling began. A new Governor and a new Senate were to come into power before, or at least simultaneously with, the expiration of the terms of these two members. That such an appointment was invalid is clear from all of the authorities:

*State ex rel Morris vs. Sullivan*, 26 L. R. A. (N. S.) 514; 81 Ohio State 79; 90 N. E. 146;

*State vs. Clark*, 52 L. R. A. (N. S.) 912-916;

Rep. Atty. Gen'l., 1928-1930, p. 325;

*Board of Education of Boyle County vs. McChesney (Ky.)*, 32 S. W. (2d) 26-27; 22 R. C. L. p. 437, para. 91;

*State vs. Mayor of City of Butte (Mont.)*, 109 Pac. 710;

*State vs. Peele (Ind.)*, 24 N. E. 440.

Prospective or future appointments can be made a reasonable period ahead of time provided the appointing power will be the same. In the case presented, however, the appointing power was not the same. A new Governor and a new Senate had come in before the appointees went out. The power of appointment in cases of this character is joint and concurrent in the Governor and in the Senate. Rep. Atty. Gen'l., 1928-1930, p. 325; also conference opinion No. 2908, addressed by the present Attorney General to Governor R. S. Sterling on January 16, 1933.

The rule is stated in *Morris vs. Sullivan*, supra, as follows:

"Machem, in his work on Public Offices and Officers, at Section 133, states the general rule as follows: 'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' The author then quotes with approval the language of Buchanan, J., in *Ivy vs. Lusk*, 11 La. Ann. 486, where he says: 'That an appointment thus made by anticipation has no other basis than expediency and convenience, and can only devise its binding force and effect from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.' Throop, in his treatise on Public Officers (Sec. 92), says: 'But it has been held that where an office is to be filled by appointment by the Governor, with the advice and consent of the Senate, the Governor and Senate cannot forestall their successors, by appointing a

person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the Governor and Senators, and that an outgoing board of freeholders of a county cannot lawfully appoint a person to an office which will not become vacant during their official terms.' The correctness and soundness of the rule and doctrine as above enunciated, so far as investigation has disclosed to us, is not opposed by any of the authorities, but is supported by many, among which are; State ex rel, Bownes vs. Meehan, 45 N. J. L. 189; People ex rel. Sweet vs. Ward, 107 Cal. 236, 40 Pac. 538; Ivy vs. Lusk, supra."

In the recent case of Boyle County vs. McChesney, supra, the Court said :

"Appointments to office may be made a reasonable time in advance of the time a vacancy is to arise. Prospective appointments to office soon to become vacant are generally deemed valid. 46 C. J. 952. People vs. Fitzgerald, 180 N. Y. 269, 73 N. E. 55; Towne vs. Porter, 128 App. Div. 717, 113 N. Y. S. 758; State of Ohio ex rel. vs. Sullivan, 81 Ohio St. 79, 90 N.E. 146, 26 L. R. A. (N. S.) 515, 18 Ann. Cas. 139; Whitney vs. Van Buskirk, 40 N.J. Law, 463; State ex rel. vs. O'Leary, 64 Minn. 207, 64 N. W. 264. The one limitation on the principle is that the appointment must be made by the same authority that is authorized to act when the vacancy actually occurs. Harrod vs. Hoover, 209 Ky. 162, 262 S. W. 400; Terry vs. Cornett, 136 Ky. 628, 124 S. W. 870; Dixon vs. Caudill, 143 Ky. 623, 136 S. W. 1043; Sheperd vs. Gambill, 75 S. W. 223, 25 Ky. Law Rep. 333; Seiler vs. O'Maley, 190 Ky. 190, 227 S. W. 141; Walker vs. Fox, 216 Ky. 33, 287 S. W. 228."

See also the following :

Mechem, Pub. Off., Sec. 133;  
 State ex rel Peters vs. McCollister, 11 Ohio 51;  
 State ex rel Ives vs. Choate, 11 Ohio 511;  
 State ex rel Atty. Gen'l. vs. Thompson, 9 Ohio C. C. 161;  
 State ex rel Lueders vs. Ermston, 14 Ohio C. C. 614; 57 Ohio St. 665,  
 50 N. E. 1129; 23 Am. & Eng. Enc. Law, 2d ed. p. 347;  
 Throop, Pub. Off. Sec. 92;  
 People ex rel Sweet vs. Ward, 107 Cal. 236, 50 Pac. 438;  
 Ivy vs. Lusk, 11 La. Ann. 486;  
 State ex rel Bownes vs. Meehan, 45 N. J. L. 189;  
 State ex rel Childs vs. O'Leary, 64 Minn. 207, 66 N. W. 264;  
 State ex rel Whitney vs. Van Buskirk, 40 N. J. L. 463;  
 State ex rel Bovee vs. Catlin, 84 Tex. 48, 19 S. W. 302.

The action of Governor Moody in filing with the Secretary of State a written designation of the term of Judge Stanhope Henry as the "two year term, to expire in 1931," in our opinion, neither added to nor took from the term he was holding and to which he was then entitled. For, as pointed out above, under the terms of Sec. 21, of the act of the special session of the 41st Legislature, Judge Henry's term was preserved to him and did not expire until January, 1931, when a new Governor was inaugurated.

On January 26, 1931, however, the new Governor R. S. Sterling, submitted Judge Henry's name to the Senate for reappointment, employing the following language:

"Board of Pardons and Paroles.

"Mr. Stanhope Henry, of Atascosa County, reappointed to the *next succeeding statutory term.*" (Undercoring ours), S. J. 1931, p. 75.

This appointment was subsequently confirmed and operated to give

to Judge Henry a full six year term as member of the Board, to expire in January, 1937, with the inauguration of the Governor.

As to Judge Hamilton: We have reached the conclusion that he was prematurely reappointed on March 20, 1930, by Governor Moody in view of the fact that his existing term of office did not expire until the inauguration of Governor R. S. Sterling on the 18th day of January, 1931. Since the terms of the members of the Board serving when the act of the special session of the 41st Legislature became effective in August, 1929, were preserved to them by Sec. 21, we are of the opinion that Governor R. S. Sterling had the power at the time of his inauguration, or immediately thereafter, to appoint two members of the Board to succeed both Judge Hamilton and Judge Henry, and to designate the terms for which they were to serve. Governor Sterling failed to exercise this power of appointment and submitted only the name of Judge Henry to the Legislature "for the full statutory term." Judge Hamilton held over, under the Constitution, and continued to act as a member of the Board until his death in March of this year, but his term of office expired when R. S. Sterling became Governor on the 18th of January, 1931.

When, however, Governor Sterling reappointed Judge Henry on January 26, 1931, "for the next succeeding statutory term" of six years, and failed to act as to Judge Hamilton, he evidently acquiesced in the written designation filed by Governor Moody with the Secretary of State on January 12, 1931, providing for the expiration of Judge Woodward's term in 1935, of Judge Hamilton's in 1933, and of Judge Henry's in 1931. Had he exercised this privilege of making another appointment in January, 1931, however, such appointment could have only been for a two year term to succeed the expiring term of Judge Hamilton and to continue until January, 1933. In other words, in order to give uniformity to the terms of office and to carry out the statutory and constitutional purposes of biennial appointments, Judge Hamilton's successor could only have been designated by Governor Sterling for the two year term expiring in 1933. Therefore, his holding over, in a legal sense, was an encroachment upon a two year term; and, in our opinion, any appointment made by you to succeed Judge Hamilton will be for a six year term, dating from the inauguration of your Excellency on January 17, 1933, and to expire with the inauguration of the Governor in 1939.

A difficult question is presented with reference to Judge J. O. Woodward, who was appointed by Governor Moody on March 20, 1930, and confirmed by the Senate. His tenure of office would ordinarily have begun from the date of such appointment, having been so fixed by the chief executive. Rep. Atty. Gen'l. 1924-1926, p. 469; 22 R. C. L., Sec. 251, and cases cited; State vs. Amos, 133 So. 623; 39 S. E. 274; 146 S. E. 167, id. 472.

The law is equally well settled, however, that the appointing power has the right to fix the commencement and ending of the terms of office unless the same is fixed by statute. In filing the written designation of the term of the Board members with the Secre-

tary of State on January 12, 1931, Governor Moody evidently had in mind the history of the legislation under which he sought to act as well as the custom of his predecessors in office. In designating the two, four and six year terms to and in 1931, 1933 and 1935, respectively, he evidently had in mind the provisions of Section 30a, Article 16, of the Constitution, supra, and also the special provision of the act of the special session of 1929, which, in effect, fixed the expiration date of the terms of the two members of the Board for January, 1931. It is apparent, therefore, that Governor Moody had in mind, and undertook to fix the usual and customary biennial expiration dates of the terms of the Board members to expire at the end of the biennial period. He thereby continued the long established policy of his predecessors in conceding to each newly elected and incoming Governor the right to name and appoint members whose terms had expired. It is true that the effect of this holding would be to shorten Judge Woodward's term of office by several months. A considerable portion of this period, however, would be chargeable to the delay of the Governor appointing him; and it is clearly necessary to so construe his term of office in order to give effect to the statute and to Section 30a, Article 16, of the Constitution, providing for biennial appointments of one-third of the members, each for six years.

The failure of Governor Moody in submitting the name of Judge Woodward to the Senate on March 20, 1930, to designate the term of office so that the Senate might concur therein, and the subsequent action of the Governor in filing the designation of the terms, or number of years, with the Secretary of State without any action or confirmation of the Senate, presents a grave question. We have been unable to find any authority on either side of the question. However, in view of the fact that no question or protest was raised at the time and because this construction was acted upon by Governor Moody and his immediate successor, and acquiesced in by the Senate and appointees as well, (*Walker vs. Myers*, Tex. Sup., 266 S. W. 499; *City of Denison vs. Municipal Gas Co.* (Civ. App.) 257 S. W. 616-620, affirmed in 3 S. W. (2d) 794), which executive, legislative and departmental construction is entitled to great weight in case of doubt, we believe that this appointment and designation of Judge Woodward's term was not invalid; and that his present term of office will expire in January, 1935. This construction harmonizes with the statutes and Constitution, and gives effect to the rule of law that in case of doubt as to the length of term of office, construction will be given which shortens the term (*Wright vs. Adams*, 45 Tex. 134).

Summarizing, you are therefore respectfully advised that, in our opinion:

1. The term of Judge James R. Hamilton expired January 18, 1931. He held over thereafter but, in view of the conclusions reached in this opinion, the holdover term upon which he encroached was, as a matter of law, only a two year term beginning January 18, 1931 and expiring with the inauguration of Your Excellency on January

17, 1933. Any appointment by you to succeed Judge Hamilton would, therefore, in our opinion, be for a period of six years from January 17, 1933, and to expire with the inauguration of the Governor in January, 1939.

2. The term of Judge J. O. Woodward will expire in January, 1935, simultaneously with the inauguration of the Governor.

3. The term of Judge Stanhope Henry will expire in January, 1937, simultaneously with the inauguration of the Governor.

Very truly yours,

A. R. STOUT,  
Assistant Attorney General.

JAMES V. ALLRED,  
Attorney General of Texas.

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Op. No. 2917.

CONSTITUTIONAL LAW—COMMISSIONERS' COURTS—"COUNTY BUSINESS"—COURTS (GENERAL)—CITIES AND TOWNS—PUBLIC UTILITIES, REGULATION OF RATES.

1. Legislature may delegate to municipal corporation power to regulate rates of public utility operating within its boundaries.

2. The regulation of public utility rates within the county is "county business" within the meaning of that term as used in Article 5, Section 18, Constitution of Texas, and the Legislature may therefore delegate that power to the commissioners' court of the county.

3. District courts having supervisory control over the actions of the commissioners' court, the Legislature may empower district courts to review, revise, alter or change an order of the commissioners' court fixing the rates of public utilities operating within the county.

4. The Constitution prohibits the Legislature from giving the district courts jurisdiction to revise or change an order of the governing body of a city or town fixing rates of public utilities; the courts of the State can only affirm or annul in toto the orders of such bodies.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, April 10, 1933.

*Honorable Elbert M. Barron, Chairman, Committee on Municipal and Private Corporations, House of Representatives, Capitol.*

DEAR SIR: Your letters of March 8 and March 18, addressed to the Attorney General, have been received and referred to the writers for reply. You request that the Committee on Municipal and Private Corporations for the House of Representatives be advised whether the power to fix and promulgate rates for public utilities can be vested in county commissioners' courts and in district courts, in the manner prescribed in House Bill No. 95, now pending before the Forty-third Legislature.

The bill under consideration purports to delegate to the commissioners' court of each county of this State the power to regulate and fix the rates to be charged by public utility corporations, including



gas, light, telegraph and telephone companies, operating within the territorial limits of the county outside of the boundaries of incorporated cities or towns of the county. The bill further provides that the governing bodies of incorporated cities and towns shall have the power to fix and regulate the rates of such public utility corporations operating within the city limits of any such city or town. Section 22 of the bill reads as follows:

"When the court or city has ordered any existing rate reduced or has refused an application for an increase, the utility affected by such order may appeal to any District Court of the county or city by filing with it on such terms and conditions as such District Court may direct, a petition and bond to review the decision, regulation, ordinance or order of the commissioners' court or city. Upon such appeal being taken the District Court shall set a hearing and make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The District Court shall hear such appeal de novo and shall have power to substitute an entirely new rate, change or alter the existing rate, prepare an entirely new rate structure and/or make such other and further orders as may be consistent with establishing fair and reasonable rates to be charged the patrons in such territory for the commodity furnished and services rendered by the utility. The District Court may immediately after it has acquired jurisdiction of the appeal suspend the existing rate and establish a temporary rate structure, if the circumstances and facts in the case should warrant such action by the District Court. Whenever any utility whose rates have been fixed by any commissioners' court or city, desires a change of any of its rates, rentals or charges it shall make its application to the court or city wherein such utility desires such change and such court or city shall determine said application within a reasonable time and not to exceed one hundred and twenty days after presentation unless the determination thereof may be longer deferred by agreement. If the court or city should reject such application or fail or refuse to act on it within said time then the utility may appeal to the District Court as hereinabove provided. The said District Court shall determine the matters involved in any such appeal as soon as it is practicable to do so after the filing of such appeal with said District Court, and the rates fixed by the court or city shall remain in full force and effect until ordered changed or altered as hereinabove provided. In all rate hearings the burden of proof shall be upon the utility."

Section 68 of the bill would amend Article 1125, Revised Civil Statutes, 1925, to read:

Article 1125. "All extortionate and unreasonable rates charged by public utility corporations, as herein defined, are hereby declared to be unlawful; and the district courts of this State are hereby vested with appellate jurisdiction, with full power and authority to regulate, prevent and abolish the same under the rules as herein fixed and said district courts are given the power and authority whenever the public interest may require after said appeal thereto, to fix and establish rates for the service and products of all public utility corporations, and whenever the public interest may require and to carry out the provisions herein conferred, said courts are hereby expressly authorized to issue injunctions, quo warranto, and all other writs for the purpose of carrying out and making effective the purposes of this chapter, and said writs shall be governed by the rules and regulations now prescribed by law. No original proceeding shall be begun in the district court having for its purpose the fixing of rates of public utility corporations until and unless the commissioners' court or city shall have fixed the rates as herein provided and appeal is had or taken to such court."

It is well settled by the decision of the courts of this and other

states that the Legislature may properly delegate to municipal corporations the power to regulate the rates of public utility corporations operating within the boundaries of the municipality. † McQuillan on *Municipal Corporation* (2nd Ed.) p. 937, Sec. 1875.

The question whether the Legislature may delegate to the commissioners' court of a county the power to regulate the rates and control the operations of public utilities outside of the limits of any incorporated city or town, and within the boundaries of the county, presents a different question, and, insofar as the writers have been able to ascertain, a novel one. Section 1 of Article II of the Constitution of Texas provides that:

"The powers of the Government of the State shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to -wit: 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 those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Section 1 of Article V of the Constitution of Texas, as amended in 1891, reads, in part, as follows:

"The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in *Commissioners' Courts*, in Courts of Justice of the Peace, and in such other courts as may be provided by law." (Italics are the writers).

Article V, Section 18 of the Constitution, as amended in 1891, provides, in part:

"Each county shall \* \* \* be divided into four commissioners' precincts in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioners so chosen, with the county judge, as presiding officer, shall compose the County Commissioners' Court, *which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.*" (Italics are the writers).

The function of rate making is purely legislative in its character, whether exercised directly by the Legislature itself or by some subordinate legislative or administrative body, to whom the power of fixing rates has been delegated. *Railroad Commission of Texas vs. Neville* (Sup. Ct. of Tex.), 73 S. W. 529; *Prentis vs. Atlantic Coast Line Ry. Co.*, 211 U. S. 210, 29 Sup Ct. 67, 53, L. Ed. 150; 4 McQuillan, *Municipal Corporation*, p. 940, Sec. 1875. Where the Constitution divides the powers of government into separate bodies of magistracy, and provides that legislative power shall be vested in one department, judicial powers in another, and executive powers in another, and prohibits one department from exercising powers properly referable to another department of the government, the Legislature is without power to impose upon judicial bodies the power to make rates (8 LRA (NS) 529 and note), unless expressly permitted by the Constitution to do so.

It will be observed that section 18 of Article V of the Constitution provides that the County Commissioners' Court shall "exercise such powers and jurisdiction over county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed." Under this section of the Constitution, the Commissioners' Court is designated as the governing body for the county, and as such its powers are not wholly judicial; some of its functions are judicial, some are executive, but most of its powers and duties are legislative in nature. *Ex parte Towles*, 48 Tex. 413, 40, 11 Texas Jurisprudence p. 558, Sec. 32. Within the scope of the meaning of the term "county business," the Legislature may impose duties or powers upon the commissioners' court, whether the same be judicial, administrative or legislative in character.

The jurisdiction of commissioners' courts, however, is limited to "county business," and the Legislature has no authority to enlarge their powers or jurisdiction except in that regard, and any attempt to require the commissioners' court to exercise powers over any matter which is not "county business" would be in contravention of the constitutional provision. *Sun Vapor Electric Light Co. vs. Keenan*, 88 Texas 197, 30 S. W. 868. The remaining question, therefore, to be answered in determining whether the Legislature can delegate such rate making power to the commissioners' court, as the bill under consideration purports to delegate to it, is whether the regulation of such rates is "county business" within the meaning of the constitutional provision referred to.

The writers have been unable to discover any case, either in this or in any other state, deciding whether the regulation of the rates of public utilities is "county business." An examination of the authorities disclosed that the courts have not attempted to define the term "county business," but have decided each case presented upon its individual facts, holding either that certain things were included within the term or not.

In *Sun Vapor Electric Light Co. vs. Keenan*, *supra*, the Supreme Court held that the administration of the effects of a dissolved municipal corporation, and the levying of taxes upon its inhabitants to pay its debts, was not "county business," and that a statute requiring the commissioners' court to do so was invalid. This decision was followed in *Ranken vs. McCallum*, 60 S. W. 975.

Since the decision of the *Keenan* case, *supra*, there have been a number of decisions upholding the delegation of the power to regulate—to levy taxes for political corporations organized for public utility purposes. *Preston vs. Anderson County Levee Impr. Dist. No. 2*, 3 S. W. (2d) 888; *Wharton County Drainage Dist. No. 1 vs. Higbee*, 149 S. W. 381; *Glenn vs. Dallas County Bois D'Arc Levee Dist.*, 275 S. W. 137. In the *Preston* case, *supra*, the court, in discussing the contention that the act under consideration by the court was invalid as attempting to impose upon the commissioners' court business other than county business, said:

"Neither is the act opposed to Section 18 of Article 5 of the Constitution upon the ground that it imposes duties upon the commissioners' court not

constituting 'county business' in the meaning of that term. The levee district is created as a public utility and within the boundaries of designated counties. It is made the duty of the commissioners' court to levy taxes, authorized through the initiation and referendum of landowners, to discharge the cost of construction and maintenance of levees. Taxation is the normal and ordinary source of income of counties."

In *Glenn vs. Dallas County Bois D'Arc Island Levee District*, 275 S. W. 137, 145, the court said that the term "county business" should be given a broad and liberal construction; in that case, too, the court comes nearer to defining the term "county business" as used in Article 5, Section 18 than does any other court. In upholding the validity of the Laney Act, pertaining to the creation of levee districts, their operation, etc., the court distinguished it from the act involved in the Keenan case, saying that the decision in that case "involved the validity of an act of the Legislature making it the duty of the commissioners' court to act in matters that were not in any respect county business, *while the act in question only confers jurisdiction to act in reference to matters that are of public concern to the people of the county, therefore, county business.*" (Italics are the writers).

In *Robbins vs. Limestone County*, 268 S. W. 916, 918, the Supreme Court, in answering the contention that an act of the Legislature vesting in the State Highway Commission authority to take over and control various highways of the State was violative of Article 5, Section 18 of the Constitution, said:

"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 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. \*\*\*\*\*"

"This provision of the Constitution, (speaking of Article 5, Section 18) as the others, calls for careful consideration. It involves two issues: First, what powers are by the Constitution delegated to the county commissioners' court; second, what is 'county business.' Without going into a detailed statement of what specified powers have been 'conferred by this Constitution' upon the commissioners' courts, it is sufficient to say that that instrument does not, in terms, confer the power over public roads. Article 5, Section 18, does confer upon county commissioners' courts the power and jurisdiction over all 'county business' as is conferred by 'the laws of the state, or as may be hereafter prescribed,' and it is by virtue of the powers conferred by the Legislature that the commissioners' court of a county may lay out, construct, and maintain public roads.

\*\*\*\*\* In other words, it is only by the laws of the state, as enacted by the Legislature, that jurisdiction over public roads has ever been exercised by county commissioners' courts as a part of its 'county business.'"

In analogy to the reasoning of the court in the case of *Robbins vs. Limestone County*, supra, we may say that since the power to fix and regulate the rates of public utilities is inherent in the State, the right to control them resides primarily in the Legislature, and, subject to constitutional restrictions, it may exercise its power di-

rectly or may delegate it to a political subdivision of the State. It is our opinion that the Legislature may delegate to commissioners courts the power to regulate and fix the rates of public utilities within the territorial limits of the county and outside of the boundaries of any incorporated city or town, for the following reasons:

1. The theory under which the State assumes to control the rates charged by public utility companies is that the business in which they are engaged is a business charged with a public interest—that is, the business is of public concern to the people of the State. Certain it is, then, that the business of a public utility is of public concern to the people of the county wherein it operates and does business, so as to bring the regulation thereof within the meaning of the term “county business” as it is defined in *Glenn vs. Dallas County Bois D’Arc Levee Dist.*, supra.

2. Counties are quasi-corporations created by the Legislature by general laws without reference to the wish of their inhabitants, as an agency of the State through which it can most conveniently and effectively discharge the duties which the State, as an organized government, assumes to every person, and by which it can best promote the welfare of all. *City of Galveston vs. Posnainsky*, 68 Tex. 118; *Bexar County vs. Linden*, 110 Tex. 339, 220 S. W. 761. Counties are political subdivisions of the State, and act, where the power to do so has been delegated to them, as local agents of the State in the performance of governmental functions belonging to the State as a sovereign. *Commissioners of Hamilton County vs. Mighels*, 7 Oh. St. 109. In the case last cited, it was said that, “with scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy.” While counties have and exercise quasi-municipal functions, the business of the county, in view of the very reason for their creation, cannot be regarded as being limited to the business of the county in its capacity as a municipal or quasi-municipal corporation, but, in our opinion, “county business” also includes all powers delegated by the Legislature to the county as an agent of the State to discharge within the territorial limits of the county the duties which the State as a government assumes to exercise for the welfare of the people of the State. We have heretofore pointed out that the regulation of public utilities is a power which the State as a government exercises in promoting the general welfare of the people of the State.

You are, therefore, advised that, in our opinion, the Legislature may delegate the power to regulate and fix rates of the public utilities named in the proposed bill under consideration to the commissioners’ courts of the counties of this State wherein such public utilities operate.

Having reached the conclusion that the Legislature may empower commissioners’ courts and the governing bodies of incorporated cities and towns to fix the rates of public utilities operating within their respective territorial jurisdictions, we are confronted with the ques-

tion whether the Legislature may provide that upon an "appeal" from the order made by the commissioners' court or by the governing body of the city or town to the district court, as provided in the proposed bill, there shall be a hearing de novo, and that the district court shall have the power to substitute an entirely new rate, change or alter existing rates and make such other and further orders as it may deem necessary to establish fair and reasonable rates in such territory.

As hereinabove stated, the fixing of rates of public utilities is a legislative, not a judicial, function, and, therefore, a court ordinarily could not revise or modify the order of a rate-fixing body, but in determining whether the rates fixed by such a body are reasonable or unreasonable, could only set the order aside or affirm it *in toto*. Railroad Commission of Texas vs. Neville, supra; Ball vs. Texarkana Water Corp., 127 S. W. 1068 (Texarkana Court of Civil Appeals). However, subject to restrictions contained in the State Constitution, the Legislature may delegate to a court the power to regulate and fix rates of public utilities. Our Constitution (Article II, Section 1, above quoted) would prohibit the Legislature from delegating to the courts of this State the legislative power of fixing rates of public utilities, subject, however, to the exception hereinafter set out. We have reached the conclusion in this opinion that the power to fix the rates of public utilities within the county is "county business" and may be delegated to the commissioners' court of the counties of this State. Our Constitution (Article 5, Section 8, as amended in 1891) provides that:

"The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners' Court, with such exceptions and subject to such regulations as may be prescribed by law; \* \* \*."

Prior to the amendment of Section 8, Article 5 of the Constitution of Texas in 1891, it had been held that the district courts did not have and could not be vested with jurisdiction to entertain an appeal from, nor alter, modify or amend the orders of commissioners' courts; nor had the district courts supervision of control over the commissioners' courts. Ex parte Towles, 48 Tex. 413. It was said in the case last above cited that to give the district court power and to require it to review proceedings had before the commissioners' courts, and to revise or alter its orders or findings would be to "make the District Court act as a commission to try an extra-judicial question," in view of the fact that commissioners' courts had, at best, only quasi-judicial powers, whereas most of their powers were legislative or administrative in nature.

By the amendment to Section 8 of Article 5, supra, adopted in 1891, however, the district courts were given appellate jurisdiction and general supervisory control over the orders and judgments of the commissioners' courts, and it has been held by the courts of this State that this broad revisionary power conferred upon the district courts gave them the power to review, revise, correct, alter, amend or annul orders or judgments entered by commissioners' courts in the exercise of political or legislative powers vested in that body. Oden

vs. Barbee, 103 Tex. 449, 129 S. W. 602; Mann vs. Trinity Farm Co. (Tex. Civ. App.), 270 S. W. 923, 928; Doyle et al vs. Slaughter et al., 250 S. W. 1090; 11 Tex. Jurisprudence 566, Sec. 39, and cases cited in Note 17.

We think that the constitutional amendment of 1891 to Section 8 of Article 5 operates as an exception to the general rule that legislative powers cannot be vested in a judicial body, insofar as it confers supervisory control over the actions of the commissioners' courts upon the district courts. In view of this conclusion, it is our further opinion that the act under consideration would not be invalid because it allows an appeal to the district court from an order of the commissioners' court of the county, fixing the rates of public utilities operating within the county, nor because it vests in the district court the power to review, revise, alter or amend such an order of the commissioners' court. While under the proposed act, the district court, in reviewing an appeal an order of the commissioners' court fixing a schedule of rates for a public utility, would sit as a legislative commission exercising legislative function, it is our opinion that that feature of the proposed act is not unconstitutional as being in contravention of those provisions of the Constitution segregating the powers of government, for the reason, as we have heretofore pointed out, that, in our judgment, said feature of the bill falls within the exception to the rule that legislative powers cannot be vested in judicial tribunals.

Our Constitution, however, does not assume to give any court appellate jurisdiction or supervisory control over the actions of the governing bodies of cities and towns, and the district court cannot be vested with jurisdiction to review and revise an order of such a body fixing the rates of public utilities, since the order of the governing body of the city or town in such an instance is the exercise of a delegated legislative power, and the courts of this State cannot be empowered by the Legislature to sit in review of legislative action and by its own judgment be required to make rules for the future conduct of the business of the public utility, subject to the exception hereinabove noted.

You are, therefore, respectfully advised that, in our opinion, (1) House Bill No. 95 is not unconstitutional because it vests legislative powers in the county commissioners' courts of this State, (a) nor is the provision of the bill unconstitutional which provides for an appeal to the district court from the order of the commissioners' court fixing the rates of the public utilities named in the bill, and provides that the district court shall review the order, and affirm, alter or change the order of the commissioners' court and substitute therefor, if it deems it necessary to the ends of justice, a new schedule of rates for the public utility; (3) that the bill is in contravention of Section 1, Article 2 of the Constitution and Section 1 of Article 3 of the Constitution, insofar as it provides that upon appeal from an order of the governing body of a city or town fixing the rates of a public utility, the district court shall have jurisdiction to review said order and substitute therefor, if said court deems it necessary, a new rate or schedule of rates for the public utility.

This opinion is, of course, not to be understood as being concerned with the policy of the proposed legislation, but it is our intention herein to pass solely upon the legal aspects of the questions presented.

Respectfully submitted,

GAYNOR KENDAL ,  
Assistant Attorney General.

SCOTT GAINES,  
Assistant Attorney General.

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Op. No. 2914.

CONSTITUTIONAL LAW—APPROPRIATIO TO PRIVATE PERSONS FOR PUBLIC PURPOSES—CONSTITUTION (Art. 3, Sec. 51)—CONSTITUTION (Art. 16, Sec. 6).

1. Except where it is expressly authorized to do so, the legislature is without power under Section 51 of Article III of the Constitution to grant or appropriate public money to individuals, associations or corporations even when the money appropriated is to be used for or in aid of public purposes.

2. Fees imposed as license fees are public money within the meaning of Section 51 of Article III of the Constitution.

3. The fees collected as annual registration fees from pharmacists become public money upon their collection, and the legislature was without power to appropriate a portion of those fees to the Texas State Pharmaceutical Association, a private corporation.

OFFICES OF THE ATTORNEY GENERAL,  
AUSTIN, TEXAS, February 25, 1933.

*Hon. R. L. Reader, Chairman, Committee on Public Health, House of Representatives, Austin, Texas.*

DEAR SIR: This will acknowledge receipt of the following letter from your committee:

“Section 14, Pharmacy Law, Acts Regular Session of the Forty-first Legislature, 1929, reads in part as follows:

“Every registered pharmacist who desires to continue the practice of pharmacy in this State shall annually, on or before the second day of January of each year, pay to the secretary of the Board of Pharmacy a renewal fee of three dollars (\$3.00). If any person fails or neglects to procure his renewal registration before March first of each year his name shall be erased from the register of licensed pharmacists, and such person, in order to regain registration shall be required to pay one annual renewal fee in addition to the sum of all fees such person may be in arrears. Provided, also, that the board shall each year turn over to the State Pharmaceutical Association for the advancement of science and art of pharmacy, out of the annual fees collected by it, the sum of two dollars (\$2.00) for each pharmacist actively engaged and one dollar (\$1.00) for each pharmacist not actively engaged in pharmacy in this State.’

“I wish you would give me your opinion as to the constitutionality of this section. Funds collected, as provided herein, are being used to pay the salary of the Secretary, Legislative Committee, publication of magazine, expenses of delegates to the National Association of Retail Druggists



meeting and delegates attending the American Pharmaceutical Association and one scholarship loan each year, amounting to about two hundred dollars. In other words, the money is used for purposes such as those used by the State Medical Association or Bar Association or other professional organizations.

"I want to correct this error if in your opinion this section be unconstitutional. I will thank you very much if you will give me an early opinion on this, as I have a bill now pending in the Public Health Committee on this subject."

In view of the fact that the Texas State Pharmaceutical Association is a private corporation, organized, according to its charter, "for the promotion of Pharmaceutical Science and Art; the fostering and encouragement of all legitimate schools of pharmacy which have been or may be established in the State of Texas, and, if necessary, the creation of a College of Pharmacy, which shall be under the direct supervision of this Association," I interpret your letter as requesting the opinion of the Attorney General in reference to the validity of that portion of Section 14, supra, which provides that the Board of Pharmacy shall turn over to the Pharmaceutical Association "a stipulated portion of the annual registration fees collectible under the provisions of the act.

The request of Honorable Moore Lynn, State Auditor, for an opinion on the same question has been under consideration by this department for some time. Both inquiries will be treated and answered in this letter.

Section 51, Article III of the Constitution of Texas, reads in part as follows:

"The Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporations whatsoever, provided, however, the Legislature may grant aid to indigent or disabled Confederate soldiers or sailors, \* \* \*, and provided further that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity."

If it is to be said that the appropriation made to the Pharmaceutical Association is invalid as being a grant of public money in contravention of Section 51 of Article III, supra, it is requisite that it first be decided that the money appropriated is "public money," within the meaning of the constitutional prohibition. In answering the latter question, we deem it necessary to consider the nature of the power under which the fees are assessed and collected.

Chapter 107, Acts Regular Session, Forty-first Legislature, which you term the "Pharmacy Law," creates a State Board of Pharmacy, provides for the appointment, terms and tenure of office of its members, and provides for their compensation. It further provides for the examination of persons who desire to engage in the practice of pharmacy in this State, and for the licensing and registering of those persons who honorably meet the requirements set up by the board. Section 14 of the Act, a portion of which is copied above from your letter, requires registered pharmacists who desire to continue to pursue the occupation, to renew their registration with the board annually, and to pay a renewal fee of three dollars, if the

person is in active practice, or two dollars if inactively engaged, in order to legally continue in the practice. It is made unlawful for any person to practice pharmacy in the State, without having complied with the provisions of the act; the board is charged with the duty of seeing that all laws which pertain to the practice of pharmacy are enforced, and it is provided that the license of any pharmacist may be cancelled by the board upon his conviction of having violated certain of the penal provisions of the laws.

Examination of the act readily discloses, therefore, that the primary purpose of the legislature in the enactment thereof was to regulate and control the practice of pharmacy—the compounding and selling of dangerous drugs. The annual registration fees imposed by the act are not so great in amount as to indicate that the primary purpose for which they were imposed was for the raising of revenue, other than to defray the expense incident to controlling the pursuit of the occupation regulated by the act. A charge imposed under such conditions is a license fee imposed under the sovereign's power of police and is not a charge imposed under the power of taxation. *DeGruy vs. Louisiana State Board of Pharmacy*, 141 La. 896, 75 So. 835; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516; *Brown vs. City of Galveston*, 97 Tex. 1, 75 S. W. 488; *Ex parte Cramer*, 62 Tex. Cr. Rep. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588; 37 C. J. 169, Sec. 6.

The writer is not aware of any Texas decision deciding whether license fees assessed under the police power of the State and collected by the officers of the State are public moneys within the meaning of Section 51 of Article III, *supra*. A close analogy, however, is to be found in the instance of fines and penalties collectible under the penal laws, as they are imposed by the State in the exercise of its police power. It is settled law in Texas that moneys paid to the officers of the State in the discharge of a pecuniary fine or penalty are "public moneys" within the meaning of Section 51 of Article III of the Constitution. *Ex parte Smythe*, (Tex. Cr. App.) 120 S. W. 200. It is our opinion that the moneys collected from pharmacists as annual registration fees are likewise "public moneys."

Having reached the conclusion that the money appropriated to the State Pharmaceutical Association "for the advancement of science and art of pharmacy," is public money, we are confronted with the question whether the appropriation thereof to the Pharmaceutical Association is a "grant" of public money to a private corporation in contravention of the constitutional provision above quoted.

In a few jurisdictions, it has been held that a constitutional prohibition inhibiting a "donation" or "gift" of public money to or in aid of any individual, association or corporation, is a restriction upon the power of the legislature with reference only to the purposes for which public funds may be used. Under this view, the legislature would be within its powers in using any agency within the limits of its discretion to achieve an end for which an expenditure of public funds may be made, and it is held that an appropriation to a private individual or private corporation is not a "gift" or "donation"

within the meaning of prohibition, if the use be a public one. *Hager vs. Kentucky Children's Home Society*, 119 Ky. 235, 83 S. W. 605, 26 Ky. Law Rep. 1133, 67 L. R. 815; *Bullock vs. Billheimer*, 175 Ind. 428, 94 N. E. 763.

The Kentucky Court of Appeals in the *Hager* case, *supra*, clearly summarizes the view taken by these authorities, in saying:

"These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. The limitation put upon the State government by the people is as to what things it may collect taxes from them for, to which it may apply their property through taxation; not upon the means by which or through which it will do it. It may well and wisely be left to the legislature to say how it will dispense the state's charities."

Seemingly, the Missouri Supreme Court is, in spirit, in accord with the authorities above cited. The view of that honorable court should receive our especial attention, in view of the fact that the Missouri Constitution contains a provision very similar to Section 51 of Article III of our own Constitution. The 46th section of Article IV of the Constitution of Missouri reads as follows:

"The general assembly shall have no power to make any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The general assembly of the State of Missouri in 1893, made an appropriation "for the support of the indigent insane in the insane asylum of the City of St. Louis, who belong to the State outside of the City of St. Louis" in the sum of fifty thousand dollars. The insane asylum was owned and operated by the city, and the state auditor refused to draw his warrant in favor of the asylum, contending that the appropriation was unconstitutional. In *State ex rel. City of St. Louis vs. Seibert*, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624, a divided court sustained the validity of the act, saying:

"If the appropriation complained of had been made for the support of the insane asylum of St. Louis, there could be no doubt of its unconstitutionality. \* \* \*"

"The appropriation is for the indigent insane of the state outside the City of St. Louis, and not for the institution. There is no prohibition here, unless the state has no power to dispense its public charity through the agency of a private institution. There is no constitutional inhibition against it doing so. \* \* \* There is no provision that all charity shall be dispensed through state institutions. \* \* \* But a private corporation or individual may be the recipient of the funds of taxation, provided that the use be a public one."

On the other hand, a number of jurisdictions have construed prohibitions against appropriations of public money to individuals, associations and corporations as prohibiting appropriations to any of the enumerated classes upon any use, public or private. *Speer vs. School Directors of Blairsville*, 14 Wright, 150; *Wilkesbarre City Hospital vs. County of Luzerne*, 84 Pa. St. 55; *Washingtonian Home*

of *Chicago vs. City of Chicago*, 157 Ill. 414, 29 L. R. A. 798; *Mich. Corn Improvement Ass'n. vs. Auditor General*, 150 Mich. 69, 113 N. W. 582; *Detroit Museum of Art vs. Engel*, 187 Mich. 432, 153, N. W. 700; *State ex rel. Orr vs. City of New Orleans*, 50 La. Ann. 880, 24 So. 666; *Johns vs. Wadsworth*, 80 Wash. 352, 141 Pac. 892.

The 7th section of Article IX of the Constitution of Pennsylvania, 1874, declared that "The general assembly shall not authorize any county, city, borough, township or incorporated district \* \* \* to obtain or appropriate money for or loan its credit to any corporation, association, institution or individual." In speaking of the above-quoted constitutional restriction, the Supreme Court of Pennsylvania, in *Speer vs. School Directors*, supra, said.

"The purpose was to prevent the money of the people from passing into the control of private irresponsible associations of parties, and from being squandered in undertakings of doubtful propriety, or being liable to be lost through the want of integrity of those engaged in its disbursement. It intended to confine the municipal expenditures not only to public objects, but to public officers or agents under their direct responsibility to the municipality."

The position taken by the court in the *Speer* case, was re-affirmed in *Wilkesbarne City Hospital vs. County of Luzerene*, supra.

In *Johns vs. Wadsworth*, supra, the court had under consideration the constitutionality of an act authorizing counties of the state to grant money to agricultural fair associations to enable such associations to promote agricultural exhibitions, etc.

Article VIII, Section 7, of the Constitution of Washington reads:

"No county, city, town or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

The Supreme Court of Washington, holding the act invalid, said in the course of its opinion:

"The section of the Constitution last quoted in most express terms prohibits a county from giving any money, property, or credit to, or in aid of, any corporation, except for the necessary support of the poor and infirm. If the framers of the Constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words. That agricultural fairs serve a good purpose is not questioned, but the constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation, subject to the exception noted. \* \* \*

"Here the appropriation is to a private corporation organized for a worthy purpose, educational in its nature. There is no room, however, for construction. Unless plain, simple, direct words have lost their meaning, the Legislature was without power to authorize the gift."

An examination of the cases above cited discloses that there is a conflict of judicial opinion upon the question whether a constitutional provision prohibiting a "grant" or "donation" of public money to individuals, associations or corporations, prohibits appropriations to

private persons or corporations where the money is appropriated for and is to be used for a purpose public in its nature. In determining whether the framers of the Constitution intended that Section 51 have the one meaning or the other, let us examine the language of that section in reference to other provisions of the Constitution.

If Section 51 of our Constitution prohibits appropriations or grants of public money to individuals, associations or corporations only where the appropriation is for private or individual purposes, it is superfluous, since Section 6 of Article XVI denies to the legislature the power to make an appropriation for private or individual purposes. Evidently, the framers of the document intended that the former section should have some meaning other than that expressed in unmistakable terms in Section 6, Article XVI.

Further, we think that another provision of the Constitution clearly shows what was meant by the exception from the powers of the legislature the power to "grant" public money to individuals, associations or corporations. Section 52, Article III of the Constitution of Texas, as amended in 1904, reads as follows:

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or 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 a 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 limits 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) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

We think that there is no doubt that the improvement of rivers, creeks and streams to prevent overflows, the construction and maintenance of reservoirs, etc., for the purposes of irrigation, drainage and navigation, and the construction of improved roads and turnpikes, are public purposes for which state governments and their local subdivisions, in absence of constitutional restriction, can expend public funds however raised. The scope of the exception proves the breadth of the rule. The constitution having prohibited the legislature from authorizing counties and other political subdivisions of

the state from granting public money and from lending public credit to any individual, association or corporation, yet excepting certain *public* purposes for which the legislature may authorize counties, cities and political corporations to issue bonds or otherwise lend their credit, it follows that public purposes not enumerated in the exception are included within the rule prohibiting the granting of public money or credit to private associations or parties. The legislature would, therefore, be powerless to authorize political subdivisions of the State to grant public money or to lend public credit to private persons, natural or artificial, except where expressly authorized to do so by the Constitution itself, even in the achievement of a public purpose.

The framers of the Constitution have couched the exception to the power of the legislature to "grant" public money to private persons in the same language that they used in excepting from its powers the power to authorize political subdivisions of the state to grant public money or public credit to private persons. We know of no better rule to follow in construing constitutional provisions, than to assume that where a word or phrase is used more than once in the same document, it is intended that the word or phrase has a uniform meaning. The constitutional provision excepting from the powers of the legislature the power to authorize political subdivisions of the State to appropriate public money to private persons even to be used for or in aid of public purposes or objects, by prohibiting the authorization of cities, counties, etc., to "grant" public money to private persons except for certain enumerated public purposes, it follows that the constitutional provision, denying to the legislature the power to grant public money to private persons, prohibits appropriations to those persons even though the money is to be expended by them for or in aid of a public purpose provided of course that the legislature may make such appropriation where it is specifically authorized to do so by the Constitution.

To paraphrase the language of the Supreme Court of Pennsylvania, we think it was the purpose of the people in incorporating Section 51 of Article III in the Constitution, to prevent the money of the people from passing into the control of private irresponsible associations or parties—to confine public expenditures not only to public objects, but to public officers or agents directly responsible to the sovereign, except in those instances in which the Constitution expressly authorized grants or appropriations to private persons or corporations. In other words, it is our opinion that the legislature is prohibited from turning public money over to individuals having no official connection with the State, even if the money is to be expended by them in aid of or for a public purpose.

We think that the case, *City of Aransas Pass vs. Keeling*, 112 Tex. 339, 247 S. W. 818, in no way conflicts with the conclusions reached in this opinion. In that case it was held that Section 51 of Article III did not prohibit the legislature from using cities or counties as agents for the disbursement of public money in the performance of duties resting on the State at large. When the officers of a county or a city act in the performance of a governmental function, they

act not for the city or county, but for the State itself—they are in such instances public officers acting as the agents of the sovereign. *City of Galveston vs. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

Further, we think that the Keeling case is distinguishable from the question under consideration in that it was held in the case that the legislature was expressly authorized under Section 8 of Article XI of the Constitution to donate public money to the counties and cities of the Gulf Coast in the construction of sea walls, breakwaters, etc.

It is our opinion, therefore, and you are advised, that the provision in Section 14, Chapter 107, *supra*, which requires the board to turn over to the State Pharmaceutical Association certain portions of the annual fees collected, is invalid and void under Section 51 of Article III of the Constitution of Texas.

Yours very truly,

GAYNOR KENDALL,  
Assistant Attorney General.

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Op. No. 2912.

COMMISSIONERS' COURT—JURISDICTION—ARTICLES 7346, 7347 AND  
7350, R. C. S., 1925.

1. Where an assessment of properties for 1930 was considered by the Board of Equalization and the values of some of the real estate therein were increased by the court, the assessment approved and entered regularly on the rolls of the tax assessor, and the Board had adjourned, said assessment being protested by the owner of the property at the time, and afterwards, upon the application of the taxpayer, the commissioners' court of the county, in the following year, under Article 7346 of the statute, had the right to inquire into said assessment and hear evidence on the same, and if it found said assessment invalid, it had the right and authority to set such assessment aside and cause said property to be re-assessed and placed on the roll at the re-assessed valuation, to the end that the taxes thereon might be collected.

OFFICES OF THE ATTORNEY GENERAL.  
AUSTIN, TEXAS, February 13, 1933.

*Honorable Geo. H. Sheppard, State Comptroller, Public Accounts,  
Austin, Texas.*

*Attention: Mr. J. W. Stewart*

In Re: Assessment of Mound Company on real property,  
1930, re-assessed by order of Commissioners' Court  
in 1931.

DEAR SIR: We have your letters relating to the above matter, and a reply, for various reasons, has been postponed until this time. The questions presented are novel and difficult and have received much serious consideration by the writer.

Your letter containing the questions you propound, together with your statement of the facts, is as follows:

I am herewith submitting to you a question, or questions, for an opinion from your department which I consider of very grave importance, as there are several questions involved:

In the year 1930 the Freeport Sulphur Company rendered to the Tax Assessor of Brazoria County, in the name of the Mound Company, the real estate owned by this company for three million and some odd dollars. The Commissioners' Court, sitting as a Board of Equalization, raised the valuation of the property to something over ten million dollars. The court adjourned as a Board of Equalization and the tax rolls of that county for the year 1930 were made up with the property of the Mound Company carrying something over ten million dollars in valuation. The rolls were duly approved by the Commissioners' Court and the Assessor collected his fees for assessing this county on the valuations shown on the rolls of the county including the ten million and odd dollars of the Mound Company.

"In July of 1931 the Commissioners' Court cancelled the assessment of the Mound Company but did not state in any of the orders the reason for such cancellation. They ordered the Assessor to re-assess the property of the Mound Company for the year 1930, which he did, and they proceeded to equalize the values placed on this assessment by the Assessor by fixing the value at \$6,281,160.00 and ordered the Tax Collector to accept payment of the taxes on this \$6,281,160.00, which he did.

"This supplemental roll, which constitutes the assessment of the Mound Company as re-assessed by order of the Commissioners' Court, was filed with this department, and also the Collector's report forwarding the State taxes on the valuation fixed in this supplemental assessment.

"This department has always required where there were cancellations of taxes on lands that the reason be given for such cancellations before the department felt that it was justified in approving the cancellation. The County Judge and Commissioners' Court of Brazoria County refused to give a reason for the cancellation of the assessment of the Mound Company for the year 1930.

"The Comptroller's Department is charged with the duty of accepting or rejecting the cancellation on this property, and also with the acceptance and approval or the rejection of the supplemental assessment of this property as submitted in this supplemental roll.

"If we accept and approve this supplemental tax roll then under the statute that the court claims to be acting the Assessor would be entitled to the same fees for making the assessments on this supplemental roll as he would be for making the regular assessments of his county, and to allow these fees would mean that the Tax Assessor of Brazoria County had received fees twice for assessing the same property.

"Now, the question on which I desire an opinion from your department are as follows:

"First: Had the Commissioners' Court of Brazoria County the authority to cancel the assessment of the Mound Company without giving a reason for such cancellation after they had adjourned as a Board of Equalization for the year 1930?

"Second: Would the Comptroller's Department be justified in accepting and approving the cancellation of the assessment of this property for the year 1930 and the accepting and approving of the supplemental tax roll made up on the order of the Commissioners' Court under a re-assessment of this property for the year 1930; and if so, would the department be justified in paying to the Tax Assessor the fees for making this re-assessment as provided for under this Chapter under which the Court claimed to have acted in making this cancellation and re-assessment?

"Third: The Tax Collector, in accepting payment of the taxes on this supplemental tax roll and on the property of the Freeport Sulphur Company, charged interest from the date on which the property would become delinquent up to the time of payment. Did he act within his rights in making a charge of interest for the period specified?"



Accompanying your letter is a copy of the original rendition of said Mound Company of its property in 1930, showing the rendition of something more than 3,000 acres of land owned by it and situated in Brazoria County, consisting of twenty-one separate tracts, each tract being valued separately and the total rendition amounting to \$3,715,820.00, as rendered by the company.

The record also shows that the board of equalization increased the valuation on four of said tracts, thereby increasing the total rendition to \$10,781,160.00. The record further shows that said Mound Company was represented by counsel at the hearing of said matter by the board of equalization.

The increased valuations of said property were entered upon the rolls of the tax assessor. Later, said Mound Company tendered to the tax assessor the amount of its taxes, computed on the valuation of said property, as given in the company's rendition, which tender was refused.

Said Mound Company made application to the Commissioners' Court of Brazoria County in the first part of July, 1931, asking said Commissioners' Court to cancel the 1930 assessment of its real property, claiming said assessment to be "invalid and of no force or effect because, among other reasons, said commissioners' court, sitting as a board of equalization in 1930:

"(a) Failed to give to the taxpayer the necessary statutory notice of its intention to increase such valuation; and otherwise failed to comply with the statute in organizing and acting as a board of equalization;

"(b) Had not complied with the various statutory requirements in order to secure jurisdiction and authority to increase the value of the taxpayer's property;

"(c) Adopted a fundamentally wrong principle and method of valuing the property of the taxpayer; and

"(d) Excluded all testimony offered by the taxpayer showing discrimination against such taxpayer, especially testimony showing that the percentage of value said court had announced it proposed to place on the taxpayer's property was not used by the tax assessor and said court in valuing other properties in Brazoria County."

This application was heard by said commissioners' court on the 10th day of July, 1931, and was sustained, and the judgment of the court was entered of record and ordered said properties to be reassessed for the year 1930 and ordered the county judge to prepare a list of same in triplicate, said judgment containing the following recital:

"And the Court having heard evidence, and having considered the evidence introduced at the hearing held before this Court, sitting as a Board of Equalization during the year 1930, concerning the valuations to be placed on the above described real estate for purposes of taxation, and having also considered the evidence introduced before this Court, sitting as a Board of Equalization during the year 1931, concerning the valuation to be placed on the above described real estate for purposes of taxation, and having considered other evidence, the Court is of the opinion and now finds that said assessment on said real estate for the year 1930 is invalid, and the same should be and is now by this Court ordered, adjudged and decreed to be invalid and cancelled, together with all proceedings had thereunder and/or in connection therewith by the Tax Assessor, the Tax Collector and/or other officials."

The minutes of said court further recite that on the same day, to-wit, on the 10th day of July, 1931, the Honorable J. T. Loggins, as County Judge of Brazoria County, in pursuance of the order above referred to, submitted to said court lists of said renditions in triplicate, containing full description of the properties described in said order, and said court ordered that the lists of properties so prepared and submitted to the court by the county judge be referred to the tax assessor of Brazoria County, who was directed to re-assess each item of said property, and all of the same, for the year of 1930 and to submit said assessment to the commissioners' court.

The minutes of said commissioners' court further show that in pursuance of said order, W. S. Sproles, Jr., Tax Assessor of Brazoria County, and the owners of said property, by their attorneys, appear before the said court, and that thereupon a hearing was had upon the valuation of said property as placed by the tax assessor and the minerals therein and thereunder for the year of 1930.

Said minutes further recite that the court heard evidence and fully considered the matter and was of the opinion that the valuations placed on said real estate in said rendition by said tax assessor (meaning the values placed by the assessor on his re-assessment of said properties) are excessive and unreasonable and that said valuations should be reduced to the sum of \$6,281,160.00, and judgment was rendered fixing that as the total valuation of said properties, a separate valuation being placed upon each separate tract of land.

The Court further ordered that the tax assessor cause the taxes to be computed and extended according to said values for the year 1930, and directing that a list of said properties, with the values as fixed by the court, be filed by the tax assessor with the tax collector of Brazoria County, and ordering said collector to accept payment of said 1930 taxes as computed and extended, as aforesaid, and to issue proper receipt therefor.

It appears that said Mound Company paid to the county tax collector, the State and county taxes for 1930 under and in accordance with said re-assessment of its properties; that said tax collector reported and remitted the State's portion of said taxes to the State Comptroller, covering the county taxes into the county treasury; that the State Comptroller refuses to accept said taxes on the ground that the commissioners' court had not authority to re-assess said property and reduce the valuation thereof in the manner pursued by it, but that said Mound Company is due and should pay the taxes on said property according to the valuation fixed by the board of equalization of said county in 1930.

This department is called upon for an opinion determining the issues which have been developed by the above facts.

Article 7206 provides for the commissioners' courts convening and sitting as a board of equalization and prescribes the powers and duties, among others being:

"to examine, equalize and correct assessments made by the assessor, and when so revised, equalized and corrected, to approve the same."

Article 7212, in regard to the exercise of said powers by the board of equalization, provides:

"Said court, after hearing the evidence, shall fix the value of such property in accordance with the evidence so introduced and as provided for in the preceding article; and their action in such case shall be final."

The decisions are uniform that the excessive valuation of property is not a sufficient ground to set aside the action of the Board, where the same is the result merely of a mistake of judgment. *Early vs. City of Waco*, 3 S. W. (2d) 131; *G. C. & S. F. Ry. Co. vs. State*, 9 S. W. (2d) 1051.

In 1891 the State Constitution was amended so as to give "appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law," Article 5, Sec. 8.

No method of appeal has been prescribed by the statute, and the district court exercises its jurisdiction to revise the action of commissioners' courts by original proceedings instituted by complaining taxpayers, or by claimed illegality on the part of the Board, asserted as the defense to a suit by the State to collect delinquent taxes.

In very many cases the district court has taken jurisdiction of complaints by taxpayers and judicially reviewed the valuation placed upon the property by the commissioners' court, acting as a board of equalization. A few of said cases are:

*Martin vs. Alexander*, 218 S. W. 653.

*Haverbeeken vs. Hale*, 109 Tex. 106.

*Dreuscow vs. Baker* (Com. Appeals), 299 S. W. 493.

*G. C. & S. F. Ry. Co. vs. State*, 9 S. W. (2d) 1051.

*Randals vs. State*, 15 S. W. (2d) 715.

The serious question is whether the Commissioners' Court of Brazoria County had the authority to revise the assessment of the Mound Company, as it did, or whether the complaining taxpayer would be required to go to the district court for relief.

In the case of *Clawson Lumber Co. vs. Jones*, 49 S. W. 909, the Court of Civil Appeals held:

"After the approval of the roll by the board of equalization, it had no further jurisdiction in the matter and the order of the commissioners' court, made February 21, 1898, reducing the assessment, was void for want of authority in the court to make the order.

"*Sayle's Civil Statutes*, 1897, Articles 5120, 5123, 5126, 5128; *Duck vs. Pealer*, *supra*."

It has been held that the action of the assessor and the commissioners' court on questions of valuation is *res adjudicata*. *State vs. Cotts' Estate* 149 S. W. 281; *Railway vs. Harrison*, 54 Tex. 119; *Clawson Lumber Co. vs. Jones*, 29 S. W. 909.

The above holdings are announced in cases in which it appears that the board of equalization proceeded legally and regularly, and the same do not militate against the proposition stated above, and supported by the cases cited, where a board of equalization acts illegally or fraudulently to the injury of a taxpayer, its action may be reviewed and revised by the district court.

The opinion in the above case of Clawson Lumber Company vs. Jones, was handed down in 1899, under the statutes then existing, that opinion was unquestionably sound, there being no act of the Legislature, or constitutional warrant, for the commissioners' court revise the action of the board of equalization by reducing assessed valuations, but subsequent to that opinion, statutes were enacted under which the Commissioners' Court of Brazoria County claimed to act and which purport to give or grant to commissioners' courts the right and authority to cancel invalid assessments and for properly re-assessing, just as was done in this case.

This authority, and the method of procedure, are set out in Articles 7346, 7347, 7348, and 7349, Revised Civil Statutes, 1925, said provisions having been enacted in 1925. Article 7346 is as follows:

"Whenever any commissioners court shall discover through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments on any real property for the years mentioned are invalid, or have been declared invalid for an reason by any district court in a suit to enforce the collection of taxes on said properties, they may, at any meeting of the court, order a list of such properties to be made in triplicate and fix a compensation therefor; the said list to show a complete description of such properties and for what years such properties were omitted from the tax rolls, or for what years the assessments are made to be invalid and should be canceled and re-assessed, or to have been declared invalid and thereby canceled by any district court in a suit to enforce the collection of taxes. No re-assessment of any property shall be held against any innocent purchaser of the same if the tax records of any county fail to show any assessment (for any year so re-assessed) by which said property can be identified and that the taxes are unpaid. The above exception, with the same limitations, shall also apply as to all past judgments of district courts canceling invalid assessments."

Attention is called to that part of Article 7346 which provides:

"Whenever any commissioners' court shall discover through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments of any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said property, they may, at any meeting of the court, order a list of such properties to be made in triplicate," etc., and proceed precisely as was done in this case.

It would appear that the commissioners' court has the right, under this and succeeding articles, to correct or remedy assessments that are invalid, regardless of what it is that renders them invalid, and that the article purports to give the commissioners' court authority to cancel an assessment on any ground of invalidity for which a district court may set aside or cancel an assessment.

We think this true because the term "invalid" is used in *pari materia*, in close connection and in stating the basis for any action by the commissioners' court, and also the basis of action by the district court in setting aside an assessment, so that if this law is constitutional; that is, if the Legislature had the power to confer this authority on the commissioners' court, it occurs to us that the action of the commissioners' court under consideration was legal.

In this connection attention is called to the dual capacity in which the commissioners' court may act:

1. As a court to attend to the business of the county in general; and
2. As a special tribunal, or body, when it acts as a board of equalization. When the members of the court convene as a board of equalization and discharge its duties by correcting and equalizing assessments and approving the assessment lists and then adjourns, it ceases to exist as such tribunal and is given no authority to revise its own action at a later date.

Article 7346, et seq., does not purport to give the board of equalization any authority, but the authority which it does confer is conferred upon the commissioners' court, and we desire next to consider the question as to whether or not the authority set forth above is such as can be conferred upon the commissioners' court.

Section 1 of Article 5 of the State Constitution provides, in part, as follows:

"The judicial power of this State shall be vested in one supreme court, in courts of civil appeals, in a court of criminal appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be provided by law."

It will thus be seen that commissioners' courts are created and made the receptacle of judicial power by the Constitution. The jurisdiction of said court is defined in the latter part of Section 18 of said Article 5 in the following words:

"The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, and shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

We believe that the Constitution does not undertake to vest the commissioners' court with jurisdiction of any particular matters, but authorizes said court to exercise whatever power and jurisdiction the Legislature may confer upon it; provided, we think, the same is limited to "county business." Said courts are held to be courts of limited jurisdiction in that they have no authority except such as is expressly or impliedly conferred. *Von Roesenberg vs. Lovett*, 173 S. W. 508; *Miller vs. Brown*, 216 S. W. 452.

It is also held that commissioners' courts are courts of general jurisdiction in the sphere of the power conferred on them. *Bradford vs. Mosley* (Com. Appeals) 223 S. W. 171, reversing judgment of Court of Civil Appeals, same case, 190 S. W. 824.

This means, among other things, that their judgments import verity and are not subject to collateral attack.

We think that grounds for invoking the jurisdiction of the commissioners' court, stated in subdivisions (c) and (d) of the application of the Mound Company, unquestionably state grounds which, if true, would render the 1930 assessment void. The judgment of the court rendered upon such hearing recites that it heard evidence on said application and considered the same, and, while it does not set

forth the court's findings of fact, same does recite that, from the evidence heard and considered, the court was of the opinion that the 1930 assessment was invalid and should be set aside and the property re-assessed, and upon such conclusion the court rendered its judgment accordingly. As to the conclusiveness of that judgment, we cite the following from 11 Texas Jurisprudence, under the title "Counties," paragraph 37:

"Commissioners' courts are courts of general jurisdiction when acting within the sphere of the powers and duties conferred upon them, and the judgments of these courts are entitled to the same consideration as those of other constitutional courts. Their judgments may not be collaterally attacked."

While the Constitution gives the district court general supervision of the commissioners' court, when the commissioners' court makes an order or enters a judgment in the exercise of its judicial discretion, the same is conclusive and will not be controlled or reviewed even by the district court, unless proof is made of a clear abuse of discretion or of collusion or fraud. *Polk vs. Roebuck*, 184 S. W. 513; *Hill County vs. Sauls*, 134 S. W. 267.

It is true that the jurisdiction of commissioners' courts is limited to strictly "county business," and the Legislature has no authority to enlarge their powers or jurisdiction. *Sunvapor Electric Light Co. vs. Keenan*, 88 Tex. 197; 30 S. W. 868.

Any attempt to confer upon the court jurisdiction of a matter which is not "county business" is void. *Id. Rankin vs. McCallum* 60 S. W. 975.

The term "county business" should be given a broad and liberal construction, so as not to defeat the purposes of the law.

We are of the opinion that the matter of examining, investigating and considering an assessment of taxes, and determining whether the same is ivalid or not; and, if found to be invalid, to do the things as authorized by law to have property covered thereby re-assessed in such manner as that the taxes thereon may be collected,—all pertains to "county business." It would seem that it is as much "county business" to examine into, ascertain and determine an assessment to be invalid and to have the same re-assessed in a valid manner, as it is to inspect tax renditions, hear evidence thereon, and determine and equalize the valuations, which matters are unquestionably county business and properly intrusted to the commissioners' court, acting as a board of equalization.

Article 7350, Revised Civil Statutes, 1925, authorizing the commissioners' court to reduce the assessment in cases of delinquent taxes of unrendered and unknown property, when such valuation is excessive and unreasonable, is an entirely differet provision from the ones under consideration. This latter relates only to delinquent taxes of unrendered and unknown property.

Article 7346 seems to relate only to property that had been previously assessed, but in such manner, or for some reason, the assessment is invalid. We think both relate to "county business" and the powers and duties prescribed therein have been properly delegatd to the commissioners' court.

In the opinion of this department, the jurisdiction delegated to the commissioners' court under Article 7345 and 7347 constitutes a legal and valid delegation of power and that the action of the Commissioners' Court of Brazoria County, as detailed in the statement of the facts of this case, being in strict accordance with the direction of said statutes, is in all things valid and binding.

We therefore advise, in direct answer to your question, that the commissioners' court had the authority to cancel the 1930 assessment of the Mound Company without stating the evidence or reason upon which such action is based. The Comptroller's Department would be justified in accepting and approving the cancellation of the assessment of this property for the year of 1930 and in accepting and approving the supplemental tax roll made up on the order of the commissioners' court under a re-assessment of this property.

It appearing that the tax collector had received his commissions for assessing the property at an excessive valuation of 1930, and that such assessment had been set aside and the same property re-assessed for the same year, we submit that he would not be entitled to commissions on this re-assessment. Whether or not the collector was authorized to charge and receive interest on the supplemental tax roll from the time the property under the old assessment would have become delinquent, the taxpayer having voluntarily paid the same, the interest should be retained and treated as if legally collected.

Yours very truly,

F. O. MCKINSEY,  
Assistant Attorney General.