

No. 2991

ORGANIZATION OF INSURANCE COMPANIES—DIVISION OF CAPITAL
STOCK INTO VOTING AND NON-VOTING CLASSES

1. The omission of a significant word or provision from a re-enactment indicates an intention to exclude the object theretofore accomplished by the words omitted.
2. Apparent inaccuracies and mistakes in the mere verbiage or phraseology will be overlooked to give effect to the spirit of the law.
3. The caption or marginal note appearing in a code as adopted by the legislature is to be regarded as a part of the article to which it relates.
4. Capital stock domestic fire insurance companies may not divide capital structure into classes of stock, part of which are composed of voting shares and part of non-voting shares.
5. The holder of each share of domestic capital stock fire insurance companies is entitled to vote each share of stock that he holds at all stockholders' meetings.
6. This decision is not in conflict with the case of *St. Regis Candies vs. Hovas*, 3 S. W. (2) 430, which treats with ordinary corporations only.

Austin, Texas
September 17, 1936

Honorable R. L. Daniel Chairman, Board of Insurance Commissioners, Austin Texas.

DEAR SIR: Your communication of August 3 has been referred to the writers for consideration. We have concluded that, due to the importance of your inquiry, a conference opinion should be rendered. Your letter reads in part as follows:

"There has been presented to this Department the Articles of Incorporation and other information relative to the incorporation of a capital stock fire insurance company. It is the intent of the organizers to provide for a fully paid capital stock of not less than \$100,000. It is their desire, however, to divide the stock into Common and Preferred, the Common stock to retain the entire voting power conferred by the stock. The Preferred stock in question will be non-voting.

"You are requested to advise this Department whether or not in your opinion such a division of stock would be permissible under the laws of this State."

We think the best solution to your problem can be obtained by briefly reviewing the history of applicable general corporation and insurance legislation, and court decisions. Accordingly, we direct your attention to Chapter 108, beginning at page 192 and ending at page 215 of the General Laws of Texas, Regular, First and Second Called Sessions of the Legislature, 1909. The portion of this Act to which we direct your attention is found at page 194, about the center of such page, as follows:

"At all meetings of the stockholders, each stockholder shall be entitled to one vote for each share of stock fully paid up appearing in his name on the books of the company, which vote may be given in person or by written proxy."

This is an Act providing primarily for the incorporation of life, accident and health insurance companies and defining the same, and is now found as a part of Article 4718, R. C. S. 1925. In connection with this provision, we refer you to a letter addressed to Honorable R. L. Daniel, Chairman of the Board of Insurance Commissioners, by W. W. Heath, of this Department, under date of May 4, 1935, in which it was held under this provision that no stock in such company could be issued without voting privileges. We find, however, provision on page 210, Section 55 of said Original Act of 1909, as follows:

"All the provisions of the laws of this State applicable to *life*, fire, marine, inland, lightning or tornado insurance companies, shall, so far as the same are applicable, govern and apply to *all companies* transacting *any other kind of insurance* business in this State, so far as they are not in conflict with provisions of law made specially applicable thereto." (Italics ours).

We have briefly reviewed the title on insurance of the Revised Civil Statutes of 1925, but in our rather casual examination of same we have failed to find incorporated therein Section 55, as hereinabove quoted. This becomes immaterial to the question here presented, in view of Article 4710 of the 1925 Codification as hereinafter set forth.

In the case of *St. Regis Candies, Inc., et al vs. Hovas, et al*, 3 S. W. (2d) 432, in an opinion by the Supreme Court Commission of Appeals adopted by the Supreme Court, the question of the power of a private Texas corporation to divide its shares of stock into two classes, one class to have voting privileges, and the other class to be without voting privileges, is fully discussed. The following language is used by the Court:

"Authorized increase or decrease of 'authorized capital stock' may be secured by action of the directors based upon 'a two-thirds vote of all its stock' in the one case, or 'a two-thirds vote of all its outstanding stock' in the other, Articles 1330, 1332. Voluntary dissolution may be had 'where four-fifths in interest of all stock outstanding shall vote' therefor 'at a stockholders' meeting,' or 'when, without a stockholders' meeting, all the stockholders . . . consent in writing,' Article 1387. In respect to action taken or proposed under these provisions (i.e., articles 1330, 1332, and 1387) and action taken or proposed in respect to other fundamental alterations of the corporate purpose, structure, and properties, and for instant purposes, two assumptions are indulged in favor of the holders of class B stock, so-called: (a) Every stockholder is entitled to vote; and (b) those owners are 'stockholders.'

"We have generally reviewed the constitutional and statutory provisions mentioned above for the purpose of indicating that no expressed declaration of voting right in a stockholder exists, save in the exceptional instances last mentioned and on the assumptions there made. If the right exists in virtue of law it rests in implication. The fact that the Legislature, in execution of

the command given, made specific provision for voting rights in what we have called the exceptional situations and omitted provision therefor in other cases is not without cogency. With the exact subject of voting rights present in the minds of the law makers, a specific enactment for named conditions and silence in respect to other conditions would seem to indicate a purposed omission in deference to liberty of contract.

"There are other situations of like import: (a) The general requirements of article 12 of the Constitution have reference to railroad and insurance corporations, as well as to corporations generally. But in executing the command the Legislature put railroad corporations into a class (title 112, arts. 6259-6534, R. S. 1925) and insurance corporations into another class (title 78, arts. 4679-5068, R. S. 1925).

"In article 6289 certain 'rules' are named to be controlling in the 'election of the board of directors' of a railroad corporation. Among the rules is this:

"Each stockholder shall have the right to vote . . . for the number of shares of stock owned by him for as many persons as there are directors to be elected.'

"The matter of 'by-laws' is the subject of article 6293, and it is there said that:

"The stockholders of the corporation shall be entitled to one vote for each share of stock held by them.'

"Comparable provisions are made for 'life, health, and accident insurance' corporations (article 4718), 'mutual assessment accident companies' (article 4789), 'mutual life insurance companies' (article 4801), and 'mutual insurance companies' (article 4868), and omitted in respect to various other classes of 'insurance companies,' etc.

"(b) By the terms of section 16, art. 16, Constitution, the Legislature is required to provide, by general laws, for the incorporation of 'bodies with banking and discounting privileges, for supervision, etc., and for adequate protection and security of depositors and creditors. Execution of the requirements has general evidence in title 16, R. S. 1925 (articles 342-548). Among other things, it is there provided (article 503) that:

"In the elections of directors, and in deciding all questions at meetings of shareholders . . . each shareholder shall be entitled to one vote on each share of stock held by him.'"

It is apparent from a reading of the above quotation that it is the opinion of the court that, except to the extent as provided for by the Legislature to the contrary, corporations may be created in Texas with two classes of stock, one with voting privileges, and the other without voting privileges. It is equally apparent from a careful study of said decision that the Legislature has the right to provide that all of the stock of a corporation shall have voting privileges. It, therefore, necessarily follows that since the Legislature has seen fit to make the special provision entitling each stockholder to one vote for each share of stock fully paid up carried in his name on the books of the life, accident and health company, organized under the provisions of Chapter 3, Title 78 of the Revised Civil Statutes, as set out in Article 4718, Revised Civil Statutes 1925, in the absence of some similar provisions with respect to other domestic in-

insurance companies, such other domestic insurance companies could be created with two classes of stock, one with voting privileges, and one without voting privileges, especially if Section 55 of the Original Act of 1909, making the provision of the laws of this State, applicable to life companies, govern and apply to all companies transacting any other kind of insurance business in this State, has been repealed by omission from the 1925 Codification.

The question confronting us, therefore, narrows down to the proposition of whether or not there is any law on the statute books of our State providing that all stock in insurance companies in Texas, (either capital stock fire insurance companies, which you inquire about, or insurance companies generally), shall have voting powers.

Article 4708, Revised Civil Statutes, 1925, reads as follows:

"The affairs of any such company organized under the laws of this State shall be managed by not more than thirteen nor fewer than seven directors, all of whom shall be stockholders in the company. *Within thirty days after the subscription books of the company have been filed, a majority of the stockholders shall hold a meeting for the election of directors, each share entitling the holder thereof to one vote.* The directors then in office shall continue in office until their successors have been duly chosen and have accepted the trust. The annual meeting for the election of directors of any such company shall be held during January, as the by-laws of the company may direct." (Italics ours).

Clearly, this statute applies only to the election of directors.

Article 4710, Revised Civil Statutes, 1925, reads as follows:

"No meeting of stockholders shall elect directors or transact such other business of the company, unless there shall be present, in person or by *proxy, a majority in value of the stockholders equal to two-thirds of the stock of each company.*" (Italics ours).

This statute was brought forward from Vernon's Civil Statutes, 1914, (Revised Civil Statutes, 1911), Article 4718, unchanged except the omission of the words "at such meeting" after the word "present".

We must determine what is meant by the language in said Article 4710, "transact *such* other business of the company." If the codifiers in 1925 had not changed the language "unless there shall be present at such meeting" to "unless there shall be present", it would be obvious that "such other business of the company" would be limited to that transacted "at such meeting", referring back to the meeting held for the purpose of electing directors. It is to be considered that the codifiers and the Legislature in adopting the code intended to accomplish some purpose in dropping the language "at such meeting", or they would not have done so, and the only reasonable explanation to the mind of the writer hereof is that it was no longer intended to limit said Article 4710 to business transacted at meetings for the purpose of electing directors, but, on the con-

trary, intended that it apply to all meetings of stockholders for the purpose of electing directors, or transacting *any* other business of the company. The rule just stated is set forth in 39 Texas Jurisprudence on page 241 in the following language, and is supported by the Texas authorities there cited:

"In the construction of an act or provision that has been amended, re-enacted, or re-stated, the circumstance that the original statutory language has been modified . . . may be taken into consideration as an aid to the ascertainment of the legislative intent. . . . The omission of a significant word or provision from an amendment or re-enactment indicates a desire to change the effect or interpretation of the act, or an *intention to exclude the object theretofore accomplished by the words omitted.*" (Italics ours).

To say that the language "transact *such* other business of the company" was not intended by the Legislature to mean "transact *any* other business of the company" would be to make the language meaningless, and place a purposeless and useless interpretation upon the statute. Texas Jurisprudence, Volume 39, page 222, uses the following language:

"Thus it has been decided that a statute or provision should not be given a construction rendering it fruitless, futile, meaningless, purposeless, or useless, when the language can be otherwise construed." (See Texas cases cited thereunder).

A careful examination of the preceding statutes in Chapter 2 of Title 78 of the Revised Civil Statutes, wherein Article 4710 is found, reveals that the only business of the company set forth in such Chapter 2 for the stockholders to attend to is the election of directors, and, therefore if the word "such" is interpreted literally rather than as "any", that portion of the statute will be meaningless.

Corpus Juris, Volume 59, under the title "Statutes", Section 573, reads as follows:

"(3) Spirit or Letter. In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statutes, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradictions, or would defeat the plain purpose of the act, or where the provision was inserted through inadvertence. In following this rule, words may be modified or rejected and others substituted, or words and phrases may be transposed. So the meaning of general language may be restrained by the spirit or reason of the statute, and may be construed to admit implied exceptions. Apparent inaccuracies and mistakes in the mere verbiage or phraseology will be overlooked to give effect to the spirit of the law. However, to permit the

application of the principle under discussion, there must be something in the statute which makes it clear that the legislature did not intend that the letter of the statute was to prevail. When the law is free and clear from ambiguity, the letter of it is not to be disregarded on the pretext of pursuing its spirit."

We believe that it is obvious that said Article 4710 was intended to apply to all meetings of the stockholders in any Texas insurance corporation held for the purpose of electing directors, or transacting any other business. If that be true, then no meeting of stockholders shall transact any business of the company unless there shall be present in person or by proxy a majority in value of the stockholders equal to two-thirds of the stock of such company. Then the question to determine is whether or not such language prevents an insurance company from being created with two classes of capital stock, one class voting, and another class non-voting. The caption or heading of this statute in the 1925 Codification is "Quorum of stockholders". The word quorum as defined in Webster's Unabridged Dictionary is as follows:

"Such a number of officers or members of any body as is, when duly assembled, legally competent to transact business. The quorum of a body is an absolute majority of it, unless the authority by which the body was created fixes it at a different number."

The caption or marginal note appearing in a code as adopted by the legislature is to be regarded as a part of the article to which it relates. 39 Texas Jurisprudence, page 229; Robinson v. State, 11 Criminal Appeals, 309; R. C. L., page 1034.

If Article 4710 has for its purpose the defining of what is a quorum of stockholders of an insurance company, and such quorum is defined to be a majority in value of stockholders equal to two-thirds of the stock of such company, and such a quorum is that number of stockholders, as when duly assembled, is legally competent to transact business, it is obvious that it is intended by said Article 4710 to provide for voting power for all of the stock of such company.

It might be contended that the language "unless there shall be present, in person or by proxy, a majority in value of the stockholders equal to two-thirds of the stock of such company", merely requires the presence of such number of stockholders for the purpose of advancing their views to those entitled to vote under the provisions of the charter of the company, and does not of necessity grant voting privileges to such stockholders. We, believe, however, that the use of the word "quorum" of stockholders in the marginal note or title to said Article 4710, placed there by the codifiers, indicates that it was intended that the number of stockholders set forth in such article as being those necessary to be present in order to transact business implies that such stockholders have the usual powers of those necessary to make such a quorum of any body. For instance, there are certain territorial representatives in the Congress of the

United States who possess certain privileges and rights of members of Congress who do not have voting privileges, but they are not required to be present to transact business and are not taken into consideration in determining a quorum.

The position here taken is further supported by the use of the word "proxy" in the language "there shall be present, in person or by proxy." The word "proxy" is defined in Webster's Unabridged Dictionary as follows:

"The action or practice of voting; making promises, etc., by means of an authorized agent or substitute; agency, function, sometimes office, of a procurator or deputy; as to vote or appear by proxy; marriage by proxy.

"Authority or power to act for another, as in voting in a legislative or corporate capacity; specif., document or writing giving such authorization; as to send proxies for the directors' meeting."

If such stockholders must be present in person or by proxy under such definition of the word proxy, there is carried with it the intention and meaning that the person holding the proxy shall have the right to vote in the place of the absent stockholder.

It may be contended that such statute only requires the granting of the voting privilege to a majority in value of the stockholders equal to two-thirds of the stock of such company, but it will be noted that under the terms of such article, if a majority in value of stockholders equal to two-thirds of the stock of such company are present either in person or by proxy, they constitute a quorum authorized to transact business, and we believe that under said article if *any* majority in value of the stockholders equal to two-thirds of the stock of such company are present, that they constitute a quorum with voting powers, and, therefore, it necessarily follows that all of the capital stock of said company has voting powers.

It, therefore, is our conclusion that said article 4710 fixes the quorum of stockholders of any insurance company, unless there be a special provision to the contrary elsewhere, (and there is none in the case of domestic capital stock fire insurance companies), and gives to the stockholders of such companies the right to vote their stock; and, therefore, that no capital stock fire insurance company can be created in Texas with two classes of capital stock, one with voting privileges, and one without voting privileges. Since neither the charter nor the by-laws nor the Articles of Incorporation, can contain anything that is in conflict with legislative enactments (See 14 C. J., page 363), we respectfully advise that the division of such stock, as outlined in your letter, in our opinion, would be in conflict with our laws.

Yours very truly,
W. W. HEATH,
Assistant Attorney General
T. F. MORROW,
Assistant Attorney General

This opinion has been considered in conference, approved, and is now ordered recorded.

WM. MCCRAW,
Attorney General of Texas

No. 2992

SALARY BILL—COMMISSIONERS' COURT POWER TO
REDUCE SALARY OF COUNTY OFFICIAL—
MISTAKE OF LAW OR FACT.

Under the terms of Senate Bill No. 5, Acts Second Called Session, Forty-fourth Legislature, a Commissioners' Court is unauthorized to set, reduce or change the salary of any county official except at a regular meeting of the Commissioners' Court in January. It does not alter the situation because there is a mistake of fact or law in setting the salary of county officials. The Commissioners' Court may reduce, alter or change the salary of county officials at a regular meeting of said Court provided it does not reduce the salary so as to deny the officer the minimum allowed by law or to increase said salary so as to exceed the maximum provided by law.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 10, 1936.

Mr. L. P. Heard, County Auditor, Belton, Texas.

DEAR SIR: This will acknowledge receipt of your letter of inquiry under date of November 9, 1936, wherein you state that the Commissioners' Court of Bell County, at its first regular meeting in January, 1936, under the terms of Senate Bill No. 5, Acts Second Called Session, Forty-fourth Legislature, fixed the salary of the County Attorney of such county at the sum of \$2,589.50 to be paid in twelve (12) equal installments as provided in said Senate Bill No. 5. It appears from the statement of facts given in your letter that this salary was based upon the report of the County Attorney of fees earned by him in 1935 and included fees that were served out in jail in the amount of \$740.00. As a result of a misunderstanding which will appear hereafter, the Commissioners' Court of Bell County, Texas, is holding up the warrant of the County Attorney for the reason that he is receiving more salary than in the opinion of the Court he is entitled to receive under the law. It further appears that the Commissioners' Court, in setting the salary of the County Attorney, was laboring under a mistake of law in that they thought that fees discharged by laying out in jail should be considered as fees earned as compensation for the year 1935. It is admitted in the letter of inquiry that the salary of \$2,589.50 does not exceed the maximum allowable to said County Attorney under the law as it existed on August 24, 1935. After the above

statement of facts you desire to be advised upon the following two questions:

"(1) Can the Commissioners' Court at this time deduct the sum of \$754.00 from the salary of the County Attorney, that amount being the amount of fees served out in jail in 1935 by defendants charged in the various courts in Bell County, regardless of the fact that his salary for the year 1936 was fixed by the Court at \$2589.50 to be paid in 12 monthly installments?

"(2) Can the County Attorney be required to refund to the Officers' Salary Fund the amount of \$754.00, of fees served out in jail by defendants in 1935?"

As we understand this inquiry, it is not whether or not the Commissioners' Court may at its next regular meeting reduce the salary of the County Attorney but rather whether or not they have the power at any other meeting than the regular term to reduce the salary of the County Attorney. At any event, this is the first question to be decided by this Department.

In the opinion of the writer this question is entirely answered by the terms of Senate Bill No. 5. in the following provisions, Section 2 thereof providing as follows:

"In counties having a population of less than twenty thousand (20,000) inhabitants according to the last preceding Federal Census, it shall likewise be the duty of the Commissioners' Court, by its order duly made and entered of record at its first regular meeting in January of each calendar year, to determine whether county officers of such county (excluding county surveyors, registrars of vital statistics and notaries public) shall be compensated for the fiscal year on the basis of an annual salary or whether they shall be compensated on the basis of fees earned by them in the performance of their official duties, and it shall also be the duty of the county clerk to forward to the Comptroller of Public Accounts of the State of Texas, on or before the 31st day of January, a certified copy of said order of said Commissioners' Court."

Section 15 of said Act reads in part as follows:

"The Commissioners' Court in counties having a population of not less than twenty thousand (20,000) inhabitants, according to the last preceding Federal Census at the first regular meeting in January of each calendar year, may pass an order providing for compensation of all county and precinct officers on a salary basis. The Commissioners' Court in each of such counties is hereby authorized, and it shall be its duty, to fix the salaries of Criminal District Attorneys."

Section 13 reads in part as follows:

"The Commissioners' Court in counties having a population of twenty thousand (20,000) inhabitants or more, and less than one hundred and ninety thousand (190,000) inhabitants according to the last preceding Federal Census, is hereby authorized and it shall be its duty to fix the salaries of all the following named officers, to-wit: sheriff, assessor and collector of taxes, county taxes, county judge, county attorney, including criminal district at-

torneys and county attorneys who perform the duties of district attorneys, district clerk, county clerk, treasurer and animal inspector. Each of said officers shall be paid in money an annual salary in twelve (12) equal installments of not less than the total sum earned as compensation by him in his official capacity for the fiscal year 1935, and not more than the maximum amount allowed such officer under laws existing on August 24, 1935;"

A careful review of the above cited sections will reveal that the Commissioners' Court set the salary of all county officials who by their order are placed upon a salary basis at the first regular meeting in January of each calendar year. In view of these expressed sections the Commissioners' Court would not have authority to set the salary of any county official in any other than the regular term.

Under a recent conference opinion this Department has held that a County Attorney is entitled to no fee in a misdemeanor case where a defendant discharges his fine and cost by going to jail. Section 13 of Senate Bill No. 5, supra, in authorizing the various Commissioners' Court to set the salary of county officials placed the following limitation upon the discretion of the Commissioners' Court as follows:

"Each of said officers (referring to county officials who have been placed upon a salary basis) shall be paid in money an annual salary in twelve equal installments of not less than the total sum earned as compensation by him in his official capacity for the fiscal year 1935, and not more than the maximum amount allowed each officer under laws existing on August 24, 1935;"

Under Article 3883 as amended, Acts of Forty-fourth Legislature, Regular Session, Section 3, the maximum that could be paid a county attorney as of August 24, 1935, in a county within the population brackets of Bell County, is \$3500.00. It has been determined that a Commissioners' Court may not reduce or alter the salary of a county official except at a regular meeting of the Commissioners' Court in January. It now remains to be seen whether or not in view of the fact that there existed a mistake of fact and law, the situation is altered so as to allow the Commissioners' Court to make a change under these circumstances. It is conceded that the Commissioners' Court of Bell County set the salary of the county attorney somewhere between the minimum, which is the amount earned as compensation and the maximum as provided by law. The mistake of fact or law did not cause the salary of the official to exceed the maximum provided by the law as it existed on August 24, 1935. In other words, there can be no question that if there had not been a mistake that the Commissioners' Court would have had ample authority to set the salary of the official as they did. In a recent letter opinion written by the Honorable J. H. Broadhurst, Assistant Attorney General, and in passing upon this identical situation, it was held that the original action of the Commissioners' Court at the regular meeting in January was conclusive and binding and said Court did not have the power at the pres-

ent time, even in view of the fact that they were laboring under a mistake of fact and law, to reduce the salary of the county attorney. To substantiate that opinion the writer of the same referred to the case of Jeff Davis County vs. Davis, et al, 192 S. W. 291, a case which is strikingly analogous to the present situation. That part of the opinion of the Court adopted in that opinion and which we feel should be quoted here is to the following effect:

"That said court in approving, allowing and ordering said claims paid out of the funds of Jeff Davis county acted in good faith, but under a mistake of fact, and without a knowledge of the law, and said claims being such the payment of which plaintiff was not in law bound, their acts in approving, allowing and ordering them paid out of the funds of the county as well as the payment thereof are unauthorized, without the warrant of law and unlawful."

"These allegations, in a few words, present the sum and substance of appellant's contention respecting the guard hire items, viz: That the orders of the Commissioners' Court allowing same should be nullified because the court acted under a mistake of fact and without a knowledge of the law and therefore the orders were unauthorized and unlawful. The majority is of the opinion that such position is wholly unsound; that the judgment of a court cannot be collaterally impeached merely because it was based upon a mistake of fact and without a correct knowledge of the law."

This Court decision as well as other authorities herein cited, in the opinion of this Department, is conclusive of the question submitted and you are therefore advised that the Commissioners' Court of Bell County does not have authority at this time or any other time other than the regular term of said Court in January to change their orders so as to reduce the salary of the County Attorneys. Of course, the Commissioners' Court at its next regular meeting may at that time reduce the salary of the County Attorney to an amount not less than that actually earned by said official as compensation for the year 1935. We merely wish to hold that in setting the salary of the County Attorney at the first regular meeting in January 1936 that the order of said Court in that respect is conclusive and binding until set aside at a regular meeting of the Commissioners' Court in January and in strict compliance with the terms of Senate Bill No. 5, supra.

Answering the above as we have disposed of the necessity of answering your question number two.

Very truly yours,
JOE J. ALSUP,
Assistant Attorney General.

This opinion has been considered in conference and is hereby ordered approved.

WILLIAM McCRAW,
Attorney General of Texas.

No. 2993

COMMERCE—INTERSTATE IMPORTATION AND SALE OF
NATURAL GAS—TAXATION

1. Interstate importation of natural gas by corporation partly through its own pipe lines and partly through those of affiliated corporation transporting same for hire, and first sale within the State at wholesale to local distributing company for resale to consumers, constitute interstate commerce not subject to gross receipts tax levied by State.
2. Sale of interstate gas by importer, not to distributing company, but direct to consumer either through rural or urban domestic, commercial or industrial taps, constitutes intrastate commerce, the gross proceeds of which are subject to the tax levied by Article 6060.
3. The transportation of natural gas for hire between points, and by pipe lines, wholly within the State of Texas, even though imported from another State, constitutes intrastate commerce, the gross proceeds of which are subject to the tax levied by Article 6060.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 16, 1936.

*Hon. Olin Culberson, Director, Gas Utilities Division, Railroad
Commission of Texas, Austin, Texas.*

DEAR SIR: This acknowledges receipt of your inquiry of October 30, 1936, from which the following facts are deducible:

The El Paso Natural Gas Company owns and operates a natural gas pipe line extending from the source of supply at Jal, New Mexico, to the east city limits of the City of El Paso, Texas. It also owns and operates a natural gas pipe line extending from the west city limits of El Paso in a westerly direction into the States of New Mexico and Arizona. It has no pipelines within the City of El Paso, and no franchise to conduct a business in the City of El Paso.

El Paso Gas Transportation Corporation (formerly El Paso Gas Utilities Corporation) owns and operates a pipe line within the city limits of El Paso connecting with the aforesaid interstate pipe line of the El Paso Natural Gas Company at the east city limits of El Paso, and extending through and across the City of El Paso to the west city limits where it connects with the afore-mentioned western unit of the El Paso Natural Gas Company's pipe lines. The El Paso Natural Gas Company owns and controls the El Paso Gas Transportation Company through 100% stock ownership and common or interlocking directorates and officials.

The Texas Cities Gas Company, which is not affiliated in any way with either of the above-mentioned companies, owns and operates the local gas distribution system within the City of El Paso which serves domestic, commercial and certain industrial consumers within that City. Texas Cities Gas Company pur-

chases its gas requirements in El Paso from the El Paso Natural Gas Company, and is supplied through the latter's interstate line from the Jal, New Mexico, field and through the connecting line of El Paso Gas Transportation Corporation aforesaid. The measuring station at which the gas so sold is delivered to Texas Cities Gas Company is located within the corporate limits of El Paso, approximately three miles west of the east city limit, and on the above mentioned connecting line of El Paso Gas Transportation Corporation. The El Paso Natural Gas Company pays a stipulated rate per one thousand cubic feet to its subsidiary, El Paso Gas Transportation Corporation, to transport its interstate imports of gas from the east city limits of El Paso to the city gate or measuring station at which the gas is delivered to the Texas Cities Gas Company; and also to transport the remaining volume of such interstate gas from the east city limits to certain industrial taps within the city limits where the same is sold to industrial users by the El Paso Natural Gas Company, but delivered to them for the El Paso Natural Gas Company by El Paso Gas Transportation Corporation; also the remaining volume of such interstate gas is transported by El Paso Gas Transportation Corporation to the west city limit of El Paso and there delivered to the western section of the El Paso Natural Gas Company's transportation lines above mentioned, from which point the latter transports a portion into New Mexico and Arizona, but makes sales and deliveries therefrom to industrial users within the State of Texas at points west of El Paso.

The pressure in the El Paso Natural Gas Company's line from Jal, New Mexico, to the east city limit of El Paso averages about 360 pounds per square inch, while the pressure average within and west of the El Paso city limit is reduced to about 50 pounds per square inch.

The questions you propounded are as follows:

"1. Are the above operations, both within and west of the City of El Paso, intrastate operations and if held so, are they subject to the tax levied under amended Article 6060, Revised Civil Statutes of Texas?

"2. If held subject to said tax, to arrive at the amount of tax, should the price paid for said gas be considered or the amount received for the transportation of said gas?"

We have considered carefully all of the authorities cited and quoted from in your letter of inquiry. The cases upon which we have principally based the conclusions which we shall state hereinafter, however, are as follows:

Public Utilities Commission of Kans. vs. Landon, 249 U. S. 236, 63 L. Ed. 577. (1919)

Pennsylvania Gas Co. vs. Public Service Commission of New York, 252 U. S. 23, 64 L. Ed. 434. (1920)

Missouri ex rel Barrett vs. Kansas Natural Gas Co., 265 U. S. 298, 68 L. Ed. 1027. (1924)

People's Natural Gas Co. vs. Public Service Commission of Pa., 270 U. S. 550, 70 L. Ed. 726. (1926)

East Ohio Gas Company vs. Tax Commission of Ohio, 283 U. S. 465, 75 L. Ed. 1171. (1931)

State Tax Commission of Mississippi vs. Interstate Natural Gas Company, 284 U. S. 41, 76 L. Ed. 156. (1931)

Western Distributing Co. vs. Public Service Commission of Kansas, 385 U. S. 119, 76 L. Ed. 655. (1932)

State Corporation Commission of Kans. vs. Wichita Gas Co., 290 U. S. 561, 78 L. Ed. 500. (1934)

Pennsylvania Railroad Co. vs. Public Utilities Commission of Ohio, 80 L. Ed. 733, 56 S. Ct. 687. (1936)

The broad principle which we deduce from the above decisions, (especially from East Ohio Gas Company case, where the analogy of the "original or unbroken package" doctrine is expressly adopted), as to the line of cleavage between interstate commerce and intrastate commerce in natural gas, is this:

That the interstate importer of natural gas is entitled, as an incident of interstate commerce, to make a first sale, free from State interference or regulation, *at wholesale to local distributors*; but is not entitled to an exemption from State regulation or taxation on local sales, either in large or small quantities, *direct to the local consumers*, whether domestic, commercial or industrial.

In the solution of these questions we do not think the reduction of pressure is controlling as to when interstate commerce ends, but rather that this is controlled by the actual or theoretical breaking up of the original volume into smaller streams for retail sale to the local consumers, whether domestic, industrial or commercial. It is true that in the cases of People's Natural Gas Co. vs. Public Service Commission of Pennsylvania, and East Ohio Gas Co. vs. Tax Commission of Ohio, *supra*, the Court, in setting forth the material facts, adverted to the reduction of pressure which invariably takes place sometime prior to the gas being turned into the local distribution mains; but we do not think it necessarily follows always that when and merely because the pressure is reduced the interstate commerce *ipso facto* ends then and there. Nor do we think it material to the determination of the questions here involved to decide whether the corporate fiction should be disregarded and the El Paso Natural Gas Company and the El Paso Gas Transportation Corporation treated as one corporate entity. We are also of opinion that the motives of the Companies in adopting their methods of operation are immaterial. *Western Union Tel. Co. v. Speight*, 254 U. S. 17, 65 L. Ed. 104.

Applying these principles to the fact situation above outlined, we hold as follows:

1. The sales by the El Paso Natural Gas Company to the Texas Cities Gas Company are interstate commerce, and, therefore, not subject to the gross receipts tax imposed by amended

Article 6060, Revised Civil Statutes of Texas. This is true in our opinion, even though the pressure is reduced at the east city limits of El Paso, and the delivery not actually made until the El Paso Gas Transportation Corporation transports it some three miles further westward to the city gate or measuring station at the reduced fifty pound pressure, and there delivers it within the city limits of El Paso. The United States Supreme Court expressly holds, in the case of *East Ohio Gas Co. vs. Tax Commission of Ohio*, supra, that "the mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends."

2. We are of the opinion that the sales by the El Paso Natural Gas Company direct to industrial, commercial or domestic consumers in Texas are intrastate commerce, whether such sales be made within or without the city limits of El Paso, and whether the deliveries be made from the El Paso Natural Gas Company's own pipe lines or from the lines of its carrier for hire, the El Paso Gas Transportation Corporation. These sales are not made at wholesale to distributors for resale to local consumers, but are made direct to local consumers themselves and are in their nature essentially local or intrastate business within the holdings of the authorities above cited. We do not think that the quantity of such deliveries, whether large or small, affects the nature of such business. We therefore hold that this business falls within the taxing power of the State, and is subject to the tax levied by amended Article 6060. The tax should be measured by the amount received by the El Paso Natural Gas Company for the sale of this gas, and not by the amount received by the El Paso Gas Transportation Corporation for transporting it.

3. Upon the authority of *Pennsylvania Railroad Co. vs. Public Utilities Commission of Ohio*, supra, we hold that the El Paso Gas Transportation Corporation's business of transporting gas for hire is intrastate commerce, and the gross proceeds realized from such transportation is therefore subject to the tax levied by amended Article 6060; and, of course, the tax should be measured by the amount received for such transportation and not by the value of, or the amount received for, the gas itself by the El Paso Natural Gas Company.

Your file is returned herewith.

Very truly yours,

ALFRED M. SCOTT,
Assistant Attorney General.

This opinion has been considered in conference, approved and is now ordered approved.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2993-B

ANTI-NEPOTISM LAW—ASSISTANT DISTRICT ATTORNEY

1. The appointment of an uncle of one of the members of the Commissioner's Court as Assistant District Attorney is not a violation of the Anti-Nepotism Law of the State of Texas.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 29, 1936.

*Hon. William Stone Wells, District Attorney-Elect, Henderson,
Texas.*

MY DEAR SIR: You inquire if the appointment of an uncle of one of the Commissioners' Court of Rusk County as Assistant District Attorney would be in violation of the Nepotism Law of the State of Texas.

Article 3902, Vernon's Texas Statutes, 1936 provides for the employment of various deputies and assistants and further requires the authority for such appointment to be sanctioned by the County Commissioners' Court of the particular county in which they are to be employed. It further provides that no member of the Commissioners' Court shall attempt to influence any such appointment.

On various occasions this statute and those that have preceded it have been interpreted by both the courts and by opinions from this department. See report of Attorney General, 1916—opinion of W. P. Dumas, page 466; also report of Attorney General, 1928—opinion of Honorable Claude Pollard—page 306; also Tarrant County vs. Smith 81 S. W. (2d) 537-38.

In the instant case, as in other similarly situated the law provides that the commissioners' court may provide only a position. Their vote is not in confirmation of the individual who will later hold the appointment.

Having no authority to vote for or against the particular individual whom you seek to appoint, it clearly appears that the appointment you seek to make would not be in violation of the nepotism laws of the State of Texas.

Yours very truly,

WILLIAM McCRAW,
Attorney General of Texas.

No. 2993-C

NEWSPAPERS—LEGAL PUBLICATION.

1. A newspaper with the editorial and business office in Cherokee County, and having a mailing permit issued from a Post Office in Cherokee County,

and which is mailed from Cherokee County, is a legal publication in Cherokee County even though the paper is printed in Anderson County.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 7, 1937.

Hon. Herman Price, Publisher of the Jacksonville Journal, Jacksonville, Texas.

MY DEAR FRIEND: I have your letter of December 14th addressed to our mutual good friend, Mr. Sam P. Harben, Secretary of the Texas Press Association, Richardson, Texas, which Mr. Harben has referred to me for attention.

In your letter you inquire as to whether or not your publication, the Jacksonville Journal, is a "legal publication" under your present set up, which you outline as follows, to-wit:

1. The editorial and business office of such paper is in Jacksonville, Cherokee County, Texas.

2. The paper is printed in Frankston, Anderson County, Texas, where you own the Frankston Citizen, this plant printing the Journal by contract the same as it would any other kind of commercial printing.

3. Your second class mailing permit is issued from the Jacksonville Post Office and the Jacksonville Journal is mailed from that post office.

From the context of your letter I gather in making inquiry of whether or not your paper is "legal", you have in mind whether or not same is legally published in Cherokee County in contemplation of the statutes of this State relative to the publication of notices, citation by publication, etc., which statutes generally require that such notices, citations, etc. be printed in a paper published in the county where such notices, etc. are required.

In reply to your inquiry, I beg to advise that it is the opinion of this writer that your publication, the Jacksonville Journal, is legally published in Jacksonville, Cherokee County, Texas.

In the case of *In Re: McDonald*, 201 Pac. 110, the Supreme Court of California had before it for determination the question of whether or not a newspaper which was actually printed in Colton, California, but which had its office and principal place of circulation and license to conduct the business of a newspaper in the City of Ontario, California, was "printed and published as a newspaper of general circulation" in the City of Ontario, California. The Court held that even though the actual printing of the paper was done in Colton, since the office of the newspaper, principal place of circulation and place of business was located in Ontario, California, it was a "newspaper of general circulation printed and published" in Ontario, California.

The case of *Bayer v. Hoboken*, 44 N. J. L. 131 is also directly in point. There a statute required the printing of a notice in a newspaper "printed and published" within the limits of the

municipality. The newspaper in which the publication was made was printed altogether in New York but was distributed in Hoboken. The New Jersey Court held that same was "printed and published" as required by the statute.

Other cases which we do not discuss but merely cite and which we consider particularly in point are:

In Re: Le Favor, 169 Pac. 413; Nebraska Land Stock Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co., 72 N. W. 357.

We think, by reading the above cited authorities, anyone will readily be convinced that, under your set up, your publication, the Jacksonville Journal, is a "legal" publication so far as the statutes of this state concerning legal notices, etc. are concerned.

Trusting that this is sufficient and will answer your inquiry, I remain,

Very truly yours,

WILLIAM McCRAW,
Attorney General of Texas.

No. 2993-D

ATTORNEY GENERAL—COUNTY AND DISTRICT ATTORNEYS
—PROSECUTION OF CRIMINAL CASES.

1. The County and District Attorneys have the authority and responsibility of representing the State in criminal proceedings in the District, County, and Justice Courts.

2. The Attorney General does not have authority to take action in cases where the County Attorney refuses to file information charging offenses and insists upon presenting the matter to the Grand Jury.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 9, 1937.

*Hon. Bert Ford, Administrator, Texas Liquor Control Board,
Austin, Texas.*

DEAR SIR: By letter of January 5th you inquire if this Department is empowered to take action in cases where the county attorney refuse to file informations charging offenses and insists upon presenting the complaint to the grand jury awaiting the return of an indictment by that body. The particular instance in which complaint is made is relative to a telegram embodied in this letter concerning County Attorney, Theo Bald of Galveston County.

I beg to advise that the statute provides in Article 413 of the Code of Criminal Procedure that an "information" may be filed and presented by the county or district attorney. The language excludes the filing or presenting of this instrument by any

other officer. The penal code in defining the duties of both the county and district attorneys reposes in these officers the authority and responsibility of representing the state in criminal proceedings in the district courts, county courts and justice courts of their respective districts and counties.

The code makes no provision for the superceding of county or district attorneys by the Attorney General. Likewise no provision is made under which a prosecuting officer may be required to prosecute under information rather than indictments.

Yours very truly,

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2994

COMMERCE—INTERSTATE IMPORTATION AND SALE OF
NATURAL GAS—TAXATION.

1. Gross receipts realized by public utility from distribution, direct to retail consumers, of natural gas imported from another state through company's own pipe lines, are amenable to tax imposed by amended Article 6060.

2. Where pipe line company imports natural gas into Texas and sells at city gate to affiliated distribution company, tax levied by Article 6060, after its amendment in 1931, should be paid by pipe line company on receipts from gate sales, and not by distribution company on receipts from burner tip sales. Prior to the 1931 amendment of Article 6060 the pipe line should have paid such tax on the gate sales, and the distribution company should have paid the tax on its burner tip sales.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 21, 1937.

*Hon. Olin Culberson, Director, Gas Utilities Division, Railroad
Commission of Texas, Austin, Texas.*

DEAR SIR: This acknowledges receipt of your inquiry of November 19, 1936, together with file accompanying same, from which the following facts are gathered:

At present the Arkansas-Louisiana Gas Company owns, operates, manages and controls natural gas pipe lines through which it transports natural gas, either purchased or produced by it, from the source of supply in the State of Louisiana, into the eastern portion of Texas, where such pipe lines are the sole source of natural gas supply for the following Texas towns: Jefferson, Linden, Avinger, Daingerfield, Naples, Omaha, Pittsburg, Gilmer, Winnsboro, Mt. Vernon and Mt. Pleasant. In former years the Southern Cities Distribution Company owned and operated the distribution systems through which the above

mentioned gas was sold and distributed to the local consuming public in the aforesaid towns. At present, however, the distribution systems in all of the Texas towns hereinabove and hereinbelow named are owned and operated by the Arkansas-Louisiana Gas Company. Substantially all of the common stock of both the Arkansas-Louisiana Gas Company and the Southern Cities Distribution Company was owned by the Cities Service Gas Company; and we are assuming further, from inferences that may be drawn from the file, that the Cities Service Gas Company, for all practical purposes, dominates and controls the affairs of the other two above named corporations through such ownership, and through community of officers and directors. The Arkansas-Louisiana Gas Company also owns, operates, manages and controls a natural gas pipe line extending from a source of supply in the State of Arkansas into northeast Texas, and also owns and operates the distribution systems in the Texas towns of Texarkana, Queen City and Atlanta, through which it distributes to the consuming public the gas imported from Arkansas through such pipeline. It further owns a pipe line from a natural gas field in Panola County, Texas, which transports gas into the State of Louisiana, but we understand no distribution operations from this line are conducted in Texas. The Cities Service Company owns and operates approximately 60 miles of natural gas pipe line in Texas leading out of the Panhandle Gas Field in Wheeler County, Texas, to other points not disclosed, and probably not material. We are assuming further that some or all of these pipe lines, or portions thereof, are "laid upon, over or under a public road or highway of this State, or street or alley of a municipality, or the right of way of a railroad or other public utility," so as to fall within the provisions of subdivision 2 of Article 6050, and that the above named companies are all public utilities as defined and regulated in Articles 6050-6066, inclusive, and as such are "authorized by law to exercise the right of eminent domain." (Again quoting the language of subdivision 2, Article 6050). It is also probable, though not so stated and not necessary to support this opinion, that portions of the rights of way over which the above mentioned pipe lines are laid were acquired by right of eminent domain, so as to fall within subdivision 2 of Article 6050. No sales of gas are made at the city gates of the towns above mentioned, and no gate rate is set up by Arkansas-Louisiana Gas Company on its books. We are assuming however, that during the period that the Southern Cities Distribution Company owned and operated the distribution systems in the above named towns, it purchased its gas at the city gates from its affiliated pipe line company, the Arkansas-Louisiana Gas Company, and that the latter paid to the State the taxes on its gate sales levied by Article 6060. Also that before the 1931 amendment of Article 6060 the Southern Cities Distribution Company paid its taxes under that article on its burner tip sales. All of the gas served in

the above mentioned towns is and has been interstate gas, imported either from Louisiana or Arkansas.

In the above state of facts, you ask whether the gross receipts (a) of the Arkansas-Louisiana Gas Company, and (b) of the Southern Cities Distribution Company as operated in former years, for gas sold and distributed to the local consuming public in Texas, are subject to the $\frac{1}{4}$ of 1% gross receipts tax imposed upon intrastate business by amended Article 6060.

We are of opinion that both prior to and subsequent to the 1931 amendment to Article 6060, a company which imported interstate gas through its own pipe lines and distributed same through its own distribution systems in Texas, should have paid, or should now pay, the $\frac{1}{4}$ of 1% tax levied by that Article, upon the gross receipts realized in Texas from its burner tip sales on the system; that prior to the 1931 amendment of Article 6060, the pipe line company was due to pay said taxes on the gross receipts from its gate sales to its affiliated distributing company, and the affiliated distributing company should have paid the tax on its burner tip sales; but that subsequent to the 1931 amendment of article 6060 the distributing company purchasing at the city gate from its affiliated pipe line company was not required to pay the tax on its burner tip receipts.

We will attempt now to summarize the reasoning on which we adopt those conclusions.

It may be conceded at the outset that the interstate transmission of natural gas by pipe line has been held to be interstate commerce, and therefore not subject to state regulation or taxation, where at the end of such transmission the gas is sold at wholesale at the city gates to independent distributing companies, who in turn sell and distribute the gas to the consuming public: *Public Utilities Commission of Kansas v. Landon*, 249 U. S. 236, 63 L. Ed. 577 (1919); *Missouri ex rel Barrett v. Kansas Natural Gas Co.* 265 U. S. 298, 63 L. Ed. 1027 (1924); *State Tax Commission of Mississippi v. Interstate Natural Gas Co.* 284 U. S. 41, 76 L. Ed. 156 (1931).

There is also a dictum in *State Corporation Commission of Kansas v. Wichita Gas Co.* 290 U. S. 561, 78 L. Ed. 500 (1934) to the effect that interstate transmission and sale of natural gas to affiliated distributing companies is interstate commerce, and that the price thereof at the city gate may not be regulated by State authority. If this were law, a corollary would be that the proceeds of such gate sales could not be taxed by a state. But the statement was not necessary to a decision of that case, and the Court expressly declined to pass upon the validity or invalidity of the gate rate orders promulgated by the state regulatory body there involved. Furthermore, the cases there cited by Mr. Justice Butler to support such dictum are not in point upon the proposition to which he cites them. The question of disregarding the corporate fiction because of intercorporate affiliation, domination and control was apparently not raised, and certainly not noticed.

In *Public Utilities Commission of Kansas v. Landon*, supra, the broad statement is made:

"That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted."

Equivalent statements may be found in other cases, notably in the *Peoples Natural Gas Company* case, hereinafter discussed. It will be noted that Mr. Justice McReynolds, who wrote the opinion in the *Landon* case, recognized that his statement just quoted was too broad and all inclusive, for he immediately limited it with the following qualifying statement:

"Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas so transported to *local distributing companies free from unreasonable interference by the state.*"

It is clear that he was speaking of independent distributing companies, for that was the only kind of distributing companies involved in that case. It occurs to us, too, that the interstate transmission could there more logically have been held to be interstate commerce because it was incident to the interstate sale at wholesale, (which in itself was plainly interstate commerce), than that the sale was an incident to the transportation, as the opinion seems inadvertently to state. So too, all broad generalities of the kind above quoted, are to be read in the light of, and limited in their operation to, the very facts involved in the particular case.

In *Pennsylvania Gas Company vs. Public Service Commission of New York*, 252 U. S. 23, 64 L. Ed. 434 (1920), the company operated a physical set-up exactly like that presently operated by the *Arkansas-Louisiana Gas Company*. It transported natural gas through its own pipe lines from fields in Pennsylvania into the State of New York, where it sold and delivered the gas at retail to the consumers in several New York towns through its own distribution systems. The United States Supreme Court there upheld the power of the New York Public Service Commission to fix burner tip rates in the New York towns upon two grounds: (1) That the transmission phase and the distribution phase were both interstate commerce throughout, and therefore within the potential power of exclusive regulation by the national congress, but (2) that in the absence of congressional regulation upon the subject, the states were free to regulate the local burner tip rates even though this had the incidental effect for all practical purposes of determining absolutely the amount realized for the interstate gas.

The decision in *Peoples Natural Gas Company vs. Public Service Commission of Pennsylvania*, 270 U. S. 550, 70 L. Ed. 726 (1926), was obviously influenced by the *Pennsylvania Gas Company* decision which was there cited as an authority. There the *Peoples Gas Company* imported some gas from West Virginia into Pennsylvania through its own pipe lines, but there

commingled with the West Virginia gas a larger amount of Pennsylvania gas. It distributed the most of this volume of mixed gas direct to the consuming public in several Pennsylvania towns through its own distributing systems, but for some years had been selling the mixed gas to an independent distributing company at the city gate of the City of Johnstown, Pennsylvania, where this was the sole available supply of gas. When the company elected to terminate its contract under an appropriate provision thereof and ceased the delivery of gas at the City of Johnstown, the Pennsylvania Public Service Commission ordered the company to continue delivery of gas to that city, without fixing the price therefor and without specifying where the gas so delivered should be derived from. The proportions respectively of West Virginia gas and Pennsylvania gas in the mixture in the pipe lines was definitely known at all times. The State Court, in upholding the order found that the amount of Pennsylvania-produced gas available in the lines was more than sufficient to supply the City of Johnstown. Because of that finding, the Supreme Court of the United States upheld the Commission's order as not being a forbidden burden upon or interference with interstate commerce. It was said:

"As respects the West Virginia gas, we are of opinion in view of its continuous transportation from the place of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point, and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business."

It is obvious that the above holding, that the West Virginia gas was interstate commerce, was only intended to apply, and could only be applied, to the gas delivered to the independent distributing company at the city gates of Johnstown; therein the actual holding goes no farther than that in the Landon, Missouri ex rel Barrett, and Interstate Gas Company decisions first above cited; if the quoted statement were extended to the West Virginia gas distributed locally by the company through its own systems in towns other than Johnstown, it would be purely dictum, for no situation except that at Johnstown was involved.

That the Pennsylvania Gas Company opinion was materially modified in some respects by later decisions of the same court will be seen plainly from a study of the following decisions:

In Missouri ex rel Barrett vs. Kansas Natural Gas Company, 265 U. S. 298, 68 L. Ed. 1027 (1924), the Court disapproved the Pennsylvania Gas Company opinion insofar as it held that in the absence of congressional legislation the states could regulate interstate traffic in gas. In East Ohio Gas Company vs.

Tax Commission of Ohio, 283 U. S. 465, 75 L. Ed. 1171 (1931), it is held that the local distribution of natural gas is an interstate business and that the state may, therefore, validly impose a gross receipts tax upon proceeds of such local distribution business even though the gas so served be obtained exclusively from an interstate source. The case expressly disapproves the reasoning in the Pennsylvania Gas Company opinion, insofar as the latter holds that the local distribution phase was interstate commerce. At first blush these modifications would seem to destroy the force of the Pennsylvania Gas Company opinion as an authority in the present situation, if not indeed to change the result itself arrived at in the Pennsylvania Gas Company decision. Actually, however, they do no such thing. Identically the same result arrived at in the Pennsylvania Gas Company decision was later reached upon different reasoning not only in the East Ohio Gas Company case, *supra*, but also in the case of Western Distributing Company vs. Public Service Commission of Kansas, 285 U. S. 119, 76 L. Ed. 655 (1932), and Dayton Power and Light Company vs. Public Utilities Commission of Ohio, 292 U. S. 290, 78 L. Ed. 1267 (1934). In the two cases last cited, it was held that the state regulatory bodies have the power to fix local burner tip rates even though the gas is drawn directly and exclusively from interstate pipe line sources, because the local distribution even of interstate gas is purely an intrastate business. In the last mentioned decisions it is pointed out that the state regulation or taxation in such cases has only an indirect and incidental effect upon interstate commerce and is, therefore, not a prohibited burden on same, even though it is obvious that the practical effect thereof, as in the Pennsylvania Gas Company case, was necessarily to fix, limit and control absolutely the price obtained for the interstate gas. It is said that because of the state's undoubted power to fix reasonable burner tip rates at which the gas should be sold to local consumers, the states must necessarily have the incidental power to fix the amount that should be allowed the distribution companies as a reasonable operating expense for gas purchased at the city gates from the affiliated pipe line companies. And in the East Ohio Gas Company case, *supra*, it is said that:

"The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case, the local interest is paramount, and the interference with interstate commerce, if any, is indirect and of minor importance." (Quoting from *Missouri ex rel Barrett vs. Kansas Natural Gas Company.*)

In the present state of the decisions, it may well be doubted whether the mere interstate transportation of gas in the circumstances here involved is commerce at all, let alone interstate commerce. The original concept of commerce was the

sale, trade, barter or exchange of commodities between persons. It is "intercourse for the purpose of trade," *Carter vs. Carter Coal Company*, 298 U. S. 238, 297-299, 303, 80 L. Ed. 1160, 1182, 1885. Thus at least two persons are necessary to carry on a transaction in commerce—a seller and a buyer. Here the only commerce that is carried on is the sale of gas, from the company which both transports and distributes it, to the local consumers who buy it at the burner tips; and, according to the decisions reviewed above, this commerce is essentially local and intrastate in character, and not interstate commerce at all. The only commerce which is carried on is effectuated after the interstate transportation has ended, and is therefore local. *East Ohio case, supra*; *Western Distributing Company case, supra*; *Pennsylvania Gas Company case, supra*; *Carter vs. Carter Coal Company, supra*; *A. R. A. Schechter Poultry Corporation vs. U. S.* 295 U. S. 542, 79 L. Ed. 1587; *Hart Refineries vs. Harmon*, 278 U. S. 499, 73 L. Ed. 475, 49 S. Ct. 188; *Western Cartridge Company vs. Emmerson*, 281 U. S. 511, 74 L. Ed. 1004, 50 S. Ct. 383, and, according to the decisions above cited, this commerce being local in character is subject both to regulation and taxation by the State.

Of course, this original concept of commerce was by the subsequent decisions of the U. S. Supreme Court so enlarged and expanded as now to include all negotiations, contracts, transportation, acts, transactions and the interstate transmission of intelligence, looking toward and consummating the interstate sale and delivery of commodities.

In every case where the interstate transportation of commodities has been part and parcel of, and a necessary or reasonable incident to, an interstate sale and delivery of such commodities, such interstate transportation has been held to be a necessary and integral part of such interstate trade and, therefore, exempt from, or at least subject to well recognized limitations upon, the power of regulation and taxation by the several states.

Likewise, the interstate transportation of goods and passengers has uniformly been held to be interstate commerce, irrespective of whether it be a part of trade in the strict sense, where such transportation is carried on as an *independent business* by a public or private carrier for hire, transporting property other than its own. "Commerce" 12 C. J., Sec. 22, p. 22, note 47; *Hanley vs. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 314; *State vs. Atlantic Coast Line R. Co.*, 56 Florida 617, 47 Southern 969, 32 L. R. A., N. S. 639. In "commerce" 12 C. J., Sec. 22, p. 23, it is stated that such interstate transportation of freight is interstate commerce, irrespective of "the ownership of the property transported." That statement is not fully borne out by the authorities there cited to sustain it. In Note 52, supporting that text, the editors cite only the cases of *U. S. vs. Benson*, 234 U. S. 548, 58 L. Ed. 1459, 34 S. Ct. 956, and *Barlow vs. Lehigh Valley R. Co.* 214 N. Y. 116, 107 N. E. 814. The case of *U. S. vs. Benson, supra*, is one

of the so-called "Pipe Line Cases." There the Standard Oil interests had obtained a monopoly of the oil pipe line facilities connecting all oil fields east of the Rocky Mountains with the refineries and marketing facilities on the Atlantic Seaboard, in such way that by refusing to transport oil for independent producers or owners, the Standard interests were able to coerce all other producers and owners into selling their oil to Standard at the latter's own price. In order to remedy that evil Congress had by the Hepburn Amendment of 1906 to the Interstate Commerce Act provided that the business of transporting oil by interstate pipe line should not be carried on unless the persons owning and operating such lines should transport oil for others as common carriers for hire. The Standard Company contended that they were not engaged in the business of interstate transportation of oil because they transported only their own oil and had never undertaken to transport for others. The United States Supreme Court reached the conclusion that they were in substance and in fact carrying on the business of interstate transportation, and that all the amendment did was to give effect in law to that which was already an actual fact. In order to uphold the law, as it did, the Court was compelled to labor diligently and, may we say with due respect, to stretch to thitherto unwonted lengths the previously established constitutional principles governing interstate commerce. Even so, there was a very vigorous and logical dissent by Mr. Justice McKenna. In the course of the opinion the Court merely holds that the technical question of title or ownership of commodities in interstate transportation does not necessarily control as to whether such transportation is interstate commerce; and as supporting that statement it cites two of its earlier decisions which are plainly distinguishable on their facts from the situation here involved. We do not dissent from the result reached in the Benson case. On the contrary, we think that, rightly analyzed, the Court's holding is sound, in that the Standard had only a bare legal title to the oil, acquired by monopolistic, inequitable and unconscionable means, and not by an equitably supportable title, in that the legal title had been in effect wrongfully extorted from its true and rightful owners. The Congress in enacting the law, and the Court in construing it, were merely giving effect in law to that which already existed in fact, and even there the Uncle Sam Oil Company, which only operated an interstate oil pipe line to pipe its own oil from the source of supply to its refinery where it carried on only the intrastate business of refining and manufacture was held not to be engaged in interstate commerce. The Court said:

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that

a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

The case of *Barlow vs. Lehigh Valley R. Co.*, supra, is likewise distinguishable because it involved merely the question of whether a railroad engineer, engaged in piloting a train which was hauling both interstate shipments and coal for the railroad company's own use in all its operations, both interstate and intrastate, was within the scope of interstate employment so as to be protected by the Federal Employer's Liability Act.

In no decision that we have found has it been held that a person engaged merely in the interstate transportation of his own commodities for the sole purpose of, and purely as an incident to, ultimately engaging in local commerce with such commodities in the receiving state is engaged in interstate commerce so as to be exempt from the receiving state's taxing and regulatory powers throughout the accomplishment of such local commerce.

Under the original package doctrine illustrated by *Leisy vs. Hardin*, 135 U. S. 100, 34 L. Ed. 128, and *Rearick vs. Pennsylvania*, 203 U. S. 507, we apprehend that a farmer hauling his own produce from one state into another would have the right under the Federal Commerce Clause to sell his entire load of produce in the bulk, but would not have the right to peddle it out at retail free from regulation, taxation or interference by the receiving state. It is so with gas.

As pointed out above there is a point at which the interstate business or transportation necessarily ends, and at that point the protection of the commerce clause of the Federal Constitution ceases. The principle is illustrated further by the case of *Singer Manufacturing Co. vs. Wright*, 33 Fed. 121, which upholds the right of the State of Georgia to tax the occupation of making local retail sales in Georgia of sewing machines which were manufactured in the State of New Jersey, and thence transported into the State of Georgia.

So, even if it should be conceded that, standing alone, the mere interstate transportation of gas here involved is interstate commerce, regardless of the fact that the only commerce to which such transportation is an incident is plainly intrastate, it does not by any means follow that the State of Texas has not the power to levy upon the gross receipts realized from the retail sale of such gas at the local burner tips the tax prescribed by amended Article 6060. In fact, the contrary conclusion, it seems to us, is inevitable. The Act, as we construe it, clearly does not impose a property tax, either upon the interstate pipe line facilities, or upon the interstate gas transported. It does not levy either directly or indirectly a tax upon the act of interstate transportation as such, nor upon transportation at all.

Nor does it lay a tax upon the proceeds of interstate transportation, or business; for, it will be seen plainly that here there are no proceeds of interstate transportation or business, but only proceeds from the local intrastate business of retail distribution. As we construe amended Article 6060, in conjunction with subdivision 2 of Article 6050, it imposes a license, excise or occupation tax upon the gross receipts realized from the purely local business of retail distribution of gas when applied to the situation here involved. The essential res which renders the transaction amenable to the tax is the privilege of owning, operating, managing or controlling a pipe line within this State under certain conditions, and this, whether the pipe line be wholly within the State or extending from one state to another; and, so far as the operation of the tax is concerned, it makes no difference whether such pipe line be used exclusively for interstate transmission or exclusively for intrastate transmission, or partly for both. It is the ownership and operation of a pipe line which renders the company subject to the tax, and the extent of the tax is measured by the total "gross receipts" or "gross income received from all business done by it within this State." The interstate importation of gas is in nowise forbidden, restricted, impeded, burdened, taxed or regulated; but, on the contrary, the company is left free to conduct interstate transportation of gas in any manner or by any means which it may please to adopt. The Act does not make payment of the tax a condition precedent to engaging in interstate commerce, but its collection is left entirely to the ordinary processes of law. See *Pacific T. & T. Co. vs. Tax Commission of Washington*, 297 U. S. 403, 80 L. Ed. 760. The sole and ultimate effect of the Act, as here construed and applied to the instant situation, is that when the gas ultimately reaches its destination and is there comingled in local distribution operations with the common mass of property within this State, the gross receipts of such local distribution business are taxed for the privilege of owning, operating, managing and controlling a pipe line lying wholly or partly within this State, whether the same be used for interstate or intrastate transmission. If the proceeds of the business are taxable, as they plainly are here, it is immaterial upon what condition the state imposes the tax so long as it does not discriminate against interstate commerce. The ownership, operation, control or management of a public pipe line laid over, across, upon or under public roads, highways, streets and easements, and acquired by, or enjoying the power to use, eminent domain is certainly not a free and unrestricted privilege which belongs as of right to every person, but is a franchise or privilege which the State may withhold entirely at will, or which may be granted, if at all, upon such terms and conditions as the State may impose.

It is well settled that not all burdens upon interstate commerce by states are forbidden by the commerce clause of the Federal Constitution. It is only direct and substantial burdens that are prohibited. "Commerce," 12 C. J., Sec. 126, p. 97, Note

3; *U. S. F. & G. Co. vs. Kentucky*, 231 U. S. 394, 58 L. Ed. 283. With respect to indirect burdens the only limitation is that they must not discriminate against interstate commerce. "In the exercise of its general police power and its power to license occupations and businesses, a state or municipality may impose a license tax for the doing of local or domestic business within its territorial jurisdiction, although the property involved may have come originally from another state." 12 C. J. 103, Note 69. "A non-discriminatory state license tax imposed on business carried on within the State is valid, although it may incidentally affect or relate to interstate commerce." *Id.*, Note 75.

As pointed out in the *Western Distributing Company* case, the *Dayton* case, the *Wichita Gas Company* case and the *East Ohio Gas Case*, *supra*, the effect, if any, of the local regulation or taxation upon interstate commerce is here at most only indirect and incidental. It is certainly not discriminatory against interstate commerce, for the owner of a pipe line transporting exclusively intrastate gas pays identically the same tax, and at the same rate, and for the same privilege, as does the owner who transports interstate gas.

In the *East Ohio Gas Company* case, *supra*, the Court said:

"And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue intrastate business without withdrawing from the interstate business."

In our opinion the tax imposed by amended Article 6060, and as applied in the present situation, meets the test of all such requirements. The tax is imposed solely on account of a local privilege—that of owning and operating a pipe line; and only upon the proceeds of the intrastate business done—the local distribution of gas; and without enhancement because of the interstate transportation; and it further appears that if the pipe line company were engaged exclusively in interstate business, (namely, the interstate transportation of gas and its sale at wholesale in the receiving state to independent distributing companies), it would not be subject to the imposition of the tax; and it further appears that the taxpayer in this instance could easily discontinue the intrastate business (local distribution) without withdrawing also from the interstate business, for plainly it could sell its local distribution systems to others and engage solely in interstate transportation and sale to such local distributing companies of its interstate gas.

During the period that the pipe line company transported the interstate gas and sold it at the city gates in Texas to its affiliated distribution company, we do not think that solely on account of the intercorporate affiliation and control of the two companies

by the Cities Service Gas Company, the companies as an integrated group would be subject to the payment of the tax levied by amended Article 6060, both upon its sales at the city gates and upon its sales at the burner tips. It is true that in *State of Texas vs. Lone Star Gas Company*, 86 S. W. (2) 484, writ refused, and in many other cases, it has been held that for many purposes the corporate fiction should be disregarded. It is, however, the general rule that tax statutes are strictly construed against the taxing authority, and will not be extended by implication beyond the plain terms of the taxing act. "Taxation," 40 Tex. Jur., Sec. 45, pp. 68-70; "Statutes," 39 Tex. Jur., Sec. 142, pp. 268-271; Cooley, *Taxation*, 4th Ed., Sec. 503. If the Legislature, in imposing the tax levied by amended Article 6060, had intended, in cases of intercorporate affiliation and control, to levy same upon both the gate receipts and the burner tip receipts, it would doubtlessly have so provided in plain and unmistakable terms, as it did before the 1931 amendment to Article 6060. It has not done so, but on the contrary has repealed the portion of Article 6060 levying the tax upon burner tip receipts (except where both transportation and distribution are carried on by the same company), and on account of the general rule last above mentioned, we are not inclined to read into the statute any additional onerous provisions not found to be plainly expressed in the statute.

We fully realize the far reaching importance of this opinion, and for that reason have extended it to a length which we would ordinarily consider unwarranted.

Your file is returned herewith. Compare the recently decided case of *Arkansas-Louisiana Pipe Line Company vs. Coverdale*, 17 Fed. Supp. 34.

Very truly yours,

ALFRED M. SCOTT,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered recorded.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2995

LEGISLATURE—QUALIFICATION OF ITS MEMBERS—
JURISDICTION TO DETERMINE CONTESTED ELECTION
OF PRIMARY—ARTICLE 3, SECTION 8 OF THE
CONSTITUTION.

The Legislature is without jurisdiction under Article 3, Section 8 of the State Constitution to try a contested primary election. The procedure for contesting such election is specifically set out by law and such procedure must be followed, and the Legislature does not have authority to go behind

the general election in determining the qualification and election of its members.

OFFICES OF THE ATTORNEY GENERAL'S DEPARTMENT.

February 2, 1937.

Mr. A. P. Cagle, Chairman Committee on Privileges, Suffrage, and Elections, House of Representatives, Austin, Texas.

DEAR SIR: Your letter of inquiry under date of January 29, 1937, addressed to the Honorable William McCraw, Attorney General of Texas, wherein you enclosed the pleadings, records and argument of counsel in the election contest filed in the House of Representatives by E. E. Hunter, Contestant vs. J. K. Russell, Contestee, has been received and referred to the writer for attention and reply. The question propounded by you is whether or not the House of Representatives of the State of Texas, have jurisdiction to herein determine said contest.

It is needless to review the facts in this case and we will only state that the contestant objects only to the method by which the run-off primary election was held. No objection is levied at or charge made that the general election was not regular and valid. Therefore, the only question before this Department is whether or not Legislature is authorized to receive evidence as to the method of the conduct of the primary election or are they confined to the general election in determining the qualification and election of their respective members.

Article 3, Section 8 of our State Constitution provides as follows:

"SECTION 8. Each house shall be the judge of the qualifications and election of its own members; but contested elections shall be determined in such manner as shall be provided by law."

Clearly, under this Article the Legislature is the only body authorized to judge the qualification and election of its respective members. This power may not be delegated to any other tribunal by the Legislature. We do not feel that the question of qualification of a member is at issue in the instant case hence it is unnecessary that we discuss this phase of the question. The only question here involved is whether or not a particular person was elected. We have reached the conclusion that the term election as used in Article 3, Section 8, *supra*, refers to the general election. *Dickson vs. Strickland*, 265 S. W. 1012; *Sterling vs. Ferguson*, 53 S. W. (2d) 753. In the *Sterling vs. Ferguson* case, *supra*, the Court was ruling upon the effect of Article 4, Section 3, which authorizes the Legislature to canvass the returns of an election for Governor. Except for immaterial points this Article is to the same effect as Article 3, Section 8, *supra*. The Court held as follows:

"The only election governed by Section 3, Article 4, is the general election."

Throughout the two decisions above quoted, this definition is carefully followed. It, therefore, appears that election as used in Article 3, Section 8, supra, has reference to a general and not to a primary election. Consequently, we are constrained to the opinion that under the provisions of Article 3, Section 8, authorizing each House to be the judge of the qualification and election of its own members that such provision only authorizes the Legislature to look to the general election to determine whether or not any person was elected. The primary election is merely a process by which a candidate of a given political party is nominated so that he might run in the general election. The conduct of this election is purely a party matter and may be contested only in the method provided by law.

For still another reason, we are of the opinion that the House of Representatives is without jurisdiction to determine this particular contest and that is that this is a contested election and under the expressed terms of Article 3, Section 8, supra, contested elections shall be determined in the manner provided by law. The method for contesting a primary election is set out in Article 3146 of the Revised Civil Statutes, 1925, which follows:

"In all contests for a primary election or nomination of a convention based on charges of fraud or illegality in the method of conducting the elections or in selecting the delegates to the convention, or in certifying to the convention, or in nominating candidates in state, district, county, precinct or municipal conventions, or in issuing certificates of nomination from such conventions, the same shall be decided by the executive committee of the state, district, or county, as the nature of the office may require, each executive committee having control, in its own jurisdiction or in term time or vacation by the district court of the district where the contestee resides; said executive committee and the district courts having concurrent jurisdiction."

This Article sets out the exclusive procedure for contesting a primary election. Certainly, under the provisions of the Constitution, the Legislature was authorized to enact such provision into law. As it will be seen from a careful review of Article 3146, the Legislature has vested the exclusive authority in the respective executive committees to determine contests in primary election or in the district court. The only authority that we have been able to locate with reference to the contest of general election is Article 3059 Revised Civil Statutes, which provides as follows:

"If the contest be for the validity of an election for members of the Legislature, a copy of the notice, the statement, and the reply served upon the parties as required by this chapter, shall, within twenty days after the service thereof, be filed with the district returning officer to whom the returns of such election were made, who shall envelope the same, together with a certified copy of the poll book or register of the votes of each precinct and county returned to him in said election, and shall seal the said envelope and write his name across the seals, and address the package to the President

of the Senate or Speaker of the House of Representatives, as the case may be, to the care of the Secretary of State, and shall forward the same by mail or other safe conveyance to the seat of government, so as to reach there, if possible, before the convening of the Legislature."

A review of the above two Articles will reveal that the Legislature, in accordance with the mandate set out in Article 3, Section 8 of the Constitution, supra, has very carefully provided the means of contesting the two elections. A separate and distinct method is provided in each case. Since the contestant did not follow the procedure set out by the law, we are of the opinion that the Legislature does not at this time have authority to review the proceedings of the primary election. The time to contest the eligibility of a candidate to have his name placed upon the official ballot is past. We make the above ruling even with the realization that the Supreme Court has ruled that the nomination at a primary is tantamount to election as we fail to see how this particular ruling can have any effect whatsoever upon this question.

We do not wish to question the authority of the Legislature to judge the qualification and elections of its own members but merely wish to rule that in cases of this character said Legislature is confined to a contest of the general election.

Very truly yours,

JOE J. ALSUP,
Assistant Attorney General.

This opinion has been approved in conference and ordered recorded.

SCOTT GAINES,
Acting Attorney General.

No. 2996

STATE TREASURER—
SALE OF STAMPS ON LIQUOR, BEER, CIGARETTES AND NOTES—
METHOD OF PAYMENT

Article 3, Section 50 of the Constitution of Texas provides the following:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever."

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 8, 1937.

Hon. Tom C. King, State Auditor, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of February 4, 1937, addressed to Attorney General William McCraw wherein you ask to be advised respecting the following questions:

(1) Has the State Treasurer authority, under the Acts regulating the sale of beer and liquor tax stamps, to make shipments of beer and liquor tax stamps to banks and others on consignment or with draft attached?

(2) Has the State Treasurer authority, under the Acts regulating the sale of cigarette tax stamps, to make shipments of such stamps to banks and others on consignment or with draft attached?

(3) Has the State Treasurer authority, under the provisions of H. B. No. 8, Section 9, Acts of the Third Call Session of the 44th Legislature, which provides for the sale of documentary or "Note Stamps" to make shipments of such stamps to banks and others on consignment or with draft attached?

These three questions are very closely related, and same can be answered in one answer to cover all three questions submitted. In your first question you make reference to beer and liquor tax stamps. Under the General and Special Laws of the State of Texas, passed by the 44th Legislature in a called session, in Volume 3, page 1825, Section 45(a), is found the following

"It shall be the duty of the State Treasurer and Board of Control to have engraved or printed the stamps necessary to comply with Section 21 of this Article *and to sell same to all persons upon demand and payment therefor*. The State Treasurer shall be responsible for the custody and sale of such stamps and for the proceeds of such sales under his official bond."

In construing the meaning of this Section of the Liquor Act, it is clearly the intention of the Legislature that it is the duty of the State Treasurer to sell such stamps to all persons *upon demand and payment therefor*, and this would likewise control in answer to question No. 3 submitted by you. If such stamps were sent out on consignment or by a draft other than a cash item, certainly there would be no demand and payment.

In your second question reference is made to the sale of cigarette tax stamps. Under the Cigarette Tax Law of the State of Texas, enacted by the Regular Session of the 44th Legislature, authority was given the State Treasurer to promulgate rules and regulations for the sale of the cigarette tax stamps. The Courts have repeatedly held that the State Treasurer does have such authority, but in the promulgation of these rules he must adhere to the Constitution and prevailing laws.

In your third question reference is made to the sale of docu-

mentary or "Note Stamps". Under the provisions of House Bill 8, Section 9, Acts of the Third Called Session of the 44th Legislature, (which you make reference to in your letter) provision is made for the sale of these stamps, and authority was given to the State Treasurer to sell same to *all persons upon demand and payment therefor*.

Article 3, Section 50 of the Constitution, as is set out in the caption of this opinion, provides that the State Treasurer or any other person does not have the authority to lend the credit of this State. The draft, if sent out as a cash item, would not bind the credit of the State, but if a draft were sent otherwise it would amount to the State doing a credit business. The State Treasurer does not have the authority to send these stamps out on consignment, because such procedure would be lending the credit of the State. In all events, these stamps must be handled in such a manner as would amount to a cash transaction, and payment must be *absolute and assured*.

Trusting that this satisfactorily answers your inquiry, I am

Yours very truly,

ROBERT W. MCKISSICK,
Assistant Attorney General.

This opinion has been considered in conference, approved and ordered recorded.

WILLIAM McCRAW,
Attorney General of Texas.

No. 2997

REGISTRATION OF MOTOR VEHICLES—COUNTY
WHERE SAME MUST BE OBTAINED—IN WHOSE
NAME SAME MUST BE REGISTERED.

1. Where legal title, legal right of possession, and legal right of control of a vehicle subsist in the same person, then such vehicle must be registered in the county of such person's residence.
2. Where the legal right of possession of a motor vehicle is severed from the legal title thereof, *such vehicle must be registered in the county of the residence of the person having the legal right of possession thereof*.
3. Where the legal right of control of a motor vehicle has been severed from the legal title thereof, and the legal right of possession thereof, then such vehicle must be registered in the county of the residence of the person having legal right of control thereof.
4. Motor vehicles must be registered in the name of the true legal owner rather than in the name of the special owner as specially defined in the Motor Vehicle Registration Act.

OFFICES OF THE ATTORNEY GENERAL,
March 29, 1937.

Hon. Robert Lee Bobbitt, Chairman of the State Highway Commission, Austin, Texas.

DEAR SIR: Your letter of the 24th instant addressed to Honorable William McCraw has been referred to your writer for reply. Therein you propound the following questions:

"1. Is it permissible under the laws of this State for a private owner of a motor vehicle to register his or her motor vehicle in any county other than the county of such owner's residence?

"2. Is it permissible under the laws of this State for a corporation, doing business in Texas, to register its motor vehicles in any county other than the residence of the owner or in any county other than that in which such corporation has its headquarters, office or principal place of business?"

Under date of December 14th, 1936, this Department, through Honorable W. B. Pope, rendered an opinion to Honorable L. G. Phares, Chief of the Texas Highway Patrol and Driver's License Division, Austin, Texas, which in effect, answered each of your questions in the negative. Under date of January 23rd, 1934, since which date no change has been made in the Motor Vehicle Registration Statutes, so far as pertinent to your inquiry, Honorable T. S. Christopher, in a letter addressed to Honorable Frank Rawlings of Fort Worth, expressed a contrary view, at least, so far as an answer to your second question is concerned. Since the two said opinions are in part conflicting, your inquiry has been ordered to be considered in conference. Proper answers to your questions require a correct exposition of Article 6675a-1 to 6675a-14, which were originally passed as a single act, constitute a complete scheme for the regulation of the registration of motor vehicles and said articles will be hereinafter referred to collectively as the "Motor Vehicle Registration Act."

Portions of the statute pertinent to your inquiry are as follows:

6675a-1 "The following words and terms, as used herein, have the meaning respectively ascribed to them in this Section, as follows: . . .

"(1) 'Owner' means any person who holds the legal title of a vehicle or who has the legal right of possession thereof, or has the legal right of control of said vehicle. . . ."

6675a-2 "Every owner of a motor vehicle, trailer, or semi-trailer used or to be used upon the public highways of this State, and each chauffeur, shall apply each year to the State Highway Department through the County Tax Collector of the County in which he resides for the registration of each such vehicle owned or controlled by him, or for a chauffeur's license, for the ensuing or current calendar year or unexpired portion thereof:"

6675a-10 "On Monday of each week each County Tax Collector shall deposit in the County Depository of his county to the credit of the County Road

and Bridge Fund an amount equal to 100% of net collections made hereunder during the preceding week until the amount so deposited for the current calendar year shall have reached a total sum of \$50,000.00.

"Thereafter, and until the amount so deposited for the year shall have reached a total of \$175,000.00 he shall deposit to the credit of said fund on Monday of each week an amount equal to fifty per cent of collections made hereunder during the preceding week.

"Thereafter, he shall make no further deposits to the credit of said Fund during that calendar year. . . .

"None of the moneys so placed to the credit of the Road and Bridge Fund of a county shall be used to pay the salary or compensation of any County Judge or County Commissioner, but all said monies shall be used for the construction and maintenance of lateral roads in such county under the supervision of the County Engineer, if there be one, and if there is no such engineer, then the County Commissioners' Court shall have authority to command the services of the Division Engineer of the State Highway Department for the purpose of the supervising of the construction and surveying of lateral roads in their respective counties. All funds allocated to the counties by the provisions of this Act (Art. 6675a-1 to 6675a-14; P. C. Art. 807a) may be used by the counties in the payment of obligations, if any, issued and incurred in the construction or the improvement of all roads; including State Highways of such counties and districts therein; or the improvement of the roads comprising the County Road System."

Under the view that your writer takes of the statute, proper answers to your questions depend upon the special definition that is given by the Legislature to the word "owner" as used therein, the significance of the word "controlled" as used in connection with the word "owned" in Section 2 of the statute, and the general purposes sought to be effected by requiring the registration of motor vehicles.

We will first discuss the effect of the special definition of the word "owner" as used in the statute. The word "owner" as commonly used in its lexicographical sense means, "one who owns; a proprietor; one who has the legal or rightful title, whether the possessor or not," Webster's Dictionary.

The word "owner" ordinarily would and should have its ordinary dictionary meaning ascribed to it when used in statutes but the Legislature has specially defined same for its use in connection with the "Motor Vehicle Registration Act" and it, therefore, reasonably follows that the Legislature, in specially defining it, the word "owner," intended to impress upon it a meaning different from its ordinary meaning. Let us now determine just what this special meaning is.

Under the Articles above referred to, the person in whose name the car is registered, is the legal owner of such car while the person who has such car under his direct supervision, has the same in possession and control. Hence it is apparent that there might exist "three owners" of the same motor vehicle involved in contemplation of the Motor Vehicle Registration Act. Hence, it is conceivable that each of these owners might

have separate and distinct residences and under one construction of the Statute the motor vehicle could properly be registered in any one of the three counties since the Statutes use the disjunctive "or". Your writer does not think this interpretation correct. I think there can be only one owner of a motor vehicle for registration purposes even under the special definition of the word "owner" in the Motor Vehicle Registration Act. The view that your writer takes can best be made to appear by interpolating words in the special definition of the word "owner" as set out in the statutes so that the same would read as follows: "Owner" means any person who holds the legal title of a vehicle, or *if the legal right of possession thereof is severed from the legal title thereof*, then the person who has the legal right of possession thereof *shall be deemed the owner*, or *if the legal right of control of said vehicle is severed from the legal title thereof and the legal right of possession thereof*, then the person who has the legal right of control thereof, *shall be deemed the owner thereof*. (Underscored words interpolated by your writer).

Let us suppose that "A" has a vehicle which he has kept for his own use and operation. Under such situation the legal title of the motor vehicle, the legal right of possession thereof, and the legal right of control thereof, have met in "A". He has what would be termed in the law of real property the "fee simple title" to such motor vehicle. The three statutory situations of "owner" as specially defined in the "Motor Vehicle Registration Act," are merged in the same person, namely, "A". Under such situation clearly such vehicle would properly be registered in the county of his residence.

No doubt the situs of a very high percentage of the motor vehicles registered in Texas will be controlled by the last above mentioned situation because in most instances the "owner" will have full title, possession and control of his vehicle.

In other words, the phrase, "legal title of a motor vehicle", comprehends all three situations of ownership in contemplation of the Motor Vehicle Registration Act, to-wit, legal title thereof, legal right of possession thereof, and legal right of control thereof; the phrase "legal right of possession of a motor vehicle" comprehends only the last two situations of ownership; while legal right of control is only self-inclusive.

Often in the exposition of a statute it becomes necessary to look beyond the mere wording of it, and consider the general scheme and purpose of it in ascertaining the true intention of the Legislature.

One of the purposes of the Motor Vehicle Registration Act is to raise revenue for the construction and maintenance of roads; still another purpose is for the identification of motor vehicles for both civil and criminal purposes.

By reviewing all of the preceding motor vehicle registration laws, it will readily be noticed that it has, from the advent of motor vehicles, been the spirit and purpose of the law to re-

quire the payment of registration fees for a given vehicle where such vehicle will probably use the road the most. This attitude of the Legislature, no doubt, was based upon the proposition that the exaction by the State of registration fees of a motor vehicle owner as a prerequisite to the right of using the public highways, is in the nature of a privilege or license fee and that such fees should ordinarily be paid and applied where such vehicle will use the roads the most. Presumably a motor vehicle will use the roads more in the county of the residence of the person who actually operates and drives same than in any other county. This rule, like all others, is not without exceptions but it, no doubt, is a safe general rule.

Under Section 10 of the Motor Vehicle Registration Act, pertinent portions of which are hereinabove quoted, it is provided that one hundred per cent of all motor vehicle registration fees paid in each county shall be placed in the county road and bridge fund of such county until such fees amount to the sum of \$50,000.00, and fifty per cent of all such motor vehicle fees thereafter collected shall be placed in the county road and bridge fund until same amounts to the sum of \$175,000.00, and such money so placed in the county Road and Bridge Fund must be used for the construction and maintenance of lateral roads.

Therefore, looking to the idea of the Legislature that has consistently prevailed in the registration laws, since the inception thereof, that motor vehicle registration fees should be paid and applied where a given motor vehicle will use the roads the most, we are inevitably driven to the conclusions hereinabove reached.

The question might be raised that this opinion does not take into consideration the holding of the Court of Criminal Appeals of Texas in the case of *Opp vs. State*, 94 S. W. (2d) 180. (This opinion in no wise conflicts with the opinion in the *Opp* case or in the *Miller v. Foard Co.*, 59 S. W. (2d) 227.) In that case *Opp* resided in Bexar County and, without having any agent or other person who might be in control of the vehicle involved, he, *Opp*, registered it in La Salle County. Clearly he was violating the law in registering the motor vehicle entirely without the county of his residence. The *Miller* case did not consider nor was the question of ownership of the vehicles involved.

In this connection, your writer will further state that the fact that the word "owner" has a special meaning in the Motor Vehicle Registration Act, has no effect upon the statutes of this State which require that vehicles be registered in the name of their true owner and that they be transferred in the name of their true owner, as that word is ordinarily understood.

By way of summary, my conclusions reached herein are as follows:

1. Where legal title, legal right of possession, and legal right of control of a vehicle subsist in the same person, then such vehicle must be registered in the county of such person's residence.

2. Where the legal right of possession of a motor vehicle is severed from the legal title thereof, such vehicle must be registered in the county of the residence of the person having the legal right of possession thereof.

3. Where the legal right of control of a motor vehicle has been severed from the legal title thereof, and the legal right of possession thereof, then such vehicle must be registered in the county of the residence of the person having the legal right of control thereof.

4. Motor vehicles must be registered in the name of the true legal owner rather than in the name of the special owner as specially defined in the Motor Vehicle Registration Act.

The above construction of the Statutes involved has been consistently followed by enforcing officers over the State for a great number of years. It is a cardinal principle of law that such construction will not be overruled unless clearly erroneous and in the case of doubt such construction will be followed. Certainly, it should be followed in this instance.

It must be borne in mind that each and every case stands upon its own merits and that it is not the purpose of this Department to rule upon any fact question but we are merely setting out the law as it must be applied by the local officers.

Trusting that this sufficiently and satisfactorily answers your inquiry, I am

Yours very truly,

CURTIS E. HILL,
Assistant Attorney General.

This opinion has been considered in conference, approved and is now ordered recorded.

SCOTT GAINES,
Acting Attorney General of
Texas.

No. 2998

COMMERCE—INTERSTATE IMPORTATION AND SALE OF
NATURAL GAS TO INDUSTRIAL CONSUMERS—
TAXATION—CONFERENCE OPINION No. 2993
AMENDED.

1. Interstate importation of natural gas by El Paso Natural Gas Company from Lea County, New Mexico field into Texas partly through its own pipe lines and partly through those of affiliated corporation transporting same for hire, and sale under long term industrial contracts to five named industrial consumers in Texas held to be interstate commerce not subject to gross receipts tax levied by state. Previous Conference Opinion No. 2993 of this Department dated November 16, 1936 amended to extent herein indicated.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 2, 1937.

*Hon. Olin Culbertson, Director, Gas Utilities Division, Railroad
Commission of Texas, Austin Texas.*

DEAR SIR: This opinion supplements, and to the extent herein indicated amends, our previous conference opinion No. 2993 directed to you under date of November 16, 1936.

At the time said previous opinion was prepared, the facts therein stated were gathered as best we might from the file of correspondence in your office pertaining to the operations therein referred to, extending over a period of several years during which the operating set-up and methods were changed repeatedly in various respects from time to time; and, as we understand, without your operatives having investigated the material facts in detail on the ground. It seems to have been impossible to get a very clear, detailed and complete statement and up-to-date map showing these operations until our said previous opinion was published.

Since the promulgation of the previous opinion the attorneys for El Paso Natural Gas Company have at the suggestion of this Department and of your office submitted a detailed statement of the facts pertaining to their set-up and operations and have requested reconsideration of the matter in the light of those facts and insofar as they differ from the facts as we previously understood them we will attempt to summarize the facts as outlined in the statements now made by the company. The new matter submitted by the company consists of six pages of closely typewritten matter pertaining to the facts, accompanied by a map or plat delineating in detail the operating set-up presently in use by the company, and accompanied also by a complete copy of the ten-year industrial gas contract executed between El Paso Natural Gas Company and El Paso Electric Company under date of June 23, 1934. The company also submits a brief of legal authorities in support of its contentions as to the law; some of which authorities are hereinafter cited, and with all of which authorities together with others hereinafter cited, this Department was familiar at the time of writing the previous conference opinion.

In previous opinion we held that the wholesale deliveries of New Mexico gas from El Paso Natural Gas Company to Texas Cities Gas Company (an unaffiliated local distribution company in El Paso) at the city gates in El Paso were interstate commerce and not subject to the gross receipts taxes levied by our State statutes. We adhere to that ruling, but advert to it further hereinbelow in connection with certain facts which have been urged as changing the business from interstate to intrastate.

According to the statement now submitted by the company it also sells natural gas to the Lea County Gas Company (unaffiliated) at wholesale at the city gates of the various small dis-

tribution systems owned and operated by the latter in Texas; also the gas served by Lea County Gas Company to the domestic consumers in Texas through rural taps along the high pressure lines of El Paso Natural Gas Company, such contract being for a term of twenty-five years and total deliveries running from one hundred thousand to eight hundred thousand cubic feet per day. We likewise now hold that these sales by El Paso Natural Gas Company are interstate commerce.

We also held that the sale of gas to domestic consumers through rural taps along the high pressure lines of the El Paso Natural Gas Company in Texas were intrastate or local business and were, therefore, subject to the tax imposed by Article 6060. We likewise adhere to that ruling. At the time of the previous opinion, however, we understood that such rural tap sales were made by the El Paso Natural Gas Company. We now learn that in April, 1936, El Paso Natural Gas Company sold to Lea County Gas Company (wholly independent and unaffiliated concern in no way connected with El Paso Natural Gas Company) all of its local distribution systems, lines and services to domestic consumers both rural and urban, and that under the present set-up El Paso Natural Gas Company carries on no distribution operations in Texas and makes no sales to retail or domestic consumers in Texas whatsoever. Of course Lea County Gas Company under these facts would be a gas utility and its above mentioned operations would be local commerce subject to the State Gross receipts taxes.

We also held in previous opinion that the transaction by which El Paso Gas Transportation Corporation (a wholly owned and controlled affiliated subsidiary of the El Paso Natural Gas Company) transports gas through its lines through the city of El Paso from a point East of the city limits to a point at or near the West limits for a compensation of so much per thousand cubic feet is intrastate or local business and that the amounts paid by El Paso Natural Gas Company to its said subsidiary for such transportation is subject to the tax of Article 6060. We adhere to that ruling also.

This narrows the subject matter of the previous conference opinion No. 2993 down to the facts and law relating to the industrial sales by El Paso Natural Gas Company of New Mexico gas to five certain industrial consumers in Texas; and it is only with respect to those industrial sales that we have on reconsideration amended the previous opinion as hereinafter indicated. In writing upon this subject we will notice certain facts which have been urged as changing the gate sales to Texas Cities Gas Company, and certain of the above named individual contracts, from interstate to intrastate business.

According to the facts now submitted by the company we learn that the only other sales and deliveries of natural gas effected in Texas by El Paso Natural Gas Company are under the following five industrial contracts:

Customer	Unexpired Term of Contract	No. Cubic Feet Per Day
El Paso Electric Co.	8 years	5,000,000 to 6,000,000
American Smelting & Refining Co.	4 years	Approximately 3,000,000
Southwest Portland Cement Co.	4 years	2,000,000 to 3,000,000
Nichols Copper Co.	15 years	1,500,000 to 2,000,000
Standard Oil Co. of California	5 years	Approximately 1,500,000

I have examined in detail the industrial contract of the El Paso Electric Company above referred to. While the attorneys for the company do not so state in their written data submitted, they stated orally to me that each of the other four contracts involved is identical in terms and substance with the El Paso Electric Company contract. For purposes of this opinion we will assume that statement to be true. The attorneys state further that the facts as to such contracts and as to any of their other statements pertaining to their set-ups and methods of operation are subject at any time to verification by your representatives.

The company cites in connection with such industrial contract the cases of State, ex rel Cities Service Gas Company, vs. Public Service Commission of Missouri, 85 SW (2d) 890 (Mo. Sup. Ct.) and Sioux City, Iowa vs. Missouri Valley Pipe Line Company, 46 Fed. (2d) 819, holding that certain industrial contracts for the interstate transportation, sale and delivery of natural gas were interstate commerce. As previously stated, this Department was already familiar with those cases, and we might add thereto the case of Re Colorado Interstate Gas Company P. U. R. 1933 E 349, and State ex rel, to use of Panhandle Pipe Line Company vs. Public Service Commission of Missouri, et al, 93 SW (2d) 675. The facts relating to these industrial contracts as submitted to us in connection with the previous opinion, however, were not sufficient to convince us that the industrial contracts involved fell within the principles announced in the cases just above cited. The Supreme Court of the United States has not, so far as we have been able to find, ever passed upon the character of industrial contracts with respect to being interstate commerce or not. The above cases are the only ones which do pass upon such matters and we find ourselves in agreement with the reasoning thereof. We think the character of an industrial gas contract as being interstate commerce *vel non* depends upon the particular facts and circumstances in each case, and that each case must be passed upon separately in view of those peculiar facts. We do not think it wise to, and are unwilling to, attempt to lay down any fixed and inflexible rule governing all industrial contracts. This opinion is limited strictly therefore, to the five particular contracts above mentioned and to the particular set-ups and methods of operation presently said to be employed.

We have reviewed the facts as represented, which in addition to the facts above stated, are substantially as follows: That all of these five contracts contemplate and require deliveries exclusively from New Mexico gas, (with certain excepted contin-

gencies which have never arisen) and that such deliveries are exclusively so made. That all these sales and deliveries are effected directly through and from the 16-inch and 12 $\frac{3}{4}$ -inch high pressure pipe lines operated by El Paso Natural Gas Company and its above mentioned affiliated pipe line carrier for hire; in some cases directly off the main line and in others off of smaller high pressure laterals ranging from 4 inches to 12 inches in diameter; the quantities contemplated by the contracts and actually delivered in practice are, as will be seen from the above tabulation, quite substantial in volume; sales and deliveries are made to the industries concerned exclusively outside the city limits of El Paso, with the present exception that occasional deliveries are made to the El Paso Electric Company at its standby plant within the city; the transportation from Lea County, New Mexico to the places of delivery is continuous and uninterrupted except for the unimportant incidents of gas transportation by pipe line, such as repressuring operations, metering, testing, etc., which, in our opinion, do not change the character of the transportation. The pressure at the Lea County field is at an average 500 lbs. per sq. inch; the motive power used in the transporting of gas avails itself of the principle that the gas because of its own propensities will move from high pressure to low pressure areas, hence a concomitant result is that as the gas moves down the line the pressure automatically reduces itself to a pressure of 250 lbs. at Repressuring Station No. 1 seventy miles distant; it is boosted again to 500 lbs. pressure and reduces itself again to 250 lbs. at the second Repressuring Station seventy miles farther distant, where it is again boosted 500 lbs. and reduces itself again to around 250 lbs. on arrival at the El Paso area approximately seventy miles farther; the contracts call for deliveries at pressures less than 100 lbs. at all delivery points in the El Paso area; hence there is no occasion for further repressuring as the pressure there is more than sufficient to transport the gas to the points of delivery. At a point approximately 2 $\frac{1}{2}$ miles east of the east city limits of El Paso the 16-inch main high pressure transmission line turns northward through a gap in the mountains and extends into the State of Arizona, a repressuring station with 700 pound capacity being located approximately seven miles north of this junction. A 16-inch high pressure spur line extends from this junction into, through and for several miles northwest of the city of El Paso. At a point about 2 $\frac{1}{2}$ miles west of the City of El Paso this spur line is reduced to a 12 $\frac{3}{4}$ -inch line which extends a further distance of approximately three miles northwesterly to the final industrial connection with the El Paso Electric Company delivery point on the Texas side for the latter's plant which is on the New Mexico side. At a point about 2,000 feet west of the above mentioned junction east of El Paso is a regulator station which reduces the pressure in this 16-inch and 12 $\frac{3}{4}$ -inch spur line from that point to its western terminus from the pressure of 250 pounds maintained in the main line east of said junction to a

pressure which varies from about 65 to 100 pounds. The purpose of this pressure reduction in the spur line is two fold: First, it is considered dangerous and undesirable to transport gas through urban areas under higher pressures than are necessary, and the 65 to 100 pound pressure is amply sufficient to propel the gas to all points of delivery from the junction to the western terminus. Secondly, the deliveries to the city gates of the Texas Cities Gas Company are by contract required to be made at 50 pounds, and the reduction would have to be made at some point anyhow. So one step of the reduction is made at the above mentioned regulator station, which is east of the City. The Texas Cities Gas Company has one intake gate between the said regulator station and the eastern limits of the City, and four other intake gates within the corporate limits. At each of the city gates another regulator station is installed, which reduces the pressure further from the higher 65 to 100 pound pressure to 50 pounds at the meter stations. The El Paso Gas Transportation Company owns and operates the 16-inch line from the main regulator station east of El Paso through the corporate limits and to the beginning of the El Paso Natural Gas Company's 12 $\frac{3}{4}$ -inch line beginning about 2 $\frac{1}{2}$ miles northwest of the city limits. All industrial deliveries, with the single exception aforesaid, are accomplished from the main spur line west of the city limits. None is accomplished through the Texas Cities Gas Company intermediate or low pressure lines making up the El Paso local distribution system. The El Paso Gas Transportation Co., of course, has a local franchise for the use of necessary streets and other easements and facilities through the City of El Paso.

We have studied all of the available authorities carefully with a view of determining whether the gate and industrial sales are rendered intrastate rather than interstate business by any one or more of all of the following circumstances:

1. By the reduction of the pressure from 250 pounds to a pressure ranging from 65 to 100 pounds at the regulator station near the junction east of El Paso.

2. By the further reduction of pressure to 50 pounds at each of the city gates.

3. By reason of the fact that the transportation through El Paso is accomplished through a subsidiary corporation for hire rather than by the El Paso Natural Gas Company itself or by an independent carrier for hire.

4. By the fact that the El Paso Gas Transportation Company operates under a local franchise.

5. By the fact that deliveries are made off the spur line within the corporate limits of El Paso at four of the city gates and occasional deliveries at the stand-by electric plant.

We do not think that any or all of the above circumstances made the gate and industrial sales intrastate business. The reductions in pressure have to be made at some point or points before delivery at the city gates, and at the industrial gates, in any event; and we think it immaterial that it is made in

two steps and at two points rather than one. This reduction is not comparable to the reduction from extremely high pressure of 300 or 500 pounds down to four or six ounces at the burner tips, such as was referred to in the East Ohio decision as one circumstance rendering burner tip service local rather than interstate business. Nor do we think the turning of gas over to the subsidiary corporation for transportation works any change in its character. What one may do in interstate commerce one's self may likewise be accomplished through an affiliated or independent agent with like immunity. The fact that the transportation company exercises a local franchise is likewise immaterial, for it is general knowledge that interstate railroads commonly exercise local franchises in cities and towns through which they pass, and yet in no case has it ever been held that this transforms an interstate carriage of passengers and freight into a local business. No more do local deliveries within the city affect the question. All of these circumstances constitute the mere incidents and accidents of interstate transportation, and as said in the Peoples Gas case, the East Ohio case, and the Interstate Gas Company case, they do not affect the character of the transportation. Even the fact that both title and possession of the gas change hands at the State line was held to be immaterial in those cases; as were also the changes in pressure, which are merely analogous to changes in speed of an interstate train.

We have given very careful attention to the excellent brief submitted to us by the Chief Examiner of the Gas Utilities Division, and have also analyzed thoroughly all cases cited by him. For the most part, such cases show the origin and development and application of the so-called original package doctrine to importations from foreign countries, and to interstate shipment of goods susceptible to being shipped in packages or containers of various kinds by freight. An analogy to such doctrine has been expressly applied to the interstate pipe line transportation of natural gas, by the Supreme Court of the United States in the case of East Ohio Gas Company vs. Tax Commission, 283 U. S. 465, 75 L. Ed. 1171. In that case, and in connection with the analogy of the broken package doctrine, the Court cites with approval the cases of:

West Virginia & Maryland Gas Co. v. Towers, et al;
Public Service Commission of Maryland, 134 Md. 137, 106 Atl. 265, and
State ex rel Caster v. Flannelly, 96 Kan. 372, 152 Pac. 22.

The two cases last cited, however, involve local distribution operations in which service of gas at the burner tips was being considered, and after the interstate gas in question had plainly entered the local distribution systems it was beyond the city gate or regulatory and measuring stations. We do not understand that the Supreme Court of the United States, by citing the result of such cases with approval, intended to place

the stamp of its approbation upon everything that was said in the opinions. Other cases considered by us in this connection are:

South Carolina Power Co. v. South Carolina Tax Commission, 52 Fed. (2) 515, affirmed, 236 U. S. 525, 52 S. Ct. 494, 76 L. Ed. 1268;

May v. New Orleans, 178 U. S. 496, S. Ct. 976, 44 L. Ed. 1165;

American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538;

Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095;

Gulf Fisheries Co. v. MacInerney, 276 U. S. 124, 48 S. Ct. 227, 72 L. Ed. 495;

Whitfield v. Ohio, 297 U. S. 431, 56 S. Ct. 532, 80 L. Ed. 778;

Utah Power & Light Co. v. Pfost, 236 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038;

Superior Oil Co. v. Mississippi, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504.

At best, however, the analogy between the broken package doctrine, as it has been developed and applied in relation to merchandise or other commodities shipped in containers by freight on one hand, and the interstate pipe line transmission of natural gas on the other hand, is very imperfect. Moreover, the broken package doctrine, as applied to interstate commerce, has virtually been repudiated by the Supreme Court of the United States, itself, and at most can be used only as an aid and not as a sole test for determining when the interstate movement of natural gas and its concomitant immunity from State regulation and taxation, has come to end. After all, the cessation of interstate transportation is the controlling test, not the breaking of the package. We are of opinion that, in the true sense of the controlling decisions, the original package has not been broken, even by analogy, and the interstate transportation has not been terminated in the facts of this present situation until the gas has been reduced to the 50 pound pressure and delivered through the city gate stations or other delivery points into the local distribution system proper; and that all things which befall gas up to that point are mere immaterial incidents of interstate transportation itself.

These views are formulated chiefly from our deliberate study of the following authorities:

Missouri ex rel Barrett vs. Kansas Natural Gas Co. 265 U. S. 298, 68 L. Ed. 1027;

Public Utilities Commission of Kansas vs. Landon, 249 U. S. 236, 63 L. Ed. 577;

State Tax Commission of Mississippi vs. Interstate Natural Gas Co., 284 U. S. 41, 76 L. Ed. 156;

People's Natural Gas Company vs. Public Service Commission, 270 U. S. 550, 70 L. Ed. 726;

Pennsylvania Gas Co. vs. Public Service Commission, 252 U. S. 23, 64 L. Ed. 434;

East Ohio Gas Co. vs. Tax Commission, 283 U. S. 465, 75 L. Ed. 1171;

State Corporation Commission of Kansas vs. Wichita Gas Co., 290 U. S. 561, 78 L. Ed. 500;

Western Distributing Co. vs. Public Service Commission of Kansas, 285 U. S. 119, 76 L. Ed. 655.

Believing that the applicable decisions of the Supreme Court of the United States plainly require the holding, we are compelled to say that both the gate sales and the above named industrial sales are interstate commerce.

Yours very truly,

ALFRED M. SCOTT,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered approved and filed.

WM. McCRAW,
Attorney General of Texas.

No. 2999

SPECIAL PERMITS—STATE HIGHWAY DEPARTMENT—TRANSPORTATION OF OVERWEIGHT OR OVERSIZE OR OVERLENGTH COMMODITIES

In the issuance of special permits provided for in Article 827-a, Penal Code, the Highway Department is allowed to exercise its discretion in determining the shortest practicable route. A permit of the State Highway Department authorizing the hauling of an overweight or oversize or overlength commodity entitles the operator to transport such commodity over the highway designated in such permit without regard to the highway designated in his Certificate of Public Convenience and Necessity.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, April 8, 1937

Honorable J. B. Early, Maintenance Engineer, State Highway Department, Austin, Texas.

DEAR SIR: Your letter of April 1, 1937, addressed to Honorable William McCraw, Attorney General of Texas, has been referred to the writer for attention and reply. The questions you have propounded in your letter read as follows:

"(1) In your opinion, is it mandatory that, in the issuance of the special oversize and overweight permits, the Highway Department require that the movement be consummated over the nearest and most practicable route?

"(2) If your answer to the above question is in the affirmative, is it your opinion that the Department may exercise discretion in determining which route is the nearest and most practicable?

"(3) If your answer to question number 2 is in the affirmative, is it your opinion that it would be a proper use of discretion for the Highway

Department to consider the relative strength of bridges on routes considered, hazards to the travelling public, width of roadway, and other matters that may involve safety in determining what shall be considered the nearest and most practicable route?

"(4) The holder of a Railroad Commission carrier permit, which stipulated that the holder could not haul for hire over certain Highways in Texas, applies to the Highway Department for a permit to haul an oversize or overweight or overlength load over a route not prohibited in his Railroad Commission permit, is the Highway Department, in your opinion, obligated to select a route different from the route stipulated in the application if the route in the application was found not to be the nearest and most practicable in its judgment, even though the nearest and most practicable route selected would decree that the movement be made over a route prohibited in the holder's Railroad Commission permit?

"(5) If your answer to question 4 is in the affirmative, in your opinion would the special permit issued by the Highway Department supersede and render nullified the prohibitions in the Railroad Commission permit with reference to the route over which the haul could be consummated?

"(6) If your answer to question number 5 is in the negative, in your opinion, would the operator, in consummating the movement allowed under the special permit issued by the Highway Department, be subject to a penalty at law for the violation of the terms of his Railroad Commission permit?

"(7) Are we, in your opinion, required to give consideration as to whether or not an applicant for a special permit to haul an oversize or overweight load over State Highways has a Railroad Commission permit denying him the right to haul for hire over stipulated routes?

"(8) In your opinion, would not the responsibilities of the Highway Department cease with the issuance of the special oversize or overweight permit allowing the transportation of the oversize or overweight load over the nearest and most practicable route?"

Since questions number 1, 2 and 3 embrace the same question of law, they are grouped together for the purpose of discussion and answer.

You are advised that the Highway Department is required in the issuance of a special oversize or overweight or overlength permit under the provisions of Article 827-a, Penal Code, and Article 6701, Vernon's Annotated Statutes, to route the motor vehicle over the shortest practicable route.

Your attention is directed to that part of Article 827-a, Section 2, Penal Code, which reads as follows:

" . . . ; provided, that any haul or hauls made under such permits shall be made by the shortest practicable route;"

In determining what is the shortest practicable route the Highway Department is authorized to exercise its discretion in arriving at the facts necessary to establish in each particular instance such shortest practicable route.

Questions number 4, 5, 6, 7, and 8 are grouped together for the purpose of discussion and answer.

Article 6663, et seq., Revised Civil Statutes, vest the administrative control of all State highways in the State Highway Department, with the authority and duty to lay out, construct and maintain such highways. Article 827-a, supra, and Article 6701-a, supra, which authorize the Highway Department to issue the special permits hereinabove referred to, are in pari materia with Article 911-b, Revised Civil Statutes, which governs and regulates the issuance of certificates of Public Convenience and Necessity to common carriers. It is to be observed that Articles 6701-a and 827-a were enacted by the Legislature subsequent to the enactment of Article 911-b.

It is obvious that the statutes authorizing the Highway Department to issue special permits are exceptions to the statutes fixing seven thousand pounds as a maximum load, and the statutes relating to the Railroad Commission's authority to issue certificates of Public Convenience and Necessity.

We think that it was both the spirit and the intention of the Legislature, in enacting the statutes permitting the transportation over State highways of overweight or oversize or overlength commodities, to authorize the Highway Department in the issuance of the special permits to designate which highway is the shortest practicable route, without regard to the designated route of the carrier operating under a Certificate of Public Convenience and Necessity issued by the Railroad Commission; and that when the Highway Department has issued the special permit above referred to, permitting the hauling of overweight or oversize or overlength commodities, that the permittee is authorized to haul such load over the highways designated by the Highway Department.

Yours very truly,

LEONARD KING,
Assistant Attorney General.

This opinion has been considered in conference, approved and ordered filed.

WM. McCRAW,
Attorney General of Texas.

No. 3000

INSURANCE—RECIPROCAL—TAXATION—GROSS PREMIUM TAXES

1. Sections 5 and 5b. of Art. IV of House Bill No. 8, passed at the Third Called Session of the 44th Legislature, does not violate Section 36 of Art. III of our State Constitution.
2. Sections 5 and 5b. of said House Bill No. 8 do not amend Art. 5032, R. C. S., 1925, but rather said article is repealed by said Bill to the extent they are irreconcilably in conflict.

3. The caption of said House Bill No. 8 is sufficient insofar as Art. 5032, R. C. S., 1925, is concerned.

4. A liberal and substantial construction rather than a strict and literal one should be followed in construing constitutional provisions relating to captions.

5. Reciprocals are insurance companies, or organizations, or concerns within the meaning of said House Bill No. 8.

6. Statutes imposing taxes are strictly construed and all reasonable doubts with reference to the applicability of the taxes are resolved in favor of the taxpayer.

7. Assessments are not taxable under a statute levying a tax on gross premiums.

8. The premium deposit paid by subscribers to reciprocals is a premium within the meaning of said House Bill No. 8 and is taxable as such.

9. Said Sec. 5 levies a maximum tax of 3.25% upon gross premiums of health and accident companies, whereas said Sec. 5b. in the same bill levies a flat tax of one-half of one per cent with certain deductions allowed upon domestic health and accident companies.

10. The Legislature is without authority to levy a gross premium tax of 3.25% upon domestic reciprocals transacting a health and accident business, and a one-half of one per cent tax upon other domestic companies pursuing the same occupation.

11. Home reciprocals are required by law to use the same policy forms, to charge the same rates and operate under the same laws as other home companies transacting a home health and accident business, and pursuing the same occupation.

12. The Legislature may make reasonable classifications for occupation tax purposes, but the classifications must be based upon the occupation pursued and not upon the person pursuing it; and all persons pursuing a given occupation must receive identical treatment.

13. Classifications for occupation tax purposes must be reasonable rather than discriminatory and arbitrary.

14. If any basis for classification exists between home reciprocals and other home companies transacting health and accident business, it is in favor of reciprocals which operate on a non-profit basis for mutual protection of their subscribers as against home capital stock companies carrying on the same occupation for profit.

15. A tax of 3.25% on home reciprocals is unreasonable discrimination as against one-half of one per cent tax on other home companies pursuing the same occupation.

16. If said Sec. 5 is discriminatory and invalid, said Sec. 5b. applies to the home health and accident business of home reciprocals the same as to other home companies.

17. If two constructions can be placed upon an act, one of which will render the act constitutional and the other unconstitutional, the construction which will render it valid must be placed upon it.

18. When two sections of an act are in conflict, such a construction must be placed upon such sections as will, if possible, give some effect to both sections.

19. When two sections of an act are in conflict, one of which is general in its terms, and the other particular, the particular shall control as against the

general, leaving, if possible, some realm of operation for the general.

20. When parts or sections of the same act are in irreconcilable conflict, the part later in position prevails as the latest expression of the Legislature.

21. Said Sec. 5b., levying a one-half of one per cent tax occupies the later position and controls to any extent, is irreconcilably in conflict with said Sec. 5.

22. Said Sec. 5, levying the 3.25% tax, treats generally with both foreign and home companies, whereas said Sec. 5b. treats specifically with home companies. Therefore Sec. 5b. applies as to home companies provided for therein, and Sec. 5 should be construed so as to except the health and accident business of home companies writing health and accident insurance thereby leaving an adequate field of operation for both sections of the act, and giving some effect to each.

23. Placing the above construction on the act will make it wholly constitutional and without discrimination, requiring all home companies transacting a home health and accident business to pay the tax provided in said Sec. 5b. and leaving all foreign companies transacting such business to pay under Sec. 5, as was the evident intention of the Legislature.

24. Statutes granting exemptions from taxation must be strictly construed.

25. Since said Sec. 5b. applies only to life, health and accident business of home companies; home reciprocals must pay taxes on its health and accident business under said Sec. 5b. and on all other business except fire under said Sec. 5.

26. Reciprocals operate on a cooperative or mutual non-profit basis for the protection of their subscribers solely, and their fire business is therefore exempted from the tax provided in said Sec. 5 by the last sentence of said section.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, April 17, 1937.

Honorable R. L. Daniel, Chairman Board of Insurance Commissioners, Austin, Texas.

DEAR SIR: This will acknowledge receipt of the letter of recent date from Mr. Van Fleet of your department, addressed to Attorney General McCraw, which letter has been referred to the undersigned for attention. Your department requests the opinion of this office upon the following question:

Are reciprocals or inter-insurance exchanges, as organized under the laws of this State and licensed by the Department of Insurance, subject to the taxes as prescribed by the Omnibus Tax Bill, House Bill No. 8, passed at the Third Called Session of the 44th Legislature, particularly Article 7064, as amended in said bill?

At the time this request for an opinion was received the Assistant to which it was then referred was engaged in intensive preparation for the trial of the suit of the State of Texas against Texas Employers' Insurance Association, which was tried several weeks ago in the 98th District Court of Travis County, Texas. We have delayed replying to your inquiry awaiting a

decision in such case for the reason that some of the more important questions involved in this opinion are involved in such case. Also, various attorneys representing several of the reciprocals here concerned have requested time to furnish written briefs to this department and to present their views orally. Only today two different attorneys have talked to the writer over long distance telephone requesting further delay, but in view of the importance of the questions here presented, and in view of the fact that the time within which the Legislature can consider this matter in the light of this opinion, if it cares to do so, is growing shorter each day, and in view of the further fact that the licenses of such companies are being withheld pending this opinion, we feel impelled to render the same at this time without further delay.

Counsel for the interested companies have ably and earnestly presented a large number of legal questions. We will attempt to take up and briefly discuss what we consider to be the most important of the questions raised.

Their first contention is that said Omnibus Tax Bill violates Section 36 of Article III of our State Constitution in that it attempts to amend Article 5032, which is in the chapter of the insurance title dealing with reciprocals, without republishing such statute as amended. Section 36 of Article III provides that:

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

Article 5032, which treats with reciprocals, is with reference to the certificate of authority granted to the attorney in fact, and after setting up the method for securing said certificate of authority and of renewing the same, it contains the following sentence:

"Such attorney shall pay as a fee for the issuance of the certificate of authority herein provided for the sum of \$20.00, which shall be in lieu of all license fees and taxes of whatsoever character in this State."

The Omnibus Tax Bill nowhere expressly mentions or refers to Article 5032 or the language therein just quoted, and counsel for the reciprocals say that an act may be amended by striking out part of the language of a section as well as by changing or adding to it, and that the Omnibus Tax Bill insofar as it may attempt to levy an occupation tax upon reciprocals is an attempt to amend Article 5032 without re-enacting and publishing at length Article 5032, as amended. We do not agree with this contention. Our Courts have repeatedly held that a portion of an act or section of an act may be repealed by necessary implication. Section 20 of Article II of the Omnibus Tax Bill provides, "All laws and parts of laws in conflict herewith are hereby repealed."

We, therefore, believe that the language quoted from Article 5032 is repealed to the extent that it conflicts with the taxes

levied upon such companies under the Omnibus Tax Bill, and therefore overrules such contention.

Counsel further contend that the caption of said Omnibus Tax Bill is defective in that it merely uses the language,

“An Act amending Article 7064,”

(insofar as the subject matter of this opinion is concerned), and contains no language showing any amendment to Article 5032. They say that the caption is insufficient and is deceptive and misleading in that it places neither the Legislature nor the public upon notice that in the body of the Bill said Article 5032 is amended, and say that if the caption as written is sufficient, that a caption merely saying, “An Act to amend Article 7064,” would be sufficient for the entire Omnibus Tax Bill, and that under such caption the Legislature could proceed, as an amendment to Article 7064, which merely levies an occupation tax upon certain insurance companies, to amend every other occupation tax in the statutes. We do not agree with this proposition. The caption provides,

“ amending Articles 7064, Revised Statutes of 1925; levying a tax upon individuals, societies, fraternal benefit societies, associations, or corporations domiciled in Texas transacting the business of life, accident, life and accident, health and accident insurance; repealing all laws in conflict;”

The courts have held that a liberal and substantial construction, rather than a strict and literal one, should be followed in construing constitutional provisions relating to captions. *Dillinger vs. State*, 28 S. W. (2d) 537; *Board of Trustees, Young County vs. Bullock School District No. 12*, 37 S. W. (2d) 829, aff. (Com. App.) 55 S. W. (2d) 538; *Katz vs. State*, 54 S. W. (2d) 470; *Archev vs. State*, 59 S. W. (2d) 406. We believe the caption to be sufficient, and that a lengthy discussion of same here will serve no useful purpose.

It is also contended that the language of Article 7064, as amended, which reads:

Every insurance corporation, Lloyds, or *reciprocals*, (Italics ours) and any other organization or concern transacting the business of within this State. . . . shall pay an annual tax upon such gross premium receipts as follows:”

is not sufficient to impose a tax upon the clients of counsel interested in this matter. They contend that the word “reciprocals” is defined by Article 5026 as being the office or offices through which indemnity contracts shall be exchanged, and is not a legal entity upon which a tax can be levied. They contend that by virtue of the peculiar nature of their organization that the tax would have to be levied upon the attorney in fact as the Twenty Dollar fee provided in Article 5032 was levied, or upon

the individual members of the organization. They further contend that tax statutes must be strictly construed against the State, and that there is no such a thing as a reciprocal company, and that a reciprocal is not an insurance company, but that each subscriber acts individually in exchanging reciprocal or inter-insurance contracts with each other providing indemnity among themselves from loss, and that the business of each subscriber is translated through his attorney in fact who is likewise the attorney in fact in common for all other subscribers. The heart of such contention is that if the tax statute is to be strictly construed against the State, that each subscriber operates through his own attorney in fact jointly with other individuals rather than as an insurance company, and therefore stands on his own feet; and no tax being levied against the individual subscriber, or the attorney in fact, a tax against "reciprocals", which is contended to be defined by statute as merely an office where the subscribers meet to exchange risks, is insufficient to levy a tax which either the individual subscribers or the attorney in fact for them would be required to pay. While we appreciate the force of this argument, and recognize that the cases cited by counsel indirectly tend to some extent to support such position, we cannot agree with the conclusion reached in such respect by counsel for the reciprocals. It is true that this department has held repeatedly that statutes imposing taxes are always strictly construed and all reasonable doubts with reference to the applicability of the taxes are resolved in favor of the taxpayer. See conference opinion No. 2955, page 9, Biennial Report of the Attorney General, 1934-1936, written by Scott Gaines, then Assistant Attorney General under former Attorney General James V. Allred, and present First Assistant Attorney General. Mr. Gaines in such opinion cited in support of such proposition Sutherland on Statutory Construction, Sections 536, 537; State of Texas vs. San Patricio Canning Company, 17 S. W. (2d) 160; McCallum vs. Retail Credit Men of Austin, 26 S. W. (2d) 715; same case, 41 S. W. (2d) 46; Rudolph vs. Ptomac Electric Power Company 24 Fed. (2d) 882. Mr. Gaines said,

"This rule results, of course, from the fact that the imposition of taxes places a special burden upon those taxed and should not be lightly regarded or liberally construed."

We wish to call attention, however, to the fact that Article 7064, as amended, does not merely levy a tax upon insurance corporations and "reciprocals", but also uses the language, "any other organization or concern." We believe such language to be sufficiently broad to justify the collection of the tax here involved. Surely, these "reciprocals" are some sort of organization or concern. It is apparent that the Legislature by said Article 7064 intended to levy the tax provided in Article 7064 upon the gross premium receipts of "reciprocals".

Counsel for these "reciprocals" say, however, that they do not collect any premiums, and that, therefore, any act levying an occupation tax measured by gross premium receipts would not result in any tax being collected from them; and, therefore, they would owe no tax. They rely upon the opinions written on May 23, 1930, by former Assistant Attorney General Dewey Lawrence, and on June 9, 1933 by Assistant Attorney General Everett Johnson, now District Judge at San Antonio, and on March 20, 1937 by one of the writers, all of which opinions held that a gross premium tax upon premiums of insurance companies was not applicable to assessments.

We do not deem it necessary to again discuss the general proposition of whether or not a tax levied upon a premium without reference to assessments is sufficient to furnish a yardstick or a measurement by which a tax can be collected upon assessments. The three opinions above mentioned fully and elaborately treat with and dispose of that question. In view of such opinions this question is a most serious one, especially after applying the rule outlined above of strict construction against the State, and if counsel are right, we should go no further as their clients owe no tax under this bill as it taxes premiums only and not assessments under Sections 5 and 5b.

The "reciprocals" contend that they do not collect premiums. They admit, however, that they operate upon precisely the same basis that old line legal reserve capital stock companies operate except that any deficiency in the amount collected, which is collected in the same manner and at the same time and in the same amount as is collected by capital stock companies, is made up by assessment as needed against the subscribers, and any excess collections over and above the amounts required to be kept on hand by law may, under certain circumstances, be returned in the way of dividends to the subscribers. The question here presented is whether or not such plan of operation makes the moneys collected by such "reciprocals" premiums or assessments. We believe that the amount originally paid in is a premium within the meaning of the taxing statute rather than an assessment, especially in view of the fact that it is collected in the same amount, in the same manner and at the same time as is required of capital stock legal reserve companies rather than as needed.

Because of the conclusions herein reached and because such inquiry is not before us, we deem it unnecessary to pass upon the question of whether or not credit should be allowed for dividends paid or additional taxes collected upon assessments made where necessary to supplement the premiums collected.

Article 7064, which we have been discussing, is amended by Section 5 of the Omnibus Tax Bill. Section 5b, of the Omnibus Tax Bill reads in part, as follows:

"That a new Article be added to Chapter 2, Title 122, Revised Civil Statutes, to be called Article 7064a, to read as follows:

"Article 7064a. Every group of individuals, society, fraternal benefit society, association, or corporation domiciled in the State of Texas transacting the business of life, accident, or life and accident, health and accident insurance for profit, or for mutual benefit or protection, shall at the time of filing its annual statement, report to the Commissioner of Insurance the gross amount of premiums received from or upon the lives of persons residing or domiciled in this State during the preceding year and each of such groups of individuals, society, fraternal benefit society, association, or corporation shall pay an annual tax of one-half of one per cent ($\frac{1}{2}$ of 1%) of such gross premium receipts. . . ."

The proposition has been raised that domestic health and accident insurance companies other than reciprocals cannot be allowed to pay a flat tax of only one-half of one per cent of their gross premium receipts with certain deductions allowed, while domestic reciprocals transacting health and accident insurance are required to pay a maximum of 3.25% of their gross premium receipts under the same possible circumstances without said deductions. It is further contended that domestic reciprocals writing health and accident insurance are domestic health and accident insurance companies within the meaning of Article 7064a insofar as their domestic health and accident business is concerned. We deem it unnecessary to pass upon this last contention. But we do agree that the Legislature is without authority to levy a tax of one-half of one per cent upon companies domiciled in Texas except reciprocals transacting the business of accident and health insurance, and at the same time in the same bill levy a tax of 3.25% upon the health and accident business of reciprocal organizations domiciled in this State; and we do not believe that it intended to do so, or has done so, as is hereinafter pointed out. If we take workmen's compensation insurance as an illustration, (which is written by both reciprocals and accident companies), both the reciprocals and the accident companies are required by law to use precisely the same policy forms prescribed by the Board of Insurance Commissioners, charge the same rates fixed by the Board of Insurance Commissioners, operate under the same workmen's compensation law, and actively engage in seeking the same business as competitors to each other, then can it be said under such circumstances that the Legislature has the right to charge one domestic insurance organization pursuing a given occupation a tax at one rate, and charge another organization transacting an identical insurance business a tax six and one-half times as great? We wish to illustrate in this manner. Insurance corporations chartered in Texas under our general casualty statutes may take the power to write fire insurance as well as casualty insurance. Fire insurance companies incorporated in Texas may take the power of writing certain casualty lines as well as fire lines. Therefore, both capital stock fire and casualty companies may take the power of writing both lines. Except for the fact that one company is

organized under the fire chapter and the other company is organized under the casualty chapter, they operate in an identical manner pursuing the same occupations. Could it be said that a domestic fire insurance company writing casualty and fire insurance could be charged as occupation tax six and one-half times as large as a domestic casualty company pursuing the same occupation? It is true that the Legislature is granted the power under our State Constitution to levy occupation taxes and to make reasonable classifications for such purpose. The classification must be based upon the occupation pursued and not upon the person pursuing it, and all persons pursuing a given occupation must receive identical treatment. To illustrate, if a negro and a white man were each pursuing the same occupation in the same way and under the same circumstances, the negro could not be charged one tax for pursuing his occupation, and the white man charged a different and higher or lower tax for pursuing the same occupation pursued by the negro purely upon the basis that one was a negro and the other a white man. In the instant case the only difference that can be drawn and the only classification that can be made is that the 3.25% tax is levied upon reciprocals transacting a health and accident business, whereas the one-half of one per cent tax for transacting the same business and pursuing the same occupation is levied upon accident companies. Such a classification cannot be made. All domestic companies transacting the same business and pursuing the same occupation must pay the same rate of tax unless there be some reason for a classification other than that one is a reciprocal association doing a home accident business and the other an accident company doing the same business. Even though we should be wrong in what we have just said about there being no reasonable grounds for such a classification, we believe that a taxing statute which in the same act attempts to levy a tax six and one-half times as great upon a domestic organization operated not for profit, as it does upon capital stock companies operating for profit is such an unreasonable and arbitrary classification on its face that it cannot stand. If there be any reason for a classification between home reciprocals and home capital stock accident companies, it is by reason of the fact that one operates upon a profit basis for its stockholders, and the other operates on a non-profit basis for the protection of its subscribers. But we believe that if such difference affords reasonable grounds for any classification for occupation tax purposes, that in order for such classification to be reasonable, it must be in favor of the non-profit organization and certainly not to the extent of a six hundred and fifty per centum discrimination against it.

It, therefore, follows that it is our opinion that Article 7064, as amended by the Omnibus Tax Bill, insofar as it may attempt to tax domestic reciprocals transacting a health and accident business, if it attempts to do so, is discriminatory and invalid by reason of the provisions of the succeeding section of the same

bill which levies a smaller tax upon domestic health and accident insurance companies. In such connection we wish to point out the apparent conflict between Article 7064, as amended by the Omnibus Tax Bill, and Article 7064a, as contained in this same bill, insofar as said two Articles affect health and accident insurance companies. Article 7064, as amended, reads in part as follows:

"Every insurance corporation, . . . reciprocals . . . transacting the business of . . . accident . . . casualty, or any other kind or character of insurance business within this State . . . 3.25 % . . . gross premium receipt . . ."

Whereas, Article 7064a reads in part, as follows:

"Every group of individuals, association, or corporation domiciled in the State of Texas transacting the business of . . . accident, health and accident . . . insurance for profit, or for mutual benefit or protection, . . . shall pay an annual tax of one-half of one per cent ($\frac{1}{2}$ of 1%) of such gross premium receipts, . . ."

It is apparent that in the same act a tax of 3.25% has been imposed upon the gross premium receipts of all accidents and health companies transacting business in this State in one section, whereas in another, a tax of one-half of one per cent of such gross premium receipts has been levied against domestic health and accident insurance companies. It will be noted that Article 7064 specifically mentions reciprocals, whereas Article 7064a does not call them by name, but does treat with companies transacting life, accident and health insurance. On the other hand, Article 7064a specifically treats with domestic companies only, whereas, Article 7064 deals with both foreign and domestic companies. We believe that Article 7064a is broad enough to levy a tax upon the health and accident business of domestic reciprocals even though Article 7064 is invalid because of its discriminatory provisions.

However, if two constructions can be placed upon an act, one of which will render the act constitutional and the other unconstitutional, the construction which will render it valid must be placed upon it. Further, where two sections of the same act are apparently in conflict such a construction must be placed upon such sections as will, if possible, give some effect to both sections, as it is not to be presumed that the Legislature intended either to write an invalid and unconstitutional act, or to have irreconcilably conflicting provisions in the same act. Another elementary rule is that where two sections of an act are in apparent conflict, one of which is general in its terms, and the other particular, the particular shall control as against the general. If possible, such a construction shall be placed upon such sections as will give effect to the particular and specific section of the statute and yet leave some realm of operation for the general. Another rule of construction is that,

"Where parts or sections of the same act are in irreconcilable conflict, the act or provision later in position prevails as the latest expression of the Legislative will, and repeals the other insofar as there is irreconcilable conflict." Section 74, Volume 39, Texas Jurisprudence, page 139.

Article 7064a, levying the one-half of one per cent tax on domestic health and accident companies, is in a later position in the Omnibus Tax Bill than the 3.25% tax statute, and, therefore, if they be in irreconcilable conflict, the one-half of one per cent tax statute prevails. Article 7064, which levies the 3.25% tax, treats with both foreign and domestic health and accident companies, and with both domestic and foreign reciprocals writing health and accident and other lines of insurance, and is therefore general in its terms as compared with Article 7064a, which levies a tax of one-half of one per cent upon domestic health and accident companies to the exclusion of foreign companies. A realm of operation is left for Article 7064 insofar as it attempts to deal with reciprocals and other organizations writing health and accident insurance in that even though Article 7064a is held to be applicable to all domestic companies writing health and accident insurance, including reciprocals, the language in question in Article 7064 will still operate to levy the tax therein provided upon foreign reciprocals and other organizations transacting such business. In order to avoid placing a construction upon Article 7064 that will render it unconstitutional, and in order to give effect to the specific statute levying a one-half of one per cent tax upon domestic health and accident companies, and at the same time leave a realm of operation for Article 7064 insofar as it attempts to levy a 3.25% tax upon health and accident companies, and in order to give effect to apparently conflicting provisions of the same statute, and also in order that the portion of the statute last in position in the act may be given effect if there be an irreconcilable conflict, it is our opinion that Article 7064a should be construed to apply to domestic companies including domestic reciprocals transacting a health and accident business or either of said businesses insofar as said businesses are concerned; whereas, Article 7064 insofar as accident and health business is concerned, or either of them, should be construed to apply to those companies not specifically covered in Article 7064a, that is to say, it should be construed to apply to foreign companies including foreign reciprocals only insofar as health and accident business is concerned.

Sections 5 and 5b, have only a few lines between them in the bill. Surely, the Legislature must have intended the construction here given. They must have known they had levied a tax six and one-half times as great in one place as the other, and must have intended for the section levying the lesser tax to be considered as an exception to the other to the extent of the home life, health and accident business provided for in said Sec. 5b., otherwise there is a hopeless conflict and meaningless situation.

Nor can we ascribe to the Legislature an intention to except from the general language all home companies writing health and accident insurance except home reciprocals. In the first place, the excepting clause if we may call said Sec. 5b. that, contains no such language evidencing any intention of excluding reciprocals from the exception. The language is general, covering all. While reciprocals are specifically mentioned along with other companies in Sec. 5, after the exception is applied to said section, foreign reciprocals transacting health and accident business are left just as are other foreign companies transacting such business.

In neither Section 5 nor Section 5b., or anywhere else in the whole bill, is there a single line to indicate that the Legislature intended to treat reciprocals, whether home or foreign, any different from other home or foreign companies transacting the same business.

In such case we would not be justified in ascribing to the Legislature the intention of taxing capital stock home companies transacting a health and accident business for profit one-half of one per cent, and at the same time in the same bill tax reciprocals transacting the same business for the mutual protection of their subscribers and not for profit 3.25%.

You are, therefore, respectfully advised that it is our opinion that domestic reciprocals transacting a health and accident business in Texas should be taxed upon their gross premiums collected upon their health and accident business, or either of them, to the extent and in the manner set out in Article 7064a of said Omnibus Tax Bill rather than Article 7064, as amended in said Omnibus Tax Bill. Their workmen's compensation premiums are taxable under 7064a.

While said Article 7064a contains the following language,

"The taxes aforesaid shall constitute all taxes and license fees collectible under the laws of this State against any such insurance organizations . . ."

we do not believe that such language would have the effect of preventing the collection of the tax provided in Article 7064 upon any other business of said reciprocals.

"Statutes granting exemptions from taxation must be strictly construed and the burden is upon the person claiming such exemption from taxation to bring himself clearly within the exemption statute. In considering a claim of exemption from taxation, the exemption law must be strictly construed and doubts resolved against such claim." *Texas Employers' Insurance Association vs. City of Dallas*, 5 S. W. (2d) 614, (Writ of Error refused by the Supreme Court); *Trinity Methodist Episcopal Church vs. City of San Antonio*, 210 S. W. 669; *Santa Rose Infirmary vs. City of San Antonio*, 259 S. W. 926; *Millers' Mutual Fire Insurance Company vs. City of Austin*, 210, S. W. 825.

Bearing this rule in mind, we believe that such exemption from taxation should be construed to be limited to other taxation

upon the business taxed in said Article 7064a wherein such exemption is contained and not to be construed to be applicable to other lines of insurance written by domestic reciprocals. In view of the fact that Article 7064a does not relate to any lines of business of said reciprocals except health and accident, Article 7064, as amended, would be applicable to fidelity, guaranty, surety, and any other lines of insurance except health, accident and fire written by said domestic reciprocals which may write all lines of insurance except life. It is not unusual for insurance companies to pay gross premium taxes on different lines of business under different taxing statutes. Foreign life, health and accident companies have heretofore paid a gross premium tax on their life business under the Robertson Insurance Law, and on their health and accident business under Article 7064.

Counsel contend, however, that Article 7064 contains the following exemption,

"Purely cooperative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property, and not for profit, shall be exempt from the provisions of this law; . . ."

We are informed that the fire business of those companies is a very small part of their business, but that is unimportant from a legal standpoint. Reciprocals operate on a cooperative or mutual non-profit basis and they have no capital stock and their assets belong to the subscribers. Such companies are carried on by their subscribers solely for their own protection. No one else can get a policy. They are operated upon a cost basis and return their profits, if any, to the subscribers. We have heretofore held reciprocals to be insurance associations within the meaning of said statute. On the 1st day of March, 1937, one of these writers rendered you an opinion concerning this same exemption clause in which we held Lumbermen's Underwriters was exempt from taxation upon its fire insurance business. The reasoning there used is here applicable, and for the reason that our views were set out in such opinion, it is not necessary to here further elaborate upon the same.

As stated above, there may be sufficient basis for an exemption or classification in favor of mutual or cooperative non-profit companies as against capital stock companies operated for profit, although we believe no such classification could be indulged in an opposite direction. At any rate, to hold such exemption to be discriminatory and unconstitutional might have the effect under the decision of our Supreme Court in the case of Pullman Palace Car Company vs. State of Texas, 64 Texas 274, of rendering the entire Article 7064, as amended, invalid and unconstitutional. We are unable to come to such a far-reaching conclusion with respect to such statute. It is our duty to uphold its validity as far as possible, and the duty of our courts to resolve all doubts as to the constitutionality of a statute in its favor. It is therefore, necessary under the Pullman

Palace Car Company case, *supra*, to hold such exemption valid as to the fire insurance business of said cooperative or mutual fire insurance companies, which we believe such business of reciprocals to be.

We are not unmindful of the opinion written to you on December 21, 1936, by one of the writers hereof which held that mutual companies organized under S. B. No. 37, passed at the First Called Session of the 41st Legislature, were not exempted from the terms of Article 7064, as amended by the Omnibus Tax Bill, by virtue of the terms of the exemption above quoted. We did not have under consideration there the question of whether such companies would be taxed under Section 5 or under Section 5b. of the Omnibus Tax Bill, but rather the sole question of whether the exemption clause above quoted exempted them altogether from the terms of the bill. In holding such companies not exempted, we stated that they were not within such exemption, and inadvertently said that they were taxable under Article 7064, as amended. In conformity with our holding here, we wish to correct such inadvertent statement, and to say that it is our opinion that the business of such foreign companies is taxable under Article 7064, as amended, and the business of such home companies other than health and accident business is also taxable under Article 7064, as amended; whereas, the health and accident business of such home mutual companies is taxable under Article 7064a as contained in the same bill.

We concluded in said opinion of December 21, 1936 that said mutuals organized under said S. B. No. 37 were not exempted from taxation by the exemption clause we have been discussing. We still adhere to that view notwithstanding what we have said about the exemption as to home reciprocals. We believe our conclusions in both regards to be sound. Such mutuals are not non-profit organizations for the reasons pointed out in said opinion. They are expressly authorized to borrow money for the purpose of acquiring a surplus equal to the capital required of stock companies doing the same business so as to operate largely on a capital stock basis and to repay said loans out of profits, and Sec. 14 of the Act relating to such companies specifically makes all general laws applicable to stock companies operating for profit applicable to these companies. They were, therefore, never intended by the Legislature to operate on a non-profit basis, and therefore could not be entitled to the exemption above quoted. Further, the Act creating them provided for a gross premium tax at a time when the exemption in question was already on the statute books as Article 7064; the amendment in the Omnibus Tax Bill being in exactly the language of the original statute. The Legislature did not intend to exempt from taxation these companies in a bill designed to raise additional taxes when they had always paid a tax. On the contrary, reciprocals writing fire insurance operate on a purely cooperative or mutual basis solely for the protection

of their own property, and not for profit and come squarely within the exemption. The original act creating them recognized their non-profit nature and exempted them from all taxation of whatsoever character and provided that no other insurance laws of this State should apply to them unless they were specifically mentioned.

The writer of such opinion of December 21, 1936 did use language in one regard, not necessary to his conclusion, that would be in conflict with this opinion. That language was to the effect that because the mutual companies therein treated with could write other business they were not "Purely cooperative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property, and not for profit . . ." Such statement was not necessary in order to reach the conclusion therein expressed and was but little considered at the time.

In order for us to reach the conclusion that Article 7064a, which referred to home "health and accident companies", included home reciprocals transacting a health and accident business, it was necessary for us to conclude that it meant home companies writing that business although they might also write other business. After mature deliberation, we have concluded that such construction is a correct one and further, that the adverb "purely" in the exemption in question is intended as a limitation on the adjectives "cooperative and mutual" rather than the words "fire insurance companies," especially in view of the remainder of the sentence which requires the companies to operate on a non-profit basis for the protection of their members solely.

Therefore, we consider the use of the particular language in question in the opinion of December 21, 1936 to be ill-advised, and the language of such letter opinion is over-ruled to the extent that it conflicts with this conference opinion.

We wish to observe before closing that we have not overlooked Article 5033 in the reciprocal chapter which reads:

"Except as herein provided, no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned."

It is true that Article 7064a does not specifically mention reciprocals, but for reasons which we have concluded are unnecessary to elaborate upon here we have concluded that such exemption statute under the rule of strict construction does not apply to future tax statutes upon said companies where it is necessary that they be construed to be included within them to prevent the statutes from being invalid. See *National Life Ass'n vs. Hagelstein*, 156 S. W. 353. Unless our construction is correct that reciprocals are taxed under Article 7064a along with other home accident and health companies notwithstanding Article 5033, then we greatly fear that both Articles 7064 and

7064a as contained in said House Bill No. 8 are invalid and the courts must uphold the constitutionality of a statute, if possible.

In conclusion, you are therefore respectfully advised that domestic reciprocals should be taxed under Article 7064a as to their health and accident business, and under Article 7064 as to all other business, with their fire business exempted from taxation under said Article 7064.

Yours very truly,

W. W. HEATH,
Assistant Attorney General.
J. H. BROADHURST,
Assistant Attorney General.

This opinion has been considered in conference, approved, and ordered filed.

WM. McCRAW,
Attorney General of Texas.

No. 3001

UNIVERSITY OF TEXAS—TEXAS CENTENNIAL—
MEMORIAL MUSEUM—RESOLUTION—NAMES.

Senate Concurrent Resolution No. 54, passed April 9th in the Regular Session of the 45th Legislature cannot operate so as to disturb certain existing and enforceable legal rights secured to the Texas Centennial Committee of the American Legion, Inc. by virtue of Section 9 of a contract executed November 14th, A. D. 1935 by and between said Committee and the Board of Directors of the Texas Memorial Museum.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 18, 1937.

Hon. J. W. Calhoun, President, University of Texas, Austin, Texas.

DEAR SIR: Your letter of June 11, 1937 addressed to the Honorable William McCraw has been referred to the writer for attention. In view of the nature of the inquiry submitted, your letter will be set out at length:

"On the 14th day of November, 1935, the Board of Directors of the Texas Memorial Museum (the same being by statute the Board of Regents of the University of Texas) and the Texas Centennial Committee of the American Legion, Inc., signed a contract, a copy of which is attached.

"Under the provisions of Section 9, a number of names, of which the attached list is approximately complete, were to be placed some on the Cornerstone, and some on a wall space inside the building.

"About April 9th the Forty-fifth Legislature of the State of Texas, in Regular Session, passed Senate Concurrent Resolution No. 54, with which you are, of course, familiar.

"I am writing at the direction of the Regents (Directors) to ask you to answer the following questions:

"1. Does the above resolution have any reference to the Texas Memorial Museum?

"2. If so, what names on the attached list can still be placed on the building?"

The pertinent provisions of the contract and agreement entered into by and between the Texas Centennial Committee of the American Legion, Inc., and the Board of Directors of the Texas Memorial Museum on November 14, A. D. 1935, is Section 9 of said contract, which reads as follows:

"It is agreed that the Board of Directors will take cognizance of the part which the American Legion Centennial Committee, Inc., has had in promoting the movement for a memorial museum; will have inscribed in plaque, or on the cornerstone, or in other appropriate place the fact of sponsorship by the American Legion of Texas and the names of the American Legion Texas Centennial Committee, Inc., and of the American Legion and Legion Auxiliary officials of the Department of Texas for the years 1933, 1935 and 1936, the name of Phelps and Dewees, Architects of the American Legion of Texas, the Governor, Lieutenant-Governor, and Speaker of the House of Representatives of Texas, as well as the names of others who have made or who may in the future make a large and important contribution to the success of this enterprise, subject to the determination of the said Board of Directors."

The material provisions of S. C. R. No. 54 concerning erection of certain memorials and referred to in your letter, passed April 9th in the Regular Session of the 45th Legislature of the State of Texas, reads as follows:

"RESOLVED by the Senate of Texas, the House of Representatives concurring, that the Legislature does not view with approval the acts of these agencies who have been charged with the duty of erecting these memorials, in inscribing their names or any others of people now living, upon or about such memorials, and instruct such agencies to hereafter desist from such practice, and that it is the sense of the Legislature that any inscription placed about such memorials should simply state that they have been erected by the sovereignty for the sole and exclusive purpose of commemorating the lives and deeds of the mighty dead whom we desire to honor, and any violation hereof by such agencies in the erection of any future memorial, should be prohibited."

For the sake of convenience the questions submitted in your letter will be answered in the order in which they appear therein. Your first question reads as follows:

"1. Does the above Resolution have any reference to the Texas Memorial Museum?"

From other sources and particularly from a pamphlet entitled, "The Birth of the Texas Memorial Museums" prepared by Garland Adair, Department Historian, we gather that the Texas Memorial Museum was conceived by, sponsored and built largely through the efforts of the American Legion of Texas. A large share of the credit is due the Legion for their successful efforts in securing the necessary legislation by both the Federal and State Governments on which the erection of the Museum depended. Part of this legislation was an amendment to the Texas Centennial Bill earmarking and appropriating \$225,000.00 for the benefit of the museum. In view of the fact that this amount was appropriated by the Legislature of the State of Texas for the purpose of erecting and equipping the Texas Memorial Museum, your first question must be answered in the affirmative, and S. C. R. No. 54 is applicable to the Texas Memorial Museum in the absence of any other legal or constitutional objections.

Your second question reads as follows:

2. If so, what names on the attached list can still be placed on the building?"

Section 16 of Article 1 of the Constitution of Texas provides that "no bill of attainder, ex post facto law, retroactive law or any law impairing the obligation of contracts should be made." S. C. R. 54 was passed April 9th. The contract under consideration was entered into November 14, A. D. 1935, several years before the enactment of S. C. R. No. 54. As the law existed at the time that the contract was entered into, the provisions of said contract were perfectly valid and legal, and under the terms of said contract, the Texas Centennial Committee of the American Legion, Inc., acquired a perfectly valid and enforceable contractual right to have certain names inscribed in some appropriate place upon the Texas Memorial Museum.

Under the above quoted provision of the State Constitution the Legislature is prohibited from enacting any law retroactive in character which would impair the obligations of any valid contract or disturb any existing legal rights. Under the above quoted section of our Constitution every existing right, whether a right to property or not, is protected. *Mellinger v. City of Houston*, 3 S. W. 249.

Therefore, it is the opinion of this Department, and you are accordingly advised, that the Texas Centennial Committee of the American Legion, Inc., by virtue of Section 9 of the aforesaid contract, has the right to insist that the names of those persons or associations specified in said Section 9 be placed upon the Museum. Needless to say, we believe that the names selected must be specifically covered by and included in the provisions of Section 9, and that the Board of Directors no longer have the right to designate additional names to be placed upon said building. In other words, the placing of names upon the

Texas Memorial Museum is only permissible by virtue of the "rights" created by Section 9, and the terms of Section 9 must, therefore, be rigidly adhered to.

In view of the above, it is apparent that it was not necessary for this Department to consider the operative effect of the Concurrent Resolution under consideration as to whether or not it has the binding effect of a law. At the least, Concurrent Resolutions adopted by our Legislature, are directory and should be followed by all public and semi-public institutions and State Departments even though they might have some discretion under the law.

Yours very truly,

RUSSELL RENTFRO,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered recorded.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3002

CONSTITUTIONAL LAW—CONSTRUCTION OF
CONSTITUTIONAL PROVISIONS.

1. When one Section of the Constitution expresses a general intention to do a particular thing and another Section expresses a particular intention incompatible with the general intention, the particular is to be considered in the nature of an exception to the general provision.

2. H. J. R. No. 24 which provides in general terms that the Legislature may fix the compensation of all district, county and precinct officers can in no wise affect the provisions of Section 24, Article III which provides specifically for the compensation of members of the Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 23, 1937.

Hon. Lon E. Alsup, Chairman, Committee on Contingent Expenses, House of Representatives, Austin, Texas.

DEAR SIR: Your letter of June 22, 1937, addressed to Attorney General William McCraw has been received and referred to the writer for attention and answer. Your letter of inquiry reads in part as follows:

"In view of the many conflicting press reports with reference to H. J. R. No. 24 as passed by the Regular Session of the Forty-fifth Legislature, I most respectfully submit to you the following question with reference to this proposed constitutional amendment.

"Would the provisions of this proposed constitutional amendment in your

opinion authorize the Legislature to change in any manner the method of compensating the members of this or any subsequent Legislature, if adopted?

"It is of paramount importance that this question be answered at the earliest possible date and I most respectfully request that you give this question your immediate consideration."

In view of the great public interest with reference to this proposed Amendment, and in view of the uncertainty that exists as to the possible scope and consequence of the Amendment if adopted, your request for a conference opinion has been granted, to the end that the speculation that has arisen concerning the possible effect of this Amendment may be finally set at rest.

Section 61 of Article XVI which was added to the Constitution of this State in August of 1935 and which is known as the "Officers' Salary Amendment" provides as follows:

"*All district officers* in the State of Texas and all county officers in counties having a population of 20,000 or more, according to the then last preceding Federal Census, shall from the first day of January and thereafter, and subsequent to the first Regular or Special Session of the Legislature after the adoption of this Resolution, be compensated on a salary basis. In all counties in this State, the Commissioners' Court shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis; and in counties having a population of less than 20,000, according to the then last preceding Federal Census, the Commissioners' Court shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis.

"All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners' Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis." (Italics ours)

It must be noted that Section 61 as set out above provides the method of compensation for *all district officers*.

H. J. R. No. 24 proposes to amend Section 61 so that it shall read as follows:

"*All district, county, and precinct officers* shall hereafter be compensated in the manner and on such basis as may be prescribed by the Legislature." (Italics ours)

The phrase "all district officers" appears in both Section 61 as it now exists and in Section 61 as H. J. R. No. 24 proposes to amend it.

In a general sense it might be argued that members of the

Legislature are "district officers" of the State of Texas and, if so, then under the terms of the proposed Amendment the compensation of the members of the Legislature would be on such basis as the Legislature itself may prescribe. In determining the meaning of that phrase, however, as it appears in Section 61, both as it now exists and as H. J. R. No. 24 proposes to amend it, we must perforce regard the Constitution as an entire document in order that we may ascertain the sense in which those words are used in the particular instance. (Black on Interpretation of Laws, 2nd Ed., par. 10, page 23 and cases there cited; Collongsworth Co. v. Allred, 40 S. W. (2d) 13, 120 Tex. 473.)

The Constitution of 1845, Article III, Section 23, the Constitution of 1861, Article III, Section 23, the Constitution of 1866, Article III, Section 22, the Constitution of 1869, Article III, Section 28, all provided specifically for the compensation of members of the Legislature. Our present Constitution, Article III, Section, 24, both before and after its Amendment in 1930, provided for the compensation of the Legislature and as amended it now reads as follows:

"Members of the Legislature shall receive from the public Treasury a per diem of not exceeding \$10.00 per day, for the first 120 days of each session and after that not exceeding \$5.00 per day for the remainder of the session.

"In addition to the per diem the members of each House shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed \$2.50 for every 25 miles, the distance to be computed by the nearest and most direct route of travel, from a table of distance prepared by the Comptroller to each county seat now or hereafter to be established; no member to be entitled to mileage for any extra session that may be called within one day after the adjournment of a regular or called session."

Section 61 of Article XVI, as it now exists and as H. J. R. No. 24 proposes to amend it, provides in *general* terms for the compensation of *all district officers*. Section 24 of Article III provides *specifically* for the compensation of members of the Legislature, and we find that it has ever been the policy of this State to fix the salaries of those specific officers and to stipulate in a separate and distinct provision of the Constitution the maximum amount which they might receive as compensation for their services.

Assuming, but not conceding, that members of the Legislature may be classed generally as district officers and that there is or will be an apparent conflict or inconsistency between Section 61 of Article XVI and Section 24 of Article III, the decisions are clear that a Section which expresses a particular intention shall be construed as an exception to a general provision appearing elsewhere in the Constitution. Warren v. Shuman, 5 Tex. 441; Erwin v. Blanks, 60 Tex. 583; Lufkin v. City of Galveston, 63 Tex. 437; Howard v. Davis Oil Company, 76

Tex. 630; *City of San Antonio v. Toepperwein*, 104 Tex. 43, 133 S. W. 416; *Copy v. Schneider*, 110 Tex. 360, 218 S. W. 479 (re-hearing denied); *Ex parte Cooks*, 135 S. W. 139; *Garrett v. Commissioners' Court of Limestone County*, 236 S. W. 970, 238 S. W. 894 (re-hearing denied).

In *City of San Antonio v. Toepperwein*, supra, the Supreme Court of this State had before it for construction the provisions of Section 15 of Article VIII and Section 50 of Article XVI of our Constitution. The latter Section provided in part as follows: "No mortgage, trust, deed, or *other lien* on the homestead shall ever be valid." Section 15 of Article VIII provided in part that "The annual assessment made upon all lands and property shall be a specific lien thereon." Chief Justice Brown, who wrote the opinion in that case, stated that the phrase "other lien" in Article XVI was a general phrase while Section 15 of Article VIII provided for a specific lien on all properties and held:

"The two provisions must be construed to give effect to both and if in conflict, the specific provision must prevail . . . We therefore, conclude that the homestead is liable for the taxes which are assessed upon it . . ."

We find it unnecessary to pass upon the question of whether or not the members of the Legislature are district officers. We do rule that if they may be considered as such, then their compensation is now and must continue to be, even if the Amendment proposed be adopted, controlled by the provisions of Section 24 of Article III.

The conclusion here reached follows so inevitably from the authorities that doubt can no longer be entertained upon the question. The Amendment proposed in H. R. J. No. 24 will in no way affect the provisions of Article III, Section 24 which prescribes the salaries for members of the Legislature.

Trusting that this will answer your inquiry satisfactorily, I beg to remain

Yours very truly,

WILLIAM M. BROWN,
Assistant Attorney General.

This opinion has been considered in conference, approved and ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3003

SCHOOLS—GRANTING OF STATE AID—

It is not the purpose of the Rural Aid Law to balance the budget of the respective school districts over the State, and aid should be granted under the terms of the Rural Aid Law in such amount as the school district is able to claim under the provisions of said law.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 21, 1937.

*Hon. Olan R. Van Zandt, Chairman, Joint Legislative Committee,
Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your letter under date of July 20, 1937, wherein you make the following inquiry:

"A question has arisen before our Joint Legislative Committee, operating under the terms of House Bill 600, which we desire to have clarified by a departmental opinion.

"Under the equalization law, passed at the 44th Legislature, and appropriating \$5,000,000.00 for each of the years of the current biennium ending August 31, 1937, we find

"A. An item permitting grants under the form of salary aid.

"B. An item permitting grants to schools under tuition aid earned not to exceed \$7.50 per scholastic transferred.

"C. Industrial aid not to exceed the aggregate of \$200.00 to any one school.

"D. Transportation aid on the basis of \$1.00 or \$2.00, depending upon the classification of the child transported. The latter of which we have no concern about since it is not computed as a part of the individual school assets or needs.

"Each of the above items as classified and scheduled by the law, and the State Board of Education, contemplates as maximum to which the State may be obligated in maintaining such school. The sources of revenue to such a school are county and state available, local maintenance tax, tuition earned, and such aid as the State may be permitted to grant under the terms of said bill.

"Can the State grant aid to any one school in excess of the maximum allowed from any and all of said items which amount is needed to balance the budget of such an affiliated school in order to maintain such a school for a period of nine months?"

For the sake of further clarifying this matter, we will state that the writer has heretofore rendered three opinions: one under date of June 15, 1937, addressed to L. A. Woods, State Superintendent; one under date of April 23, 1937, addressed to L. A. Woods, State Superintendent; another under date of May 19, 1937, addressed to the Honorable Tom King, State Auditor of the State of Texas. None of these opinions pertain to this particular inquiry, with the possible exception of the first one above enumerated. We do not feel that that opinion answers the specific inquiry made by you, but since the same has been construed to have that effect, we feel that it is necessary to refer to the same here. We listed the other opinions for the reason that all of them are supplementary to the original opinion written on April 23, 1937.

In the opinion addressed to Tom C. King, State Auditor, under date of June 15, 1937, the writer held that no school district in this State was entitled to participate in the State Aid Program

or receive money out of the appropriation made by the Legislature for rural aid purposes unless they could claim the same under teachers' salary aid, transportation aid, high school tuition aid, or some other provision of the Rural Aid Law; that they could in no event obtain assistance out of the said fund for maintenance purposes. This opinion has been construed by the Department of Education, and we will frankly admit that it is susceptible of that construction, although we did not intend to so hold, that it was the duty of the State to balance the budget of the respective school districts claiming rural aid by disbursing that aid in the form of teachers' salary aid, transportation aid, high school tuition aid, etc.

The pertinent provision of the rural aid law involved here is Section 381, found in the Public School Laws of the State of Texas. That provision reads as follows:

"The trustees of the schools authorized in Section 2 of this Act, may send to the State Superintendent, on forms provided by the State Department of Education, a list of the teachers employed in the school, showing the monthly salary, experience and training of each, together with an itemized statement of expected receipts and expenditures, the length of term, and such other information as may be required, and the State Superintendent, with the approval of the State Board of Education, may then grant to the school such an amount of this fund as will, with the State and County Available Funds, together with the local funds, maintain the school for a term not to exceed nine (9) months and approximately eight (8) months; provided, that if the school has sufficient State and County Available Funds to maintain the school for an eight (8) months' term according to the salary schedule adopted by the State Board of Education or with its local maintenance tax, to maintain the desired length of term, not to exceed nine (9) months, as provided in Section 2, it shall not be eligible to receive aid; provided further, that the county superintendent shall approve all contracts with teachers, supervising officers, and bus drivers in all schools before such schools may be eligible to receive aid under any provisions of this Act. Provided, also, that all aid granted out of the funds herein provided shall be allotted only on the basis of need, based upon a proper budgeting of each district asking for any form of aid,"

A careful review of all of the provisions of the Rural Aid Law, covering the years 1935 through 1937, will reveal that the State has set up a fund for the purpose of promoting public school interest and equalizing the educational opportunities afforded by the State to all children of scholastic age within this State. It distinctly sets out the purposes for which the money so appropriated in this Bill shall be used. In each and every case the amount of money to be expended for any given purpose is limited. One provision in the law provides for transportation in an amount not to exceed \$2.00 per pupil per month. Similarly, it provides for teachers' pupil load and provides the number of teachers that may be employed and the amount of aid that may be granted. It further provides for high school tui-

tion in case of a transfer of a scholastic in the amount of not more than \$7.50 per pupil per month. It then provides for industrial aid, vocational aid, etc. No where in the bill, with the possible exception of Section 381, above quoted, do we find any provision authorizing the State to expend the funds so appropriated for maintenance purposes in any school district.

We are frank to admit that by taking the terms of Section 381, supra, and construing them alone and without regard to other provisions of the law that it appears that the Department of Education is authorized to grant to schools over this State such an amount of the funds appropriated which will be sufficient to maintain the schools for a term of not to exceed nine months, or, in other words, to balance their budgets. We do not, however, feel this is a proper construction. It is a cardinal principle of statutory construction that in case there are a number of laws upon the same subject, all parts of those laws must be considered together in order to arrive at the legislative intent, and if possible to give force and effect to each and every provision thereof. Following this principle of statutory construction, we feel that Section 381, supra, should be construed in the light of the other provisions of the Rural Aid Law. The broad and all inclusive language found in this section is necessarily limited by the specific purposes for which aid may be granted, such as high school tuition aid, teachers' salary aid, etc. To place any other construction upon the terms of this Act would obviate the necessity of the Legislature enumerating the purposes for which aid may be granted.

For if it had been the purpose of the Legislature to balance the budgets of the school districts, or to pay to said school districts, a sufficient amount of the rural aid funds to maintain the same for a period of nine months, and approximately eight months, then there would be no schools in the State which would operate a shorter length of time, if said schools were entitled, under the law, to rural aid for the reason that they would run said schools for a period of nine months, and in the case of a deficit, would be authorized, under the provisions of Section 381, to send the bill of the amount of said deficit to the State, which is clearly not the intention of the law. Further, it would have been useless to place a specific limitation upon the amount of money that would be granted for any purpose. If the legislature had intended to balance the budgets of the school districts it would have only been necessary that they lay down the qualifications of a school to be entitled to rural aid and then provided that the State would, in the case of a deficit, balance the budgets of the respective school districts. It would have been unnecessary and useless to enumerate the purposes for which aid may be granted.

In view of what has been said, the writer is of the opinion, and you are accordingly advised, that the State cannot grant aid merely for the purpose of maintaining such districts, unless the district can claim the same under teachers' salary aid,

transportation aid, high school aid, or some other provision of the Rural Aid Law. Neither may they grant an amount in excess of these claims that they may be used for maintenance purposes. To illustrate our holding, we will imagine the following hypothetical case: suppose a school district shows a deficit over and above the state and county funds and local funds of \$5,000; suppose further, that, under the terms of the Rural Aid Law, said district is entitled to \$1,000 in teachers' salary aid, and \$1,000 in high school tuition; said district transfers no scholastics, and, hence is not entitled to any transportation aid, and, consequently, after the State has paid said teachers' salary aid, and high school tuition aid, there still exists a deficit of \$3,000 in the school fund. The State is not obligated and cannot pay this \$3,000 to balance the budget; this may and must be taken care of out of local funds.

This opinion is not to be construed so as to limit the amount of State aid granted for any particular purpose where the district can claim such aid. Neither by the express enumerations set out in said opinion do we mean to hold that those are the only purposes for which State aid may be granted.

We trust that the above discussion will clarify the matter of which you inquire.

Yours very truly,

JOE J. ALSUP,
Assistant Attorney General.

This opinion has been read, considered and approved in conference and is now ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3003-A

OFFICERS—EMPLOYEES—CHIEF CLERK,
TREASURY DEPARTMENT.

1. The Chief Clerk of the Treasury Department is not holding a civil office as that term is used in Article III, Section 18 of the Constitution, and a member of the Legislature is not prohibited from appointment to that position.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS; August 26, 1937.

Hon. Charley Lockhart, State Treasurer, Austin, Texas.

MY DEAR SIR: On August 16, 1937; you inquired of this Department for an opinion in regard to the appointment of Honorable Jesse James as Chief Clerk of the State Treasury Department. You inquired as follows:

"I want to know if he is barred from holding this office by reason of Article 3, Section 18, of the Constitution of Texas."

I presume that Mr. James, being a member of the 45th Legislature, which position he now holds is the basis of your inquiry. While your inquiry does not so state, it is a matter of common knowledge that the 45th Legislature increased the salary of the position of Chief Clerk of the State Treasury Department from \$2,400.00 per year to \$3,000.00

The Constitution of Texas prohibits a member of the Legislature from accepting a position to:

". . . any civil office of profit under this State, which shall have been created, or the emoluments of which may have been increased during such term; . . ."

"The term 'office' implies a delegation of a portion of the sovereign power, and the possession of it by the person filling the office. . . . This definition carries with it *ex vi termini* the further idea that the power delegated must be exercised by the person in his own and not in another's right." State *ex rel. Brown vs. Christmas*, 126 Miss. 358, 88 So. 881."

It follows that the position of Chief Clerk is an employment arising out of an appointment whereby the Chief Clerk acts under the direction and control of others. The position does not carry with it the dignity and independence of an office, while it is true a bond is required, he is not called upon to take an official oath and in addition the position is one that may be terminated at the will and pleasure of the State Treasurer. There is a total absence of the delegation of sovereign power that marks the difference between an office and an employee.

You are, therefore, respectfully informed that Mr. Jesse James may be appointed as Chief Clerk of the State Treasury Department of the State of Texas.

Yours very truly,

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3004

CORPORATIONS—STOCKHOLDERS—PACKAGE STORE PERMITS

1. Corporations may procure permits under the present Texas Liquor Control Act, and the mere fact that a given person may own stock in several corporations does not prohibit each of the corporations in which he owns such stock from procuring the five (5) package store permits to which each corporation is entitled.

2. A stockholder in a corporation does not own an interest in the assets of a going corporation, and, therefore, a stockholder does not own an interest in the package store, the business thereof, the package

store permits or any other of the assets of the corporation in which the person is a stockholder.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 1, 1937.

*Hon. Bert Ford, Administrator, Texas Liquor Control Board,
Austin, Texas.*

DEAR MR. FORD: This Department is in receipt of an inquiry regarding the Texas Liquor Control Act, which reads as follows:

"Since we understand there may be some changes in the laws of this State regarding liquor permits, etc., we, as counsel for the following three named corporations, are directing this letter to you to ascertain certain facts and to advise you of the methods and nature of the operations of the said companies:

"WALGREEN TEXAS CO.—This company owns and operates twelve retail drug stores, all located within this State. Its officers are:

"H. W. Bass, President; A. Fredrickson, Vice-President; P. J. Redford, Treasurer; W. H. Reese, Secretary.

"WALGREEN DRUG COMPANY OF TEXAS owns and operates five retail drug stores, all located within this State. Its officers are:

"W. A. Sielaff, President; I. V. Petree, Vice-President; Sten L. Carlson, Secretary and Treasurer.

"WALGREEN DRUGS, INC. owns and operates five retail drug stores within this State. Its officers are:

"W. T. Lillie, President; W. J. Cooney, Vice-President; M. W. Pratt, Secretary and Treasurer.

"None of the officers or directors of the three above named corporations are interlocking in any instance. All three companies are domestic Texas corporations, which can be checked through the office of the Secretary of State.

"The stocks of these various corporations are of course scattered throughout the United States and some individual stockholders hold stock in all three of these corporations.

"We would like to be informed as to whether the above meets the requirements of our laws with respect to having permits to handle liquor to not to exceed five stores for each company."

We accept the statement of facts contained in the foregoing letter as true in rendering our opinion with reference to the question raised therein.

The provisions of the Texas Liquor Control Act which give rise to the question submitted in the above quoted letter are as follows:

Section 17, Subsection 2 on page 20:

"It shall be unlawful for any person to hold or have an interest in more than five (5) package stores or the business thereof. It shall further be unlawful for any person to hold or have an interest in more than five (5) package store permits."

The definition of the word "person" as set forth on page 6:

"Person" shall mean and refer to any natural person or association of natural persons, trustee, receiver, partnership, corporation, organization or the manager, agent, servant or employee of any of them."

Each separate corporation is a separate entity under the laws of the State of Texas. A corporate entity under the specific provisions of the Texas Liquor Control Act is recognized as a person capable of holding a liquor permit. If all of the requirements of the Act are met and none of its provisions are violated, each corporate entity is entitled to as many as five package store permits. Since there are no common officers or directors of the three corporations named the question presented in the present inquiry arises by reason of the existence of stockholders who own stock in more than one of the named corporations.

The question to be answered therefore narrows itself to this:

Does a stockholder hold or have an interest in the five package stores, or the business thereof, or hold or have an interest in more than five package store permits?

The person who makes application for and receives a permit is of course the holder of that permit. Therefore, each corporation named is the holder of such permits as are granted to that particular corporation.

Of course the word "permittee" is defined in Section 12, subsection 12 of Article I so as to include the owner or owners of the majority of the corporate stock of a corporation, but this definition is limited to the use of the word "permittee" in Section 12, subsections 1, 2, 3, 5, 6 and 10. This definition of the word "permittee" does not make of such statutorily defined "permittee" a holder of a permit. The term "holder" is not defined by the Texas Liquor Control Act and takes only its ordinary meaning. The person who makes application for and is granted a permit is the person who holds the permit during the entire permit period, since the same cannot be transferred.

The stockholders in the corporation would not be construed as the person holding the package stores owned by the named corporations. The Act provides that it shall be unlawful for any person to hold more than five package stores. This is a peculiar expression but certainly, if anyone holds the five package stores, it is the corporation receiving the permit to do a package store business.

The foregoing reasoning eliminates the idea that any stockholder holds any package store or any package store permit. We are left with the question as to whether or not a stockholder has an interest in the package store permits, the package stores or the business thereof when the permits are granted to a corporation and the package store business is conducted by the agents of that corporation.

It will be conceded that the package stores, the business

thereof and the permits are the property of the corporation owning same. It is now well established by the reported decisions in this State that under the laws of Texas, a stockholder of a corporation does not own or have an interest in the assets of a corporation so long as the corporation is a going concern. In support of this statement, I quote from 10 Texas Jurisprudence, 781, Sec. 153, on Corporations:

"In harmony with the concept that a corporation is a legal entity distinct from its members, the ownership of the corporate assets is held to be vested in the corporation, not in the stockholders."

In the case of *Presnell vs. Stockyards National Bank*, 151 S. W. 873, 876, we find the Court using this language:

"It is generally agreed that shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation while it is a going concern and to a share of the proceeds of its assets when sold for distribution in case of its dissolution and winding up. The shares do not give to their owner any right in the property itself of the company. That remains in the artificial body called the corporation."

The foregoing case was decided by the Court of Civil Appeals and affirmed by the Supreme Court of the State of Texas. The opinion of the Supreme Court being found in 194 S. W. at page 384, 109 Tex. 32. The Commission of Appeals of Texas, Section A, in the case of *Automobile Mortgage Company vs. Ayub*, 266 S. W. 134, held that a sale of the stock of a corporation owning liquor would not transfer any interest in the liquor. In the opinion of the Court, Judge German cites the *Presnell Case*, supra, and quotes with approval therefrom. He further quotes with approval this language from *Herbert vs. Simpson*, 220 Mass. 480, 108 N. W. 65, L. R. A. 1915 D, 733:

"A share of capital stock is property of a peculiar kind. Accurately speaking, it does not consist in an interest either legal or equitable in the property of the company. . . ."

After citing other authorities the Court discusses the proposition thusly:

"What, then, do we find in the present case? Simply a transaction in the sale and purchase of shares of stock in a corporation. They were property, they had a value, they were assignable, and they are what the parties were dealing with by the contract of sale. The consideration on the one hand was the stock in the Latin-American Club, and on the other hand the cash and notes given in exchange therefor. The value of the stock of liquor may have to some extent, contributed to the value of the shares of stock, but not necessarily so, and this would have nothing to do with determining the nature of the transaction. Miller and Sadlo as shareholders in the corporation had no legal right to demand possession of a single ounce of the liquors belonging to the corporation, or to make sale thereof. The transfer of

the stock did not have the effect of divesting the corporation of title to any part of the stock of liquor, and conveyed to the other parties no present estate or title, legal or equitable, in the physical property of the club. What they acquired was a 'right to participate according to the amount of (their) stock, in the surplus of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after the payment of its debts.' Olsen vs. Land Co., 87 Tex. 371, 28 S. W. 944. Counsel for defendant in error and the Court of Civil Appeals rest their contention that this was in effect a sale of an interest in intoxicating liquors on the expression used in some of the cases, to the effect that in the last analysis 'the stockholders are the beneficial owners of the assets of the corporation.' This is true, but counsel misconstrue the meaning of this expression. As stated by Judge Gaines in Harbor Co. vs. Manning, 94 Tex. 563, 63 S. W. 627, it means that the stockholder has no direct interest in the property of the corporation. His right is collateral. It is not a present estate, but merely a right which has as incident to it the possibility of becoming an equitable title. The condition upon which this possibility is based is that the corporation be dissolved, or cease to perform its corporate functions, and there are assets remaining after creditors are satisfied. As long as the corporation is a going concern it is owner of the whole title, legal and equitable, of all corporate property, and the transfer of shares of stock in the corporation by the individual stockholder passes no title, as distinguished from a mere equitable right, to any of the corporate assets."

There has come to my attention a line of cases in this State which advance the theory that the stockholder has a qualified interest in the property of the corporation in which he is a shareholder. This line of cases, however, originated by reason of a statement made by the Court in the case of Aransas Pass Harbor Co. vs. Manning, 63 S. W. 627, 629, wherein it was stated that in the last analysis stockholders are the beneficial owners of the assets of a corporation. Upon this theory the Courts in this State have held that where a gross injustice would be done, were it to be decided otherwise, there is a beneficial interest, or an indirect or collateral interest, in the assets owned by the corporation. However, the case upon which these decisions are predicated, which I have cited above, is one that arose after the charter of the corporation was forfeited.

Judge German has made the distinction between the Manning case, supra, and the cases which control the decisions as rendered in this opinion, in his statement that has already been herein quoted in this opinion. He cited the Manning case, and then pointed out that the stockholder's interest was collateral, and said:

"It is not a present estate, but merely a right which has as incident to it the possibility of becoming an equitable title. The condition upon which this possibility is based is that the corporation be dissolved, or cease to perform its corporate functions, and there are assets remaining after creditors are satisfied."

The rule, therefore, under the Texas authorities unquestion-

ably is that a stockholder in a corporation does not own an interest in the assets of a going corporation and, therefore, a stockholder does not own an interest in the package store, the business thereof, the package store permits or any other assets of the three named corporations.

You are advised, therefore, that neither of the three corporations named in the inquiry are prohibited from receiving five package store permits each by reason of the fact that one or more of its stockholders owns stock in all three of the said corporations.

Yours very truly,

VERNON COE,
Assistant Attorney General.

This opinion has been considered in conference, approved and is now ordered approved and filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3005

TAXATION ON LIQUOR AND TIME FOR
AFFIXING STAMPS.

1. Liquor stamps are to be affixed at the time and in the manner prescribed by rule and regulation of the Texas Liquor Control Board.

2. The Board, by rule and regulation, must fix the method of affixing liquor stamps to the containers in that the Texas Liquor Control Act makes no provision for the method of such affixation, leaving that matter to be determined entirely by rule and regulation of the Board.

Austin, Texas, September 1, 1937.

*Hon. Bert Ford, Administrator, Texas Liquor Control Board,
Austin, Texas.*

DEAR SIR: This will acknowledge receipt by this Department of your letter under date of July 10, 1937, addressed to Honorable William McCraw, Attorney General of Texas, which has been referred to the writer for attention. Your inquiry is as follows:

"Under the provisions of the Texas Liquor Control Act, as of September 1, 1937, is the Board empowered by rule and regulation to require that all liquor imported into this State be stamped, evidencing the payment of the State Tax, within 24 hours after receipt thereof, regardless of whether the same is to be placed on the floor of the wholesale outlet in private storage or in public storage?"

Under the provisions of the Texas Liquor Control Act, Article I, Section 21, the liquor tax was specifically levied on the "first

sale." The term "first sale" is defined in sub-section (f), which reads as follows:

"The term 'first sale' as used in Article I of this Act, shall mean and include the first sale, possession, distribution, or use in this State of any and all liquor refined, blended, manufactured, imported into, or in any other manner produced or acquired, possessed or brought into this State.

"The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. *Said stamps shall be affixed in strict accordance with any rule or regulation promulgated in pursuance of this Act;* provided, however, any holder of a permit as a retail dealer as that term is defined herein shall be held liable for any tax due on any liquor sold on which the tax has not been paid.

"It shall be the duty of each person who makes a first sale of any liquor in this State to affix said stamps on each bottle or container of liquor and to cancel the same in accordance with any rule and regulation of the Board. The Board shall have power to relax the foregoing provision when in its judgment it would be impracticable to require the affixing of such stamp on the bottle or container."

Upon a dissemination of the meaning of this definition, we come to a determination of the proper construction of the word "possession." Although "possession" is ordinarily understood as synonymous with ownership, this is not the word's meaning when used in connection with liquor cases. The settled Texas rule, as announced in the following liquor cases, is that "possession" means the actual control, care and management of property. *Schenk vs. State*, 293 S. W. 1101, 1102; *Watson vs. State*, 24 S. W. (2) 830, 831; *Seale vs. State*, 39 S. W. (2) 58, 61. This holding has been generally accepted in other jurisdictions. *Bergedorff vs. U. S.* 37 Fed. (2) 248, 249; *Kane vs. State*, 177 N. E. 650, 651; and *State vs. Murdock (Mo.)* 27 S. W. (2) 730, 732. In the latter case it was expressly held that ownership of liquor is not essential to constitute possession, possession being defined as having actual control over and management of liquor.

Reading this proper meaning of the word "possession" into the afore-quoted definition of "first sale," the tax becomes due on all liquor immediately upon its coming under "care, control or management" within this State. Regardless of how liquor is imported into this State, it must be under some person's care, control or management at the time, thus constituting a "first sale." Therefore, you are advised that the liquor tax is due and payable immediately upon the liquor's entry into Texas.

However, the time and manner of affixing liquor stamps to the containers is under the provisions of the Texas Liquor Control Act as a matter to be determined by the Board and fixed by rule and regulation of the Board. Therefore, the Board may, in its discretion, provide by rule and regulation that liquor can be stored in a bonded warehouse in Texas, and that the stamp be placed thereon at any time before it is withdrawn from the bonded warehouse.

Various other provisions in the Texas Liquor Control Act point to the above conclusion as being the true intent of the Legislature. For instance, shipment of liquor into this State on consignment, or any other arrangement whereby its title does not pass to the purchaser or importer, is prohibited. Section 17 (3) (c); Sec. 17 (11) and Sec. 3 (a).

The term "illicit beverage," as defined in Section 3 (a), includes all unstamped liquor. Section 17-12 provides:

"It shall be unlawful for any person to have in his possession or transport in this State any illicit beverage."

Further, the Legislature definitely expressed its intention on taxing liquor as close to the source as is legally possible, when, in sub-section (e) of Section 6, it empowered the Board to wholly abrogate any conflicting portions of the law, in case the Federal Government provided means and ways to collect the tax at the source.

Notwithstanding that the liquor tax becomes due immediately upon its entry into this State, the Legislature was wise enough to see that any such rule might not be practical in all cases, and to this end clothed the Board with broad powers in supervising the Act, in order to accomplish the purposes set out by the Legislature. Authority for this proposition is found in the two subsections of the Act quoted below:

"(a) To supervise, inspect and regulate every phase of the business of manufacturing, importation, exportation, transportation, storage, sale, distribution, possession for the purpose of sale, and possession of all alcoholic beverages, including the advertising and labeling thereof, in all respects necessary to accomplish the purposes of this Act. The Board is hereby vested with power and authority to prescribe all necessary rules and regulations to that end. . . ."

"The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. Said stamps shall be affixed in strict accordance with any rule or regulation promulgated in pursuance of this Act. . . ."

You are, therefore, advised that it is our opinion that the Board shall pass rules and regulations governing the affixing of stamps to liquor when imported into this State. The Board has the authority to pass any reasonable rule or regulation setting forth when such stamps shall be affixed—whether immediately upon arrival within the State or when withdrawn from a public bonded warehouse.

Very truly yours,

LEON O. MOSES,
Assistant Attorney General.
VERNON COE,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered recorded.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3006

CONSTRUCTION OF SENATE BILL NO. 185 ACTS FORTY-FIFTH
LEGISLATURE 1937 "RURAL AID BILL"

1. The scholastic population of districts should be the basis for determining eligibility of the districts for aid under Section 2 of Senate Bill 185.
2. Section 2 of Senate Bill 185 provides for a minimum and maximum scholastic requirement for eligibility of school districts of forty-eight or more square miles, with certain exceptions specified in said Section.
3. In sparsely settled counties of less than 1400 common school scholastic population, the minimum requirement for teachers is excepted by terms of said Senate Bill 185.
4. A scholastic may not be transferred to a district other than his home district and be counted on "teacher-pupil load" of both districts.
5. Section 11 of Senate Bill 185 refers to "county unit system of public education."
6. Section 15 of Senate Bill 185 is construed to mean that aid may be granted on a basis of the amount sufficient to maintain the schools for nine months.
7. In schools contracting with each other so that one teaches the pupils of the other, aid should be granted on the basis of amount each would be entitled to independently if each maintained its own school.
8. State aid, under the terms of Senate Bill 185, should be granted a school according to the amount of aid a school would have received prior to the time the school contracted with other schools.
9. Scholastics duly transferred may be considered in determining teacher-pupil load.
10. Scholastics of a district which are not entitled to transportation aid do not become entitled to transportation aid because of fact home district contracts with another school district to teach said scholastics.
11. High school pupil entitled to have tuition paid because of fact there is no high school in his district, is not deprived this right because his school district contracts with another school to teach its scholastics.
12. Section 20 of Senate Bill 185 construed to mean payment of \$2.50 per high school scholastic per year to schools coming within provisions of said Section.
13. Pupil within two and one-half miles of school in his district not entitled to transportation aid, under terms and conditions of question as asked.
14. School district of less than twenty scholastics entitled to have tuition paid on high school students necessarily transferring to another district to receive high school education.
15. Where Act of the Legislature is not plain and unambiguous in regard to action to be taken in particular matter, the construction as placed thereon

by the State Superintendent, the administrator of said law, is entitled to credence.

Austin, Texas, August 27, 1937.

Hon. L. A. Woods, State Superintendent, Department of Education, Austin, Texas.

DEAR SIR: Your letter of August 18, 1937 addressed to Honorable William McCraw, Attorney General, has been referred to the writer for attention and reply.

I note that you ask several questions in regard to different sections of Senate Bill 185, Acts Forty-fifth Legislature, 1937, and for convenience we shall set them out as they appear in your letter, taking up each section dealt with separately.

We quote from your letter as follows:

"Section 2. Scholastic Population of the District. State Aid under the provisions of this Act shall be distributed in such a way as to assist all school districts of not fewer than twenty (20) scholastics and not more than five hundred (500) scholastics, located in district and consolidated and/or rural high school districts which have an average of not more than two hundred (200) scholastics of each original district composing the consolidated and/or rural high school districts unit, and all districts composed of entire counties having a scholastic population of less than five thousand (5,000), provided that the provisions of this section shall not apply to any school district containing forty-eight (48) square miles of territory or more; provided that schools in sparsely settled counties may be exempt from the minimum restrictions of twenty (20) scholastics; provided that in such cases the district applying for aid shall be levying and collecting the limit of local tax support as provided by general law. Sparsely settled counties shall be defined as those having less than one thousand four hundred (1,400) scholastic population in the common school districts. It is expressly understood that the provisions and limitations of this section and other sections in this Act do not apply to vocational aid, tuition aid, and aid for crippled children.

1. "Should the scholastic population of a district or the net number of scholastics remaining in the district after all transfers in and out have been made, be a basis for determining the eligibility of the district for aid under Section 2?"

2. "Is there a minimum and maximum scholastic requirement for eligibility for districts of 48 or more square miles? To illustrate, suppose a district has less than 20 scholastics, or 500 scholastics or more, and contains 48 or more square miles. Is it eligible to receive aid should its budget indicate a need for same?"

3. "Considering Section 2 and Section 16 jointly and/or independently, may aid be granted to schools in sparsely settled counties, counties with less than 1400 common school scholastic population, for teachers in excess of the number allowed according to the net scholastics of the district. Or, should the two sections named be construed to mean that the minimum requirement may be ignored for a school located in a sparsely settled county, sparsely settled counties being defined in Section 2? To illustrate the question, suppose that District A in a county with less than 1400 scholastics

in a common school district, has 35 scholastics, thus being entitled to one teacher, but makes application for two teachers based upon the sparsely settled clause of sections 2 and 16. Should aid be granted on the basis of one or two teachers?

4. "Under Section 2, shall county superintendents permit so-called voucher transfers in lieu of regular transfers so that pupils transferred by this method shall count on the teacher-pupil load of the school receiving the transfer? For example, a pupil living in District A wishes to transfer to District B, but the trustees of District A have instructed the county superintendent to refuse this transfer on the basis that this pupil is needed to count on the teacher-pupil load of his own district. However, the trustees of District A do not object to giving a voucher to District B for the per capita money received on this pupil. The question: Since the per capita money is being paid by voucher from District A to District B should this pupil be counted on the teacher-pupil load of District B?"

In answer to the first question, quoted above, I am of the opinion that Section 2, above quoted, should be construed as meaning that as a basis of determining the eligibility of a district for aid under said section, that the scholastic population of said district should determine and not the net number of scholastics remaining in the district after all transfers in and out have been made.

In answer to your question number 2 I have carefully considered Section 2 of said Senate Bill 185 referred to in your letter and particularly that provision of same which reads as follows:

"Provided that the provisions of this Section shall not apply to any school district containing 48 square miles of territory or more."

Bearing in mind that said Section 2 is designating the school districts entitled to aid, under the provisions of said bill, this Section might be construed to mean that any district containing 48 square miles or more would not be entitled to aid. Or, it might be construed to mean that there were no maximum or minimum requirements for districts containing 48 square miles or more to receive aid under said Act. At any rate said provision of said Section 2 is ambiguous and does not set out the clear intention of the Legislature.

It being impossible to arrive at a clear intention of the Legislature under the said provision above quoted, the clear and unambiguous provision of said Section should not be limited thereby. Therefore, I am of the opinion that said Section should be read in the light of the other provisions therein contained and construed accordingly. So construing said Section 2 you are advised that in my opinion your said question number 2 above quoted should be answered that there is a maximum and a minimum scholastic requirement for eligibility for school districts of 48 or more square miles with certain exceptions specified in said section.

Considering the provisions of said Section 2, together with the other pertinent provisions of said Senate Bill 185, I am of the opinion that aid, under the provisions stated in your third question, should be granted on the basis of two teachers.

In answer to your fourth question, I am of the opinion that said question should be answered in the negative.

We quote further from your letter as follows:

"Section 11. . . . Provided, that where regular buses do not run in sparsely settled sections of counties which are operating under a county unit system, the County School Board and County Superintendent are authorized to make provisions for the transportation of pupils within said districts, and may make application for State aid thereon to an amount not to exceed One (\$1.00) Dollar per month per pupil. . . .

5. "Should the county unit system mentioned above be interpreted as a county unit transportations system, or as a county unit system of public education?"

In answer to this fifth question I am of the opinion that the Legislature was referring to the county unit system of public education.

Quoting further from your letter:

6. "Section 15. Under Section 15 should salary aid be granted nine month's term schools sufficient to maintain the school for a total of nine months, or should salary aid be granted in an amount sufficient to pay the teacher's salary according to the state schedule for a term not to exceed nine month? For example, suppose a school has state and county funds available in the amount of \$10,000.00, and a teacher's salary obligation based upon the state salary schedule in an amount of \$12,000.00, and suppose further that their total income of the district is \$18,000.00 for the year and a total cost of maintaining the school is \$24,000.00, should the grant of salary aid be \$2,000.00, which is sufficient to pay the *teacher's salary* for nine months, or should the salary aid grant be \$6,000.00, which is sufficient to *maintain* the school for nine months."

In answer to this question we call attention to the fact that said Section 15 uses the language: "Together with the local funds, maintain the school for a term not to exceed, etc." Therefore, I am of the opinion that said salary aid should be granted, for a sum sufficient to maintain said school, under the facts stated in the above question, for the nine months period.

Quoting further from your letter:

"Section 17. Section 17 reads as follows: 'Transfer of Entire District. On the agreement of the board of trustees of the districts concerned or on petition signed by a majority of the qualified voters of the district and subject to the approval of the County Superintendent and State Superintendent, the trustees of a district which may be unable to maintain a satisfactory school may transfer its entire scholastic enrollment, or any number of grades thereof, to a convenient school of higher rank, and in such event, all of the funds of the district, including the State aid to which the

district would otherwise be entitled under the provisions of this Act, or such proportionate part thereof as may be necessary, may be used in carrying out said agreement.'

7. "Should aid under the provisions of this Section be granted to the contracting school districts independently, or should aid be granted on the basis of need of receiving contracted school, taking into consideration the scholastics of the sending contract school and the amount of the local maintenance funds of the sending contracted school, which is transferred to the receiving contracted school. To illustrate, suppose that district A is a salary aid school with 157 scholastics, which entitles them to 6 teachers. District B is a salary aid school with 21 scholastics, and is entitled under the law to one teacher. District B enters into a contract with District A whereby all of the scholastics of the former are transferred to the latter school, thus giving District A a census total of 178 scholastics. The question is, should aid be granted District A on 178 scholastics, which would entitle them to six teachers, or should two grants be made, one to District A on a basis of 157 scholastics, which entitles them to six teachers and a grant to District B on a basis of 21 scholastics, which is a one teacher load, and then allow District B to make settlement with District A for the terms of this contract in accordance with the following portion of Section 17:

"... and in such event, all of the funds of the district, including the State aid to which the district would otherwise be entitled under the provisions of this Act, or such proportionate part thereof as may be necessary, may be used in carrying out said agreement.'"

In answer to the question which we have numbered 7 above, I am of the opinion that, under the provisions of said Section 17, it is the clear intention of the Legislature that the said school districts should be budgeted separately, that aid should be granted to the contracting school independently, and aid granted said district as though it had not contracted with another school, although said funds to which said district is entitled should be, under said law, and according to the terms of its contract, be paid to the district with which it may contract to teach its pupils.

We quote further from your letter:

8. "If you should hold that aid should be granted to the contracted schools independently of the contract as above mentioned, should the salary of the superintendent and/or principal or supervisor be determined by the number of teachers his district would otherwise have employed had a contract not existed with some other district, or should it be on the number of teachers employed after the scholastics of the contracted school have been transferred into the receiving school. To illustrate, suppose that in a state salary schedule a superintendent and/or principal is allowed to increase his salary by \$5.00 per month for each teacher under his supervision. In District A there are six teachers, but District A contracts with District B which is entitled to one teacher, and the scholastics of District B are transferred to District A and an additional teacher is employed, should the salary of the superintendent be determined by the number of teachers his district would

have employed independent of the contract with another school, or should it be determined by the number of teachers employed on the combined scholastics enrolled?"

In answer to your question 8, applying the same principle and rule as is applied in answer to question number 7, I am of the opinion that State aid, under the terms of Senate Bill No. 185, should be granted said school according to the amount of aid said school would have received prior to the time said school contracted with the other schools.

We quote your ninth question as follows:

9. "Suppose a district is eligible to receive aid under the provisions of this law in every way except for the minimum of scholastics. Can the scholastics of this district be transferred by contract to a school that meets all the requirements of law, and is eligible to receive aid and be figured in the teachers'-pupil load of the school receiving the scholastics?"

In answer to this ninth question I am of the opinion that if said children are transferred to another school in accordance with the law, then in that event, said children may be counted in figuring the teacher-pupil load of the school receiving the scholastics.

The tenth question is quoted as follows:

10. "Scholastics living in their home district are not eligible to receive transportation aid because of the mileage limit, but the home district contracts to another district, thus increasing the mileage from the home of the students to the place where he actually attends school. Does this student become eligible to receive transportation by virtue of contracts between the two districts?"

In answer to this question we apply the same principle pronounced above, and that is, in figuring the aid of each school, it is figured on the basis of the amount it would receive independently of any contract with any other school to teach its scholastics in the home district, and a student would not be eligible to receive transportation aid, since the district with which they had contracted would be, under the law, only entitled to receive such aid as the contracting district would have received had it taught its school in its own district.

The eleventh question reads as follows:

11. "If District B contracts with District A to teach the pupils of District B, does this make District B eligible to have the State pay the high school tuition on its pupils to District A?"

In my opinion this question should be answered in the negative, since the law provides that the high school pupils not having a high school in their own district are eligible to be transferred to a district having a high school and have their tuition paid.

Quoting further from your letter:

"Section 20. The second paragraph of Section 20 reads as follows:

"Provided that, if any incorporated city, town or village is levying and collecting taxes for the support or benefit of its municipal school district in an amount not less than provided for in Section 6 of this Act, and/or for interest and sinking funds for bonds or other indebtedness issued or incurred for the direct benefit of such municipal school district, then, in any such event, such taxes so levied and collected by such incorporated city, town or village shall, for the purpose of this Act, be considered as taxes levied and collected by such school district; and providing further that high school tuition of not to exceed Two Dollars and 50/100 (\$2.50) per scholastic shall be granted for pupils in consolidated and rural high school districts composed of not less than three (3) original districts, and whose valuation is less than Fifteen Hundred (\$1,500.00) Dollars per scholastic population, and whose budget shows a need therefor, and that maintains an affiliated high school of not less than sixteen (16) units.

12. "Is the intention of the above quoted section of the law that a district be paid \$2.50 for all scholastics meeting the requirements of this section, or for all scholastics of the district meeting the requirements of this section, or for high school scholastics only on such districts? Furthermore, is the \$2.50 per scholastic to be paid the district on the basis of \$2.50 per scholastic per month, or on the basis of \$2.50 per scholastic per scholastic year?"

In answer to the above quoted question number 12, it is my construction of the statute that the grant of \$2.50 per scholastic for high school tuition, above provided for, applies only to high school scholastics, and does not include \$2.50 for the entire scholastic population of the district. Answering the second part of the question, it is my opinion that the \$2.50 per scholastic be paid on the basis of \$2.50 per scholastic per scholastic year, and not on a per month basis.

Your thirteenth question is as follows:

13. "Should aid be granted for transportation purposes under conditions as follows: A bus from District A drives across the boundary line between District A and B, and picks up a student of District B that lives less than 2½ miles from the District B school building and leaves that student at District B school building. Should the bus driver be allowed to collect transportation from such a student?"

Replying to your question number 13, we call your attention to the provisions of Section 11, Senate Bill 185, which provides that districts through which buses travel may make provision with the county superintendent and the county school board to have other children transported within and between their respective districts, and that said district may make application for State aid thereon to an amount not to exceed \$1.00 per month per pupil. I understand, from talking with you, that your department's interpretation of this law has always been that school children living within less than 2½ miles of the

schoolhouse are not entitled to transportation aid, and that the State Board of Education has a rule to that effect of long standing. In the face of this rule it seems to me that the county school superintendent would not have a right to arrange with a school district for transportation of said student in such a way as to bind the State to grant aid thereon. Basing my answer on the facts as presumed above, I am of the opinion that your first question asked under number 13 should be answered in the negative. In answer to the latter part of said question, I am of the opinion that there is nothing to prohibit an arrangement being made between school authorities controlling the management of the bus and parents of pupils in District B, above mentioned.

Your question number fourteen is as follows :

14. "Is the minimum and maximum scholastic requirement under Section 2 applicable to a sending district for high school tuition purposes? For example, is a sending school eligible to have the State pay the high school tuition on scholastics sent from that district to some other district, if the said district has less than twenty (20) scholastics or more than five hundred (500)?"

I am of the opinion that this question should be answered in the affirmative, for the same reason as stated in the answer to the question number eleven.

Question number fifteen is as follows :

15. "Section 4 sets forth the teacher-pupil load as based on the net scholastic enumeration of white or colored scholastics in the district. This limits the number of teachers that may be employed. Does the reverse ruling hold true in this instance? In other words, if a school district has enough scholastics for twelve teachers and employs only ten, may they be given aid on twelve teachers, since this is a saving to the State in allowing the school district to take care of needed equipment for the school, and, in many instances permit a district to run a full nine months' term, thereby making it possible to pay its obligations and keep its affiliation. Taxes are not paid one hundred cents on the dollar, neither is the State able to pay one hundred cents on the dollar on State aid; therefore, something has to be done in order that the obligations of the district may be taken care of. This is the district's method of trying to make 'tongue and buckle meet.' If the State forces them to put on the twelfth teacher, then we have forced them to be extravagant and at the same time caused them to be unable to take care of these obligations. This law does not necessarily authorize the employment of the full number of teachers, but it does authorize the distribution of aid on this basis."

In answer to this question, I wish to call your attention to Section 4 of Senate Bill 185, which reads in part as follows :

". . . provided that in unusual or extraordinary conditions of actual enrollment, an adjustment as to the number of teachers may be made by the State Superintendent, with the approval of the State Board of Education."

I also call your attention to the fact that said Section 4 prescribes the basis by which State aid shall be allotted. However, said section does not provide that teachers shall, in all events, be hired on that basis.

I also call your attention to Article 2657, Revised Civil Statutes 1925, which provides in part as follows:

"... also in cases that may arrive in which the law has no provision, and where necessity requires some rule in order that there may be no hardships to individuals, and no delays and inconveniences in the management of school affairs."

It has long been the rule in Texas, as in other states, that the interpretation of administrative agencies of an Act of the Legislature is entitled to great weight with the courts in construing an Act of the Legislature, when it is the duty of that particular administrative agency to carry out the provisions of the legislative Act.

Therefore, it is my opinion that the construction of the above section, as placed upon it by yourself as State Superintendent of Public Instruction, should be given credence, since the intention of the Legislature is not entirely clear in this regard.

Sincerely yours,

JOE SHARP,
Assistant Attorney General.

This opinion has been considered in conference, approved, and ordered recorded.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3006 A

SUPPLEMENT TO OPINION RENDERED AUGUST 27, 1937,
ADDRESSED TO HONORABLE L. A. WOODS, STATE
SUPERINTENDENT, DEPARTMENT OF EDUCATION,
AUSTIN, TEXAS.

The following syllabus is substituted for syllabus No. 6 of the original opinion:

No. 6. Section 15 of Senate Bill 185 is construed to mean that aid may be granted on a basis of the amount sufficient to maintain the schools for nine months, but that it is not the purpose of the Rural Aid Law to balance the budget of the various school districts over the State, and aid should be granted under the terms of the Rural Aid Law in such amount as the school district is able to claim, under the provisions of said law; but by "amounts sufficient to maintain the schools" is not meant that aid may be granted for a purpose not specifically enumerated in the Rural

Aid Bill, but is meant those amounts that may be granted under the terms of said Bill for the period of nine months.

AUSTIN, TEXAS, September 3, 1937.

Hon. L. A. Woods, State Superintendent, Department of Education, Austin, Texas.

DEAR SIR: On August 27, 1937 we rendered you an opinion answering various questions in regard to our construction of Senate Bill 185.

It has now been brought to our attention that there has been a misconstruction and misunderstanding of our ruling in reply to your question No. 6, and, therefore, we are writing this supplement to our opinion of August 27, 1937 to clarify our answer and our opinion in regard to your question No. 6.

Your question No. 6 is as follows:

"Section 15. Under Section 15 should salary aid be granted nine months' term schools sufficient to maintain the school for a total of nine months, or should salary aid be granted in an amount sufficient to pay the teachers' salary according to the state schedule for a term not to exceed nine months? For example, suppose a school has state and county available in the amount of \$10,000.00, and a teacher's salary obligation based upon the State salary schedule in an amount of \$12,000.00, and suppose further that their total income of the district is \$18,000.00 for the year and a total cost of maintaining the school is \$24,000.00, should the grant of salary aid be \$2,000.00, which is sufficient to pay the *teacher's salary* for nine months, or should the salary aid grant be \$6,000.00, which is sufficient to *maintain* the school for nine months."

to which question we answered as follows:

"In answer to this question we call attention to the fact that said Section 15 uses the language: 'Together with the local funds, maintain the school for a term not to exceed, etc.' Therefore, I am of the opinion that said salary aid should be granted, for a sum sufficient to maintain said school, under the facts stated in the above quoted question, for the nine months' period."

Our answer, above quoted, was probably rendered upon a misunderstanding of the meaning of your question. As I now view the matter, you intended to ask us whether or not aid may be granted for the purpose of maintaining a school or balancing its budget, when it would not be entitled to that particular aid on the basis of the amount needed to pay teachers' salaries for the period of nine months.

Therefore, in order to clarify our opinion, you are advised that our answer, above quoted, in reply to said question, is hereby withdrawn and we, therefore, substitute the following as our answer to said question in its stead:

On July 21, 1937, this Department rendered a conference opin-

ion No. 3003 written by the Honorable Joe J. Alsup, in which it was held that it is not the purpose of the Rural Aid Law to balance the budget of the respective school districts over the State, and that aid should be granted under the terms of the Rural Aid Law in such amount as the school district is able to claim under the provisions of said law. A copy of said opinion is attached hereto, and the principles there announced are hereby reaffirmed and made a part hereof.

Therefore, basing our answer on the principle as set forth in said opinion No. 3003, you are advised that in answer to your question No. 6 salary aid, under the terms and conditions of your question, should be granted in the sum of Two Thousand (\$2,000.00) Dollars and not for the sum of Six Thousand (\$6,000.00) Dollars. In other words, aid cannot be granted a school district merely for the purpose of maintaining such districts, unless the district can claim the same under teachers' salary aid, or some other provision of the Rural Aid Law; that is, teachers' salary may be granted for that purpose only, and, therefore, teachers' salary aid may be granted only in an amount sufficient to pay the teachers' salaries for a term not to exceed nine months.

We trust that the above will clarify our opinion in regard to the situation presented by your above quoted question No. 6, and that there will not be any further misunderstanding in regard to same.

Yours very truly,

JOE SHARP,
Assistant Attorney General.

This supplement to Opinion No. 3006 written under date of August 27, 1937, has been read, considered and approved in conference, and is now ordered filed and recorded.

SCOTT GAINES,
Acting Attorney General of
Texas.

No. 3007

MOTOR FUEL TAXES—MUNICIPAL CORPORATIONS— EXEMPTIONS

Construing House Bill No. 247, Chapter 44, Acts Regular Session 43rd Legislature, as amended by House Bill No. 749, Chapter 240, Acts Regular Session 44th Legislature of the State of Texas, being Article 7065a, Revised Civil Statutes of Texas.

A municipal corporation of Texas importing motor fuel from another state and using same in motor vehicles owned and operated by it for public purposes upon the highways, streets and roads of the State of Texas is a distributor of motor fuel within the intendment of Section 1 (c)

of the above cited Act, and as such is liable to the State of Texas for the excise tax by Section 2 (a) of said Act of four cents (4c) on each gallon of motor fuel so imported and used.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 28, 1937.

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

DEAR SIR: We have for consideration your letter seeking a review of Conference Opinion No. 2799, issued by this Department on January 11, 1930, and holding that municipal corporations are exempt from the payment of the motor fuel tax levied by Article 7065, Revised Civil Statutes of Texas, on all motor fuel imported and used exclusively by such corporations for public purposes.

You point out in your letter that a new opinion is sought upon this question because of subsequent amendments to the Motor Fuel Tax Law, which were calculated to affect the taxability of motor fuel now being imported by border cities in this State and used in automotive equipment owned and operated by such cities.

To determine whether or not certain border cities of this State may engage in the practice of importing from other states gasoline or motor fuel for use in fire equipment, police cars, etc., without being called upon by the State to pay the tax of four cents per gallon on each gallon of motor fuel so imported and used, calls for both constitutional and statutory construction: It must first be determined whether or not municipal corporations of this State are either expressly or impliedly exempt from the tax in question, and, no such constitutional exemption on inhibition appearing, it must then be determined whether or not municipal corporations are within the purview and scope of the tax levied upon the sale and use of gasoline in this State by the Motor Fuel Tax Law.

An examination of the Constitution of Texas reveals only the following inhibitions, restraints or exemptions with reference to the taxation of a municipal corporation.

"All property in this State, whether owned by natural persons or corporations, *other than municipal*, shall be taxed in proportion to its value . . .

"It may also impose occupation taxes, both upon natural persons and upon corporations, *other than municipal*. . .

"It may also tax incomes of both natural persons and corporations other than municipal. . ." Article VIII, Section 1.

"The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor. Fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendor's lien, and mechanic's or builder's lien, or other liens now existing." Article XI, Section 9.

It is readily apparent from a critical analysis of the Constitutional provisions, above quoted, relating to the exemption of municipal corporations from taxation, that only three classes of taxes are involved in such exemption. These are ad valorem taxes, occupation taxes, and income taxes.

That the ad valorem tax is the particular tax involved in the first clause of Article VIII, above quoted is indicated by the language, "shall be taxed in proportion to its value". As to Article XI of the Constitution above quoted exempting "the property of counties, cities and towns owned and held only for public purposes" from taxation, the particular kind of taxation contemplated thereby is the direct tax upon such real and personal property commonly called an ad valorem tax. Such constitutional provision cannot, under its expressed terms, or the decisions of other states, be held to afford an exemption to municipal corporations from a payment of an indirect or excise tax upon the privilege of using motor fuel in motor vehicles operated on the highways of this State.

It cannot be gainsaid that the motor fuel tax under consideration is an indirect or excise tax rather than a direct or property tax, and, therefore, the constitutional provisions just referred to have no place in this discussion, under the established rule in all jurisdictions, that exemption from a property tax does not include exemption from an excise tax. 1 Cooley on Taxation (Third Edition) p. 357; City of Portland vs. Kozier, 217 Pac. 833; Crockett vs. Salt Lake County, 270 Pac. 142; Independent School District vs. Pfost, 4 Pac. (2d) 893; State vs. Board of County Commissioners, 51 Pac. (2d) 33.

The remaining two classes of taxes from which municipal corporations are exempted by the pertinent constitutional provisions are income taxes and occupation taxes. It will, of course, only be necessary to discuss in this opinion the constitutional exemption accorded to municipalities from occupation taxes, because the question of an income tax is not in this case. To determine whether the tax levied on the sale or use of motor fuel by the Motor Fuel Tax Law falls within the purview of the constitutional exemption of municipalities from an occupation tax, it will be necessary to determine the nature and attributes of this tax.

The Motor Fuel Tax Law of Texas levies a tax of four cents per gallon on each gallon of motor fuel sold, used and distributed in Texas. The tax is made to accrue on the "first sale" which is defined by Section 1 (d) as follows:

"First sale shall mean and include the first sale, distribution or use in this State of motor fuel refined, blended, imported into or in any other manner produced in, acquired, possessed or brought into this State."

We think this tax is clearly an excise tax; in fact the Legislature of Texas characterizes such tax in Section 2 (a) and (d) of the Act as "an occupation or excise tax".

At the time the conference opinion mentioned in your letter was written, the Legislature of Texas denominated a tax similar in its nature and attributes, as an "occupation tax" only. But, despite this limited designation, the writer of that opinion concluded that inasmuch as the tax was levied on the *use* of motor fuel in Texas, as well as upon the *sale* of motor fuel in Texas, it could not strictly and technically be an occupation tax but was in reality an excise tax; with this premise we agree, but we cannot agree with the writer of that opinion in his conclusion that "since in authorizing the various classes of taxes to be imposed the framers expressly exempted municipal corporations, we must presume then that they meant to use 'occupation taxes' in such a broad sense as to include excise taxes." An occupation tax is only a species of an excise tax. There are many kinds of excise taxes and we do not believe the constitutional exemption afforded municipal corporations should be enlarged to include all excise or indirect taxes. The Fathers of the Constitution must have been presumed to have used the words "occupation taxes" advisedly and in its proper limited sense, when they framed the Constitution and provided in Article VIII thereof that municipal corporations should be exempt from such taxes.

In this connection we wish to point out that it was competent for the Legislature of Texas to levy an excise tax on the use of gasoline upon the highways of this State, even though such right is not expressly given in the Constitution. It is elementary law that the Constitution of this State is not a grant of powers to the Legislature, but rather a limitation of powers, and in the absence of some express prohibition therein or in the Federal Constitution the Legislature may exercise all legislative power, including the power of taxation. This rule is well stated in one of our leading cases as follows:

"(The taxing power) is a power inherent in sovereignty, and without which constitutional government cannot exist. It is vested in the Legislature by the general grant of legislative power whether specifically enumerated in the Constitution among the powers to be exercised by it, or not. The constitutional provisions in reference to it, therefore, are more usually intended and understood as limitations and restrictions upon its exercise, than as the direct grant of the power to the Legislature." *Clegg vs. State*, 42 Tex. 605; 40 Tex. Jur. p. 20-21; 9 Tex. Jur. p. 422 and p. 444.

We further wish to point out that it can have no bearing upon the case under consideration whether the Legislature of Texas describes the tax levied by our Motor Fuel Tax Law as an "occupation tax" or an "excise tax" or both. It is a well settled rule of law that in determining the type of tax, the substance of the Tax Law rather than the designation given the tax by the Legislature must be considered as controlling. *Independent School District vs. Pfof*, 4 Pac. (2d) 893.

It is, therefore, our conclusion that the tax of four cents per

gallon, levied upon motor fuel sold, used or distributed in this State, is an excise tax upon the use of such motor fuel in motor vehicles upon the highways of this State; and further, that it would be competent for the Legislature of Texas to levy and collect such tax from municipal corporations, because same is neither an ad valorem or property tax, an income tax, or an occupation tax within the purview of the hereinabove quoted constitutional provisions exempting municipal corporations from such three classes of taxes.

The question now remains whether or not the Legislature of Texas did, in fact, levy, by the Motor Fuel Tax Law under discussion, an excise tax on motor fuel imported and used by municipal corporations in motor vehicles operated on the highways of this State.

An examination of said Act in its entirety does not disclose any exemption either express or implied, of municipal corporations from its terms and provisions. Section 2 (a) thereof levies a tax of four cents on "*each gallon of motor fuel or fractional part thereof*", to accrue upon the first sale in Texas. "First sale" is defined by Section 1 (d) to mean and include the first sale, distribution or use in this State of motor fuel whether refined in the State or imported into the State. Section 2 (d) of the Act provides that "every distributor making first sale of motor fuel shall pay to the State of Texas an occupation or excise tax equal to four cents *per gallon or fractional part thereof so sold, distributed or used*", and requires a monthly report of such sale, use or distribution. It was the evident intention of the Legislature to tax *each and every gallon of motor fuel or fractional part thereof* so used or distributed in this State, with certain exceptions. The only exemptions from this tax levied on *all* motor fuel sold or used in this State are enumerated in Subdivisions (b) and (c) of Section 2 of the Act, and no exemption, either express or implied, is accorded a municipal corporation. Had the Legislature intended such an exemption it would have been an easy matter for it to have employed express language to that end, such as appears in Article 6675a, Revised Civil Statutes, exempting from the motor vehicle registration fee, all "motor vehicles, trailers and semi-trailers which are the property of and used exclusively in the service of the United States Government, the State of Texas, or any county, city or school district thereof."

It is not the province of this Department to presume an exception or exemption from taxation in favor of a municipal corporation, where such exception or exemption does not fairly appear, under established canons of statutory construction. In this connection, we advert to the recognized rule of construction that exemptions from taxation are not favored and cannot be created by implication. Taxation is the rule and exemption must be provided for in clear and definite terms, and where there is a doubt in regard to a statute attempting to make an exemption, the uncertainty will be resolved against the exemp-

tion and in favor of the State. 40 Tex. Jur. 109; *City of Portland vs. Kozier*, 217 Pac. 833; *Stedman vs. City of Winston-Salem*, 167 S. E. 813; *People vs. Deep Rock Oil Corporation*, 175 N. E. 572.

In arriving at our conclusion that the Legislature intended to make municipal corporations liable for the motor fuel tax levied by the Act under consideration, rather than to exempt them, we think it significant that said Act has been several times amended by the Legislature in the face of outstanding opinions by this Department that the State of Texas and its various Departments, and the counties, school districts, and other political subdivisions of Texas are subject to the tax and are not exempt therefrom, either expressly or impliedly. Moreover, this has been the operative interpretation of this tax law by the Comptroller of Public Accounts charged with its administration, from the time it was first enacted in this State; and while such practical construction by the Comptroller and ruling by this Department is not controlling, we think it persuasive that the Legislature did not intend to alter the law so as to give the exemption claimed in the instant case.

To hold that motor fuel imported for use is tax free while that purchased in Texas is subject to the tax would be an invitation to every municipality in Texas to purchase all the motor fuel it needed from dealers residing outside of the State, thereby depriving dealers within the State of their reasonable and legitimate profit on the large quantities of gasoline required by such municipalities, and the giving of all such business and the profits thereof to their competitors residing outside of the State. This would amount to a policy of industrial suicide and we are not prepared to ascribe to the Legislature any such consequences.

As additional persuasive authority, we cite the following cases from sister jurisdictions, turning upon statutory provisions almost identical with those of the Texas law, and holding that municipal corporations and other political subdivisions are within the meaning and purview of such Acts and are not exempt from the tax levied thereby. *State vs. City of Monroe*, 149 S. W. 541; *Crockett vs. Salt Lake County*, 270 Pac. 142; *State of Iowa et al vs. City of Des Moines, et al*, 266 N. W. 41; *State vs. Board of County Commissioners*, 51 Pac. (2d) 33; *Independent School District vs. Pfost*, 4 Pac. (2d) 893.

You are accordingly advised that Conference Opinion No. 2799, directed to you under date of January 11, 1930, insofar as it presents a conflict with this opinion, is withdrawn, and that you may proceed hereunder to collect motor fuel taxes from municipal corporations importing motor fuel and using same for the operation of motor vehicles upon the highways of this State.

Yours respectfully,

PAT M. NEFF, JR.,
Assistant Attorney General.

This opinion has been considered in conference, approved, and ordered recorded.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3008

ART. 554, PENAL CODE, R. C. S., 1925—BANK LOAN LIMIT LAW—LIMITATION ON STATE BANKS AS TO EXTENT OF LOAN TO A CORPORATION—CONSTRUCTION OF WORD “CORPORATION”—MUNICIPAL CORPORATIONS AS COVERED BY ART. 554—INTENT OF LEGISLATURE AS CONTROLLING RULE OF CONSTRUCTION.

1. Art. 554, Penal Code, R.C.S., 1925—the Bank Loan Limit Statute—prohibits state bank from lending more than 25% of its capital stock actually paid in and surplus to any individual, corporation, company or firm.

2. The word “corporation” as used in Art. 554 is not limited to mere private corporations, but includes any corporation—private or municipal—capable of borrowing money, suing or being sued. Consequently, a state bank may not loan money to or allow a municipal corporation to become indebted to it in a sum exceeding 25% of its capital stock actually paid in and surplus.

3. Counties and subdivisions thereof with corporate powers are corporations within the meaning of Art. 554.

4. The intention of the Legislature controls and all other rules of construction are secondary, including the rule that the words of a statute are to receive their usual and ordinary meaning.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 22, 1937.

Hon. O. H. Jamison, Deputy Commissioner, Department of Banking, Austin, Texas.

DEAR SIR: We have before us for consideration your letter of October 15, 1937, addressed to Attorney General William McCraw, in which you request a re-consideration of an opinion of this Department written by Assistant Attorney General Vernon Coe under date of April 4, 1935 to Murphy Cole, County Auditor of Liberty County. In his opinion, Mr. Coe, construing Article 554 of the Penal Code—the Bank Loan Limit Statute—held that the word “corporation” as used in said statute does not embrace municipal corporations, but applies only to private corporations, and that as a result, there is no statute in the Revised Civil Statutes of Texas prohibiting a State bank from investing more than 25% of its combined capital stock and certified surplus in the bonds of its own county. You further request a conference opinion from this Department on this matter because counsel for the Banking Department has given

the Bank Loan Limit statute a different construction, maintaining that the word "corporation" is employed in a broader sense than simply private corporations and includes municipal corporations other than the State or the United States.

The question is whether or not a state bank may loan money to or allow a municipal corporation to become indebted to it in a sum exceeding 25% of its capital stock actually paid in and surplus.

The answer depends on the applicability of the Bank Loan Limit statute—Article 554—to municipal corporations. Article 554 provides that a State bank shall not lend more than 25% of its capital stock and surplus to any one firm, corporation, or individual. We quote the statute in its entirety:

"Art. 554. Exceeding loan limit.

No incorporated bank or trust company chartered under the laws of this State shall loan its money, directly or indirectly, or permit any individual, *corporation*, company or firm to become at any time indebted or liable to it in a sum exceeding twenty-five per cent of its capital stock actually paid in and surplus, or permit a line of loans or credits to any greater amount to any individual, *corporation*, company or firm. Any agent or officer of any incorporated bank or trust company who violates any provision of this article shall be fined not less than one hundred nor more than five hundred dollars, or be imprisoned in jail for not less than thirty nor more than ninety days, or both. All loans to members of any unincorporated company or firm shall be considered as if they were loans to such company or firm in determining the limitation here prescribed. The discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as borrowed money; a permanent surplus, the setting apart of which shall have been certified to the Banking Commissioner and which cannot be diverted without due notice to and consent of said officer, may be taken and considered as a part of the capital stock for the purpose of this article. In no event shall any such loan exceed 25 per cent of the authorized capital stock and certified surplus." (Italics ours).

The question narrows itself down to whether or not the word "corporation" as used in the statute includes municipal corporations, i. e., counties, school districts, cities, etc. In other words, the word "corporation" might be construed strictly as covering only private corporations, or it might be construed liberally as including within its purview public as well as private corporations.

In his opinion, Assistant Attorney General Coe took the position that words used in the statute are to be construed in their ordinary sense, and that counties could not be included in the meaning of the word "corporation", except in an unusual sense. He also pointed out that in his opinion Article 554 was a Penal Statute, and that the general rule of construction applicable to such statutes is that they be construed strictly.

While Mr. Coe is correct in his contention that the word "corporation", when used in a statute, ordinarily means private cor-

poration, in the construction of Art. 554 there are two important rules of construction which, when taken into consideration, counteract the effect of the rule that the words of a statute are to receive their usual and ordinary meaning. The first of these rules is that the intention of the Legislature controls and all other rules are secondary. The second important rule is that the entire statute, and even kindred statutes, will be read as a whole.

Consequently, the purpose of the statute, including the evil and the remedy, must be determined in order to arrive at the real intention of the Legislature. The object behind a statute and the mischief to be prevented in many instances are significant enough to negative the weight of a subordinate rule of construction.

Thus, "the general design and purpose of the law is to be kept in view and the statute given a fair and reasonable construction with a view to effecting its purpose and object, even if it be necessary in doing so to restrict somewhat the force of subsidiary provisions that otherwise would conflict with the paramount intent". *Re. Wilson (Mont.)* 56 P. (2d) 773; 105 A. L. R. 367.

In an opinion dated February 22, 1937, from Honorable Ocie Speer, Counsel for the Banking Commissioner, to Honorable W. W. Heath, Assistant Attorney General, the purpose and object of Article 554 are clearly and forcibly set out as follows:

"In determining the purpose and object of the statute it is well to bear in mind the fundamental policy of the State with respect to banks. The constitution itself (Art. XVI, Sec. 16) specially makes it the imperative duty of the legislature to regulate banking corporations for the protection of depositors and creditors. In pursuance of this mandate the Legislature has wisely seen fit to limit (not only the technical loan liability, but all liability to the bank) of any individual, corporation, company, or firm. Such a statute is not only wholesome but is universally, I believe—found in every state in the union and the nation as well. The evil of excessive loans is obvious. Favoritism and individual interest might well wreck a bank. The purpose to apply the prohibition to all debtors is easily the most reasonable construction, for excessive loans (the evil prescribed) whether to a private corporation or a public corporation have the same consequence—presage the same disaster—to the bank. As a matter of fact safety, a loan equal to the entire capital and surplus to one individual or private corporation might be perfectly good and yet it would be unlawful. Public policy as expressed in the statute forbids it. Such unlimited loan ought not be permitted to municipal corporations (carrying every element of the evil sought to be avoided) unless the narrower construction of the word 'corporation' is compelled."

The limitation in Art. 554 was obviously intended to prevent a state bank from investing more than 25% of its capital stock actually paid in and surplus in an indebtedness to any individual, corporation, company, or firm. The principle is precisely the

same and the evil sought to be avoided is precisely the same whether the borrower be a private corporation or a municipal corporation—for which reason the conclusion should be the same in both cases.

Mr. Coe took the position that Article 554 was a Penal Statute and must be construed strictly. While it is a penal statute to the extent that it carries a pecuniary penalty, still it is likewise a civil statute in that it pertains to the regulation of banks. The Legislature evidently came to the conclusion that loans or indebtedness in excess of 25% of a state bank's paid in capital and surplus would constitute unsafe banking, justifying closing of such bank by the Banking Commissioner, regardless of the clause penalizing the officers concerned in making such loan. Art. 554 is a civil statute insofar as it is a regulation of banking, and the rules of construction should be liberally applied to same.

Since the purpose of the statute is wholesome and since it comes within the rule that civil statutes are to be liberally construed to effectuate their purpose, it is our opinion that the word "corporation" as used in Art. 554 is not limited to mere private corporations, but includes any corporation, private or municipal, capable of borrowing money, suing or being sued. Counties and subdivisions thereof with corporate powers are therefore held to be corporations within the meaning of the Bank Loan Limit statute. The fundamental rule in the construction of a statute is to give effect to the intention of the Legislature, and the intention of the Legislature is best effected in this instance by a liberal interpretation of the word "corporation" extending it to include municipal as well as private corporations.

Therefore, you are accordingly advised that the opinion of Assistant Attorney General Coe to County Auditor Cole, insofar as it presents a conflict with this opinion, is withdrawn, and that you may hereafter proceed hereunder.

Very respectfully yours,

DICK STOUT,
Assistant Attorney General.
HENRY MOORE,
Assistant Attorney General.
RICHARD BROOKS,
Assistant Attorney General.

This opinion has been considered in conference, approved, and ordered recorded.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3009

STATE DEPARTMENT OF EDUCATION--VALIDITY OF
SUBSECTION "C" SENATE BILL NO. 138 REGULAR
SESSION 45TH LEGISLATURE AS AMENDED
BY HOUSE BILL NO. 1 FIRST CALLED
SESSION 45TH LEGISLATURE.

1. Employment of parties set out in Sub-section "C" is so closely connected with as to be incidental to the support of the public free school system.
2. Subsection "C" held to be directory and failure to comply with said Subsection "C" will not interfere with the present duties of the State Board of Education.

AUSTIN, TEXAS, December 1, 1937.

*Hon. Ghent Sanderford, President, State Board of Education,
Austin, Texas.*

DEAR SIR: This is to acknowledge receipt by this Department of your letter of November 4, addressed to the Attorney General, which has been referred to the writer for reply.

Your letter is quoted as follows:

"The First Called Session of the 45th Legislature by House Bill No. 1, amended Senate Bill No. 138 of the Regular Session by adding Section "C," which is as follows:

"Subsection c. 'The State Board of Education is hereby directed to appoint not more than two surveyors, one auditor and one bond expert; such employees are to be paid salaries and necessary expenses commensurate with salaries paid in other departments for similar employment, and are to be paid out of the Available School Fund. The surveyors shall be at the disposal of the Board of Education for the purpose of investigating and locating the true boundaries of such free school lands concerning about which any question has heretofore arisen or may hereafter arise; the auditor's duty shall be such as may be prescribed by the Board and the bond expert shall give his written opinion upon all bonds or securities tendered for purchase to the State Board of Education for investment of the Permanent School Fund. Such written recommendation of said expert shall be made of record in each instance in the minutes of the Board, and the members of the Board of Education are hereby directed to place of record the vote of each member present and voting upon all questions arising on the matter of following or rejecting the recommendations of the bond expert in the matter of purchasing securities for the Permanent School Fund.'

"By the provision of Section 'C,' the Board of Education is directed to appoint not more than two surveyors, one auditor and one bond expert, and their salaries are to be paid out of the Available School Fund. The duties of the surveyors and bond expert are set out in the bill, and the auditor's duties shall be such as may be prescribed by the Board.'

"I am directed by the Board to ask you if such employees can be paid out of the Available School Fund. In this connection, I call your attention

to Section 3 of Section 5 of Article 7 of the Constitution. If in the judgment of the Board of Education any of these employees are not necessary, please state whether or not said provision of the statute is mandatory or only directory."

In order to properly discuss the constitutionality of the Act set out in your letter, we deem it advisable to set out the various sections of the Constitution relating thereto.

Section 5, Article 7, Constitution of Texas, reads as follows:

"The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund, and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund, to which the Legislature may add not exceeding one per cent annually of the total value of the permanent school fund, such value to be ascertained by the Board of Education until otherwise provided by law, and the available school fund shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof ever be appropriated to or used for the purpose of any sectarian school; and 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."

Section 4, Article 7, Constitution of Texas, making it the duty of the State Board of Education to direct the investment of the permanent school fund, reads as follows:

"The lands herein set apart to the Public Free School Fund, shall be sold under such regulations at such times, and on such terms as may be prescribed by law; and the Legislature shall not have power to grant any relief to purchasers thereof. The Comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the Board of Education herein provided for, in the bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law; and the State shall be responsible for all investments."

Section 1 of Article 7 of the Constitution is quoted as follows:

"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

We think that the above quoted sections of the Constitution should be studied together in arriving at a conclusion as to the validity of Subsection "C" of House Bill No. 1 as quoted in your letter.

It may be seen from the provisions of Section 4, Article 7, supra, that the State Board of Education is charged with the

duty of investing the permanent school fund in certain securities prescribed by the terms of Section 4 or which may be prescribed by law. The interest derived from the investments of the permanent school fund made by the Board of Education constitutes, in part, the available school fund, which under the terms of Section 5, Article 7, supra, "shall be applied annually to the support of public free schools". Section 5 further provides that "no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever." From that part of Section 5 quoted above it is clear that the purpose of a statute enacted, the terms of which appropriate money from the available school fund, to be valid must be for the support of the public free schools. It is our opinion that the employment of such parties as is authorized by the Legislature in Subsection "C" is for the purpose of throwing additional safeguards around the investment of the permanent school fund which are required to be made by the Board of Education by providing expert advice and aid for the Board in the matter of investing the permanent school funds.

We believe that under the terms of Section 1, Article 7, making it the duty of the Legislature to make suitable provisions for the support and maintenance of an efficient system of public free schools, such body is given authority to enact Subdivision "C", for the reason that the purpose of said Act is for a more efficient and expert method of investing the permanent school fund, the interest from which goes to the support of the public free schools. The employment of the parties set out in the statute under discussion, in our opinion, is so closely connected with as to be incidental to the support of the public free school system.

It is our further opinion that when the law provides for the administration of a fund, the expenses of such administration may legally be charged against same, as it is done in the instant case by Subsection "C".

The presumption is that the Legislature acted within its authority and every intendment must be resolved in favor of the constitutionality of the statute. The rule is well established that an act of a Legislature will not be nullified until its unconstitutionality is shown clearly. 9 Texas Jurisprudence 477 and cases cited therein. Quoting from the case of *St. Louis Southwestern Railway Company vs. Griffin* 171 S. W. 703:

"Great weight attaches to the opinion of the Legislature as to its powers. This body is a co-ordinate department of government, invested with high and responsible duties. It must be presumed that it has considered and discussed the constitutionality of all measures passed by it."

The Supreme Court of Texas used the following language in the case of *Brown vs. City of Galveston*, 75 S. W. 488:

"It is but a decent respect due to the wisdom, integrity and the patriotism of the Legislative body by which any law is passed to presume in favor of

its validity until its violation of the Constitution is proved beyond all reasonable doubt."

In view of the foregoing it is our opinion that the employees authorized in Subsection "C" of House Bill No. 1, First Called Session of the 45th Legislature, can legally be paid out of the available school fund. We do not mean to hold by this opinion, however, that the Legislature is empowered to direct the payment of money from the available school fund for purposes so foreign to the support of the public free schools as to amount to a diversion of the available school fund.

We will now discuss the second question set out in your letter relative to whether said provision is mandatory or only directory. It is to be noted that Subsection "C" directs the Board of Education to "appoint not more than two surveyors, one auditor and one bond expert." The statute merely sets out the maximum number which may be employed under the terms but does not provide that any particular number shall be employed. Failure of the Board to comply with the terms of the statute would be attended with no serious consequences, and such failure would have no effect upon the duty of the Board to continue to invest the permanent school fund of Texas. You will note that no time is mentioned in the statute as to when such persons shall be employed by the Board, and no penalty is provided for failure to comply with the terms of said Article.

"A provision is directory when it contains mere matter of direction, not of the essence of the thing to be done, but designed merely to procure its proper, orderly and prompt performance. 39 Tex. Jur. 33 and cases cited thereunder."

In the case of *Heney vs. Davidson*, 32 S. W. (2d) 452 the Supreme Court of Texas quoted from *Cooley's Constitutional Limitations* as follows:

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory."

It is further held by the Court as follows:

"The subject matter of the legislation and the entire context of the statute are to be considered in determining whether a statute is mandatory or directory. *Dobey, et al, vs. Scott*, District Judge, 138 S. W. 286."

From a study of the subject matter and the wording contained in the statute under discussion and from the authorities cited, it is our opinion that the statute is directory, and that the Board of Education is under no duty to employ all or any of the persons set out in Subsection "C".

We trust that the above information will fully answer your inquiry.

Very truly yours,

JAMES N. NEFF,
Assistant Attorney General.

This opinion has been read, considered and approved, in conference and is now ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3010

BOARD OF PARDONS AND PAROLES—STATUTORY COMMUTATION

Construing Article 6166v, Revised Civil Statutes, 1925, as amended by Acts 40th Legislature, page 298, Chapter 212.

Reviewing legislative history of said Article and citing Revised Civil Statutes of 1895, 1911 and 1925, and holding that the terms days, months and years mean calendar days twenty-four hours long, calendar months and calendar years.

Holding that commutation earned under such statute by good conduct shall be credited as earned at the end of each calendar month and year.

Construing and applying said Article 6166v to a fraction of a month, to a sentence of nine months and ten days, to a sentence of one year, to a sentence of two years, to a sentence of nine years and ten months, to a sentence of twenty years, eleven months and twenty days.

Hold that convicts are not entitled to commutation of time to be applied on their sentences under Article 6166v, Revised Civil Statutes of Texas, 1925, for time served and credited on such sentences outside of the penitentiary.

OFFICES OF THE ATTORNEY GENERAL,
December 9, 1937.

*H. M. Bruce W. Bryant, Chairman, Board of Pardons and Paroles,
Austin, Texas.*

DEAR SIR: Your letter of August 30, 1937, addressed to Attorney General McCraw, is referred to the writer for attention and reply.

You advise that the Board of Pardons and Paroles, when considering the application of a convict for clemency, takes into consideration, with many other things not necessary here to mention, not only the length of time actually served by him but his commutation gained under Article 6166v of Vernon's Texas Statutes of 1936.

Some confusion has arisen as to the proper construction of this article by two conflicting opinions, one written by Honorable Pat Dougherty, an Assistant Attorney General during the

administration of your immediate predecessor, dated September 19, 1933, addressed to the old statutory Board of Pardons and Paroles, and being Departmental Opinion No. 2928, Reports of the Attorney General, 1932-1934; page 490; the other one written by Honorable O. S. Lattimore of the Court of Criminal Appeals in the case of *Ex parte Neisler*, 69 S. W. (2d) 422, which opinion was rendered subsequent to the opinion written by Assistant Attorney General Dougherty.

In order that we may be fully advised as to the proper construction of said Article 6166v and for our guidance in the future performance of our official duties, we have concluded to submit to you certain questions for your consideration and answers.

In considering the first six questions submitted, you will presume the convict entered the penitentiary and started to serve his sentence on the very day his sentence became final or effective; that his conduct has at all times been such as to entitle him to commutation as provided by said Article 6166v; and that he has not earned any overtime under Article 6166x, Vernon's Texas Statutes 1936. Your first question is as follows:

(1) Is such a convict entitled to receive credit on his sentence, as commutation gained under said article, for any fraction of a month actually served by him? For example: Is a convict entitled to be credited with one day for good conduct when he has actually served the first fourteen days of his sentence; or entitled to a credit of two days when he has actually served only twenty-eight days of his sentence?

It is proper, I believe, to set out certain statutory provisions applicable to the statement of facts you have given in your first question, together with a brief review of the history of the legislation inquired about.

It is a general rule of statutory construction that when a statute has been construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statutes as if plainly written into it originally. 59 Corpus Juris 1036, Section 613. The endeavor should be made by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature with reference to the subject matter. In other words, in determining the meaning of the particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view, therefore, it is proper to consider not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have expired or have been repealed. 59 Corpus Juris 1048-1049, Section 620 and cases there cited.

In Texas Jurisprudence, Vol. 23, page 778, Section 10, the rule is stated that prisoners in the state penitentiary who are orderly, industrious and obedient are entitled to a commutation of time by the manager for good conduct, their terms of imprisonment to be reduced according to a fixed scale: "Two days

per month off of the first year's sentence; three days off of the second year of sentence; four days" etc. The word "month" here means a calendar month, and the commutation for good behavior must therefore be reckoned in terms of calendar days, months and years. In no event may the prisoner claim commutation in excess of the two days off for each calendar month of the first year of sentence, amounting to twenty-four days.

In Volume 50, Corpus Juris, page 349, Section 50, the following rule is announced:

"The language of the statute must govern in determining how the term of the sentence and the deduction for good time is to be computed. Where such statute is capable of two constructions, that construction should be adopted which would entitle the prisoner to his discharge at the earliest time Under statutes allowing a specified credit for good behavior for each full or calendar month's service, the credits should be computed on the number of month's actual imprisonment with the requisite behavior."

The first statute enacted in Texas allowing commutation of time to convicts for good conduct was enacted in 1881, and in the revision of the civil statutes of Texas, 1895, the following statement is found under Article 3713:

"Commutation of time for good conduct shall be granted by the superintendent of the penitentiary and the following deductions shall be made from the term or terms of sentences when no charges of misconduct have been sustained against a convict, 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 per month off 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."

In the revision of the Civil Statutes of Texas, 1911, Article 6217, the following provision is found;

"Commutation of time for good conduct shall be granted by the Prison Commission, and the following deductions shall be made from the term or terms of sentences when no charge of misconduct has been sustained against the 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 per month off 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."

Under Article 6166v, Revised Civil Statutes of Texas, 1925, as amended Acts 40th Leg., page 298, Chap. 212, the following provision is found:

"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 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 per month off 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."

You will note from that portion of Article 6166v, above quoted, that it has been carried forward since its incorporation in the revision of 1895 in exactly the same form with the exception that the prison commission, the superintendent of the penitentiary and the manager have at different times been vested with the power to credit the commutation earned by a convict.

In *Ex parte Neisler*, 69 S. W. (2d) 422, Judge O. S. Lattimore of the Court of Criminal Appeals of Texas, in an able opinion, held that the terms days, months and years, as used in Article 6166v, R. C. S. of Texas, 1925, meant calendar days, months and years, i. e., in days twenty-four hours long, so many of which make up the calendar months as they come in due order, twelve of which make up a calendar year. It is further stated in said opinion that in the view of said court, a convict could not claim commutation for good behavior in excess of the two days off for each calendar month of the first year of sentence, amounting to twenty-four days, and three days per month off for the two years of sentence, amounting to thirty-six days, etc.

In the case of *In re Kness* (Supreme Court of Kansas), it is stated that the commutation law in the State of Kansas was as follows:

"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 fraction of a year, etc."

The Supreme Court of Kansas, construing and applying this statute, held:

"The good time earned by convicts in the state penitentiary as provided in Section 24, Chapter 152, Laws 1891, is computed for at the end of each calendar month; and when the time of actual service, together with the good time earned, equals the time of sentence, the convict is entitled to a discharge."

The Supreme Court of Kansas further stated in said opinion:

"The contention here is as to what constitutes the month for which the credit is to be given. In behalf of the petitioner it is claimed that, when he has observed the rules for the first month, the credit of 3 days is to be given, and that this good time deducted from the month would leave 27 days, from the end of which time the second month should begin, and so on throughout the year. The statute does not warrant this interpretation. The credit is only given for each month that he shall obey the rules of the penitentiary. As the term of the sentence is reckoned by calendar time, evidently the Legislature intended that credit should be given for and at the end of each calendar month. If the claim of the petitioner were upheld, we would have three grades of months: In the first year the month would be substantially 27 days long; in the second, it would be 24 days long; and in the third, and thereafter, it would be 22 days long. It is clear that no such shifting basis was intended, but that credit is to be given for and at the end of each month of good conduct; and when the good time earned, together with the time actually served, equals the time fixed by the sentence, the convict is entitled to be discharged."

In view of the statutory provisions and court opinions, above set forth, and in view of the particular provisions of Article 6166v, your first question is answered in the negative.

Your question number two is as follows:

(2) How many days is such a convict entitled to be credited with on his sentence as commutation gained for good conduct when he has actually served the first nine months and ten days of his sentence?

Applying the rule set forth in the above principles of law and assuming the conduct of the convict was such as to merit commutation, he would be entitled to 18 days off the first year of his sentence.

Your question number three is as follows:

(3) How much time must such a convict actually serve on a one-year sentence, which when added to the time earned as commutation for good conduct, will entitle him to a credit of one year's service and to be discharged?

To this question, I answer 11 months and a sufficient number of additional days so that when such additional days are added to 11 months and 22 days the total time will equal one calendar year.

Your question number four is as follows:

(4) How much time must such a convict actually serve on a two-year sentence, which when added to the time earned as commutation gained for good conduct, will entitle him to a credit of two years' service and to be discharged?

To this question, I answer such convict must serve 22 months and enough additional days so that when same are added to 22 months and 54 day's commutation of sentence, the total time will equal two calendar years.

Your question number five is as follows:

(5) How much commutation time is such a convict entitled to be credited with when he has actually served nine years, ten months and no days?

To this question, I answer two years, two months and 8 days computed upon the basis above set out.

Your question number six is as follows:

(6) How much commutation time is such a convict entitled to be credited with when he has actually served twenty years, eleven months and twenty days?

To this question, I answer 7 years, 6 months and 28 days computed as above specified.

You further advise that heretofore, and before the creation of this Board by the Constitution, many convicts were granted furloughs after they were received at the penitentiary, and after the expiration of their furloughs, returned to the penitentiary for the purpose of serving the remainder of their sentences. In all such instances, the time spent out of the penitentiary under furlough was credited on their sentences, and your question number seven is as follows:

(7) Are such convicts entitled to commutation for good conduct on time thus served out of the penitentiary while on furlough?

A careful reading of Article 6166v. Revised Civil Statutes of Texas, 1925, discloses some rather scholarly and learned composition, such statute commences:

"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, . . . A prisoner under two or more cumulative sentences shall be allowed commutation as 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. For extra meritorious conduct on the part of any prisoner, he shall be recommended to the favorable consideration of the Governor for increased commutation or pardon, and in case of any prisoner who shall have escaped and been captured, part or all of his good time thereby forfeited may be restored by the manager, if in his judgment his subsequent conduct entitles him thereto."

You will note that the terms "prisoner", "prison discipline" and "prison rules" are alluded to in said article as well as the violation of prison rules and escaping or attempting to escape all of which I think contemplates that the prisoner must be in

the penitentiary in order to come within the purview and intentment of said article. It is difficult to conceive how a man on a furlough could be a prisoner within the common and ordinary acceptation of such term. It is also difficult to conceive of a person on a furlough being guilty of a breach of prison discipline or escaping or attempting to escape from a penitentiary. Evidently the commutation allowed a prisoner under such article is a reward for good conduct and for obedience to prison rules while actually confined in the penitentiary. Therefore, a person could not earn this commutation except by actually serving the respective periods of time required by the statute in the penitentiary with a clear prison record. I, therefore, answer your question No. 7 in the negative and say that convicts while out of the penitentiary on a furlough are not entitled to a commutation of their sentences for time served out of the penitentiary.

Your questions and preliminary statements through (8), (9), (10) and (11) are as follows:

You further advise in some instances, convicts were granted furloughs immediately after their convictions became final and before they were ever received at the penitentiary. At the expiration of their furloughs, the convicts would voluntarily surrender at the penitentiary and be checked in as a convict. They would be credited on their sentences for the time they were out on furlough. Your question number eight is as follows:

(8). Are such convicts entitled to commutation for good conduct on the time they served out of the penitentiary while on furlough?

You further advise that prior to February 1, 1937, the effective date of the Constitutional Amendment creating the present Board of Pardons and Paroles, many convicts were granted paroles, either for short or long periods of time or general paroles, under the provisions of Article 6203, Vernon's Texas Statutes, 1936. The time thus spent out of the penitentiary was counted as time served on sentence. These paroles were all subject to revocation by the Governor for violation of any of their provisions, as evidenced by his proclamations. Some of these paroles have expired, others have not, while some have been revoked by the Governor. In most instances where the paroles have expired or been revoked, the convicts have returned to the penitentiary to complete their sentences. In those instances where the paroles have not expired, the parolees are still serving their sentences out of the penitentiary. Your question number nine is as follows:

(9). Are all or any of these parolees entitled to commutation for good conduct on the time they thus serve on their sentences while out of the penitentiary?

You further advise that under Article 768, Code of Criminal Procedure, Vernon's Texas Statutes 1936, the trial judge is authorized to give a defendant credit on his sentence for the time spent in jail since he was arrested in the cause for which

he was convicted until the day of his sentence. In some instances, the time so allowed is many months. Your question number ten is as follows:

(10). Are convicts entitled to commutation for good conduct for time so allowed them as credit on their sentences?

You further advise that it is provided in Article 774, Code of Criminal Procedure, Vernon's Texas Statutes 1936, that when a case is appealed to the Court of Criminal Appeals and is affirmed, the sentence shall begin on the date the mandate is issued, if the defendant is in jail, and if out on bond, his sentence shall date from the time he is taken into custody under the commitment which the district clerk of the trial court is required by said article to issue in such cases. In some instances, convicts stay in jail for many months, even years, after their convictions become final before they are delivered to an agent of the penitentiary to be conveyed to the penitentiary, but the time so spent in jail is credited on their sentences. Your question number eleven is as follows:

(11). Are such convicts entitled to commutation for good conduct on the time thus served on their sentences while in jail?

All such last quoted questions (8) to (11), inclusive, are predicated upon a status or condition upon which the prisoner gets credit on his sentence for time served outside of the penitentiary, and the answer to question No. (7) above likewise answers questions Nos. (8) to (11) inclusive, in the negative.

The opinion of the Attorney General's Department referred to by you in your letter in so far as same conflicts with this opinion is expressly overruled.

Trusting that this satisfactorily answers your letter, we are

Very truly yours,

H. L. WILLIFORD,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3011

SHERIFFS' AND CONSTABLES' FEES FOR EXECUTING BENCH WARRANT.

In counties where three thousand or more votes were cast at the preceding Presidential election the sheriffs and constables are entitled to receive fees for executing bench warrant for removing prisoners from penitentiary or county jail of another county to the district court in his county to be tried on a felony charge, as provided in Subdivision 4 of Article 1029, C. C. P.

OFFICES OF THE ATTORNEY GENERAL,
December 13, 1937.

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

DEAR SIR: This will acknowledge receipt of your request for an opinion wherein you submit the following question:

"A prisoner has been indicted and arrested on the original *capias* in McLennan County, but in the meantime, before he has been brought to trial, he has been taken into custody in Dallas County, or has been sent to the Penitentiary, on another charge. His case then came up for trial in McLennan County, and the District Judge issued a Bench Warrant to the Sheriff of McLennan County in order to obtain custody of the prisoner and return him to McLennan County for trial. In this case he had no *Capias* to serve. How much is the Sheriff of McLennan County entitled to per mile for: (a) going to Dallas County or to the Penitentiary, (b) for returning the prisoner to McLennan County?"

The fees provided for officers in counties of this size are included in Article 1029, C. C. P.

Subdivisions 1 and 4 of Article 1029 read as follows:

"1. For executing each warrant of arrest or *capias*, for making arrest without warrant when so authorized by law, the sum of one dollar, and in all cases five cents per mile for each mile actually and necessarily traveled in going to the place of arrest; and for conveying each prisoner to jail, he shall receive the mileage provided in subdivision 4.

"4. For removing or conveying prisoners, for each mile going and coming, including guards and all other necessary expenses, when traveling by railroad, ten cents. When traveling otherwise than by railroad, fourteen cents; provided that where more than one prisoner is so conveyed or removed at the same time, in addition to the foregoing, he shall be allowed eight cents per mile for each additional prisoner."

The principle question to be decided is as to whether or not the sheriff is entitled to five cents per mile actually and necessarily traveled in going to the place named in the Bench Warrant after the prisoner, as mentioned in Subdivision 1, or to fourteen cents per mile when traveling other than by railroad as provided in Subdivision 4.

The facts show that for a number of years the Comptroller's Department, with the approval of the Attorney General's Department of former years, has construed this statute as meaning that an officer in going to the Penitentiary or a county jail with a Bench Warrant to get a prisoner, as stated in your question above, is removing or conveying a prisoner as provided by Subdivision 4 of Article 1029, and, therefore, entitled to the mileage in going and coming as provided in Subdivision 4. Fee accounts have been approved and ordered paid by the Comptroller's Office in compliance with this interpretation for a

number of years and the fee officers have received warrants for mileage based upon this interpretation.

It is now contended that these officers have been overpaid; that they should have received five cents per mile in going after the prisoner as provided in Subdivision 1 of Article 1029 instead of fourteen cents per mile as provided in Subdivision 4 when traveling other than by railroad.

It appears from reading Article 1029 that it is ambiguous in the amount of fees to be paid officers in cases of this kind.

In *Tex. Jur.*, Vol. 39, Sec. 126, p. 235, dealing with statutory construction, reads as follows:

"Executive or Departmental Construction—The courts will ordinarily adopt and uphold a construction placed upon a statute by an executive officer or department charged with its administration, if the statute is ambiguous or uncertain, and the construction so given it is reasonable. In other words, the judiciary will adhere to an executive or departmental construction of an ambiguous statute unless it is clearly erroneous or unsound, or unless it will result in serious hardship or injustice, although it might otherwise have been inclined to place a different construction upon the act.

"The rule above stated is particularly applicable to an administrative construction of long standing, where valuable interests or rights have been acquired or contracts have been made, or where a law that has been uniformly construed by those charged with its enforcement has been reenacted without a change of language. It has been variously applied to constructions, opinions or rulings of the Governor, the Attorney General, the Comptroller, the Secretary of State, the Treasurer, the Land Commissioner, the Compensation Claim Board, and the State Department of Education. In particular, an opinion or ruling of the Attorney General is highly persuasive and will be carefully considered and followed in case of doubt as to the proper construction to be given a statute.

"It is needless to say that a court is not bound by an executive or departmental construction. On the contrary, the rule pertaining to the judicial adoption of an administrative construction does not apply to a construction of an unambiguous statute, even though it has been followed for many years."

Both, *Texas Jurisprudence* and *Texas Digest on Statutory Construction*, cite numerous court decisions in Texas where the courts have held that great weight should be given to executive or departmental constructions of an ambiguous statute. *Edwards v. James*, 7 *Tex.* 372; *Galveston H&SA Ry. Co. v. State*, 17 *S. W.* 67; *Moorman v. Terrell*, 202 *S. W.* 727; *Koy v. Schneider*, 221 *S. W.* 880; *State v. Houston Oil Company of Texas*, 194, *S. W.* 422, and many others.

A bench warrant is a common law process not defined by the Statute of Texas, and although the courts in *Oxford v. Berry*, 170 *N. W.* 83, 204 *Mich.* 197, and in *Ex Parte Lowe*, 251 *S. W.* 506, have defined a bench warrant as a warrant of arrest, they further say that it is sometimes used to bring a convict confined in the penitentiary to trial in another case, and we are of the opinion that a bench warrant is not contemplated as being a warrant of arrest or *capias* as provided in Subdivision 1 of Art-

icles 1029, but it is merely an order by the District Judge in cases such as those submitted in your question for the sheriff to proceed to a certain place and get a prisoner whom he has already had in custody and upon whom he has already served the *capias* or warrant of arrest and returned the body of such prisoner to the court issuing the order. It is not an ordinary warrant of arrest directing the sheriff to arrest the person named therein where ever found, but on the other hand it is an order directed to the officer or person having custody of the prisoner ordering such officer or other person to deliver the prisoner to the sheriff for the purpose of conveying him to the court issuing the warrant.

In cases where the sheriff has not had the prisoner in his custody on the same charge prior to the issuance of the bench warrant, then it is necessary for the sheriff to proceed with a *capias* as well as with a bench warrant to the penitentiary or other place for the purpose of arresting a prisoner, and in cases of this kind we are of the opinion that he would be entitled to only five cents per mile while going to the place of arrest, but in cases such as the question submitted by you where the sheriff has already taken the prisoner into custody and has served the *capias* upon him, and then the prisoner has been taken to some other jurisdiction and it became necessary for the sheriff to proceed under a bench warrant to get the prisoner and bring him to the court issuing the bench warrant, then in that event he is not going to the place of arrest, but is merely going to convey a prisoner to the court, and we are of the opinion that the sheriff is entitled to mileage as provided in Subdivision 4 of Article 1029.

The Supreme Court of Texas in the case of *Binford v. Robinson*, 244 S. W. 807, has held that the sheriff is entitled to ten cents per mile for himself and ten cents per mile for the first prisoner, making a total of twenty cents per mile when traveling by train with the prisoner. Therefore, it would necessarily follow that the sheriff when traveling otherwise than by railroad would be entitled to fourteen cents for himself and fourteen cents for the prisoner for the mileage traveled with such prisoner.

The fact that this construction has been placed upon this statute for a number of years by the Comptroller's Department and the fee officers have acted under such construction over a long period of time, and the Legislature although charged with the knowledge of such construction, have not amended or in anywise changed the wording of such statute, leads us to the conclusion that it was the legislative intent that this construction be placed upon this Act.

We are, therefore, of the opinion that an officer while acting as set forth in the question propounded above should draw fees or mileage as provided in Subdivision 4 of Article 1029. For example, a sheriff in executing a bank warrant for removing prisoners confined in the State penitentiary to another county

to be tried on a felony charge should receive, when travelling otherwise than by railroad, fourteen cents per mile while going after such prisoner and fourteen cents for himself and fourteen cents for the prisoner, making a total of twenty-eight cents per mile while returning the prisoner to the jurisdiction of the court issuing the warrant.

Trusting this satisfactorily answers your question, we are

Very truly yours,

J. H. BROADHURST,
Assistant Attorney General.
H. L. WILLIFORD,
Assistant Attorney General.
JAMES N. NEFF,
Assistant Attorney General.

This opinion has been considered in conference, approved, and ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3012

DEPARTMENT OF EDUCATION—TEACHERS CERTIFICATES
SCHOOLS AND SCHOOL DISTRICTS—PUBLIC MONEYS DEFINED
ARTICLES 2879—2887—2888—2891a

1. Fees collected on issuance of teachers' certificates by State Board of Examiners payable into general revenue fund of the State Treasury.
2. Fees collected on accreditation of institutions as junior colleges payable into general revenue fund of the State Treasury.
3. Fees collected on revival and continuance in force of teachers' certificates payable into general revenue fund of the State Treasury.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 3, 1938.

Hon. Tom C. King, State Auditor and Efficiency Expert, Austin, Texas.

DEAR SIR: Your letter of January 31, 1938, addressed to the Honorable William McCraw, Attorney General of Texas, has been received and referred to the writer for attention.

In such letter you make reference to Title 49, Chapter 17, R. C. S. of Texas, 1925, providing among other things for the issuance of teachers' certificates by the State Department of Education and the collection of fees therefor. In connection with such chapter you request the opinion of this department on the following questions quoted from said letter:

- "(1) Should the funds collected on the above named statute and remitted

to the State Department of Education be deposited with the State Treasurer of Texas and disbursed therefrom by warrants issued by the Comptroller of Public Accounts?

“(2) If the answer to the above question is in the affirmative, should the fees collected and remitted under the provision of the above named statute be deposited with the State Treasurer to the account of the General Revenue Fund, or to some properly titled special fund?”

Specifically, the Articles contained in Chapter 17, Title 49, having to do with the collection of fees are in substance as follows:

Article 2879:—“Any person desiring to be examined for a teachers certificate shall make application to the County Superintendent . . . After investigation, the County Superintendent shall give the applicant a written recommendation to the County Board of Examiners, requiring them to examine the applicant for a certificate—; *but no person shall receive such recommendation without first depositing with the County Superintendent the sum of \$4.00 as an examination fee and the recommendation . . . given by the County Superintendent shall show the receipt of said fee.* The County Board of Examiners shall not permit any person to enter in the examination who does not first present the written recommendation of the County Superintendent. The County Superintendent shall forward promptly to the State Superintendent all papers of applicants applying for State Certificate, these to be submitted to the State Board of Examiners . . . *with a fee of \$2.00 from the fee paid to him by each of the applicants . . .*”

Article 2881:—“The State Board of Examiners shall at their next meeting after receipt of said papers and reports, *together with the fees,* examine the papers and shall make a report to the State Superintendent . . .”

Article 2888:—“The State Board of Examiners in the Department of Education shall on application of institutions in Texas, to be recognized as junior colleges, etc. . . make investigation . . . and shall make recommendations . . . Any school applying for approval under this act shall pay a fee of \$25.00. *Each applicant for teachers certificate based on college credentials from Junior Colleges, etc., shall pay a fee of \$1.00 to cover the expenses of inspection and standardization of approved colleges and of recording and issuing the certificate.*”

Article 2891a:—“Any person holding a teachers certificate . . . shall have the right to have such certificate revived and continued in force for a period of one year by taking three courses or subjects and passing in same . . . Upon successfully passing such three courses or subjects . . . *such teachers certificate . . . upon payment of \$1.00 by the holder, shall be renewed and continued for one year . . .*”

It is understood that the various fees and the amounts enumerated in the Statutes above set out, save one-half of the \$4.00 fee collected, by virtue of Article 2879 which will hereinafter be referred to, are transmitted, when received, to the State Department of Education where their final disposition is administered.

The first question asked being whether such fees should be deposited with the State Treasurer and disbursed therefrom

on warrants issued by the Comptroller, the answer thereto involves a consideration generally of the duties imposed upon each such official by law.

Article 4372, R. C. S. Texas, 1925, provides that the Treasurer "shall keep true accounts of the receipts and expenditures of the public moneys of the Treasury . . . He shall also open an account in the Treasury for all appropriations of money made by law."

Article 4344, R. C. S. Texas, 1925, provides by Section 9 thereof, that the State Comptroller shall "keep and settle all accounts in which the State is interested, including all moneys received by the State as interest and other payments on land and office fees of his and other departments of the State Government, and all other moneys received by the State from whatever source and for whatever purpose."

Other related Articles pertaining to the duties of such officers are Section 10, Article 4344, providing that the Comptroller shall direct and superintend the collection of all moneys due the State; keep and settle accounts of persons owing such money. Section 16 of the same Article provides that the Comptroller shall draw warrants on the Treasury for the payment of all moneys directed by law to be paid out of the Treasury; Section 3, Article 4344 provides that the Comptroller shall superintend the fiscal concerns of the State as the sole accounting officer thereof; Section 8 of the same Article requires all persons to settle their accounts who have received and not accounted for any moneys belonging to the State; Article 4371 provides that the Treasurer shall countersign and pay all warrants drawn by the Comptroller on the Treasury, which are authorized by law; further providing that no money shall be paid out of the Treasury except upon a warrant drawn by the Comptroller.

With a view toward further enforcing upon the officers of the various departments of the government, the obligation to pay into the State Treasury funds properly receivable therein, the Legislature has enacted various other provisions in the Penal Code of the State. They have to do with the misapplication of funds and further strengthen the conclusion to be drawn from the above several statutes that public funds are to be paid into the State Treasury.

Article 86 (P. C.):—"If any officer of the government who is by law a receiver or depository of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take, misapply or convert to his own use, any part of such public money, or secrete the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two nor more than ten years."

Article 87 (P. C.):—"Within the terms 'misapplication of public money' are included the following acts:

"(1) The use of any public money in the hands of any officer of the

government for any purpose whatsoever, save that of transmitting or transporting the same to the seat of government and its payment into the treasury;

“(3) The deposit by an officer of the government of public money at any other place than the treasury of the State when the Treasury is accessible and open for business, or permitting the same to remain on deposit at such forbidden place after the treasury is open,”

Article 92 (P. C.):—“The term ‘officer of the Government,’ as used in the chapter, includes the State Treasurer and all other heads of departments who by law may receive or keep in their care public money of the State, tax collectors, and all other officers who by law are authorized to collect, receive or keep money due to the government.”

With the prescription of the above statutes in mind, it becomes obvious that the contemplation of the Legislature, clearly implied thereby, is that unless otherwise expressly provided, State funds or public moneys must go into the State Treasury. Affirmation by statute may properly be construed as the negation of everything not affirmed thereby. *Bryan vs. Sundberg*, 5 Texas 418. (See letter opinion under date of July 23, 1931, addressed to the Honorable Moore Lynn, State Auditor and Efficiency Expert, signed Ralph W. Yarborough, Assistant Attorney General). Thus the question presented revolves upon the determination as to whether the funds under consideration are State funds . . . or public money . . . the terms being used interchangeably herein as elsewhere.

State funds, or “public moneys” have been variously defined as follows:

By Statute of the State of Michigan. Comp. Laws, Michigan, 1897, Section 1197: “All moneys which shall come into the hands of any officer of the State . . . pursuant to any provision of law authorizing such officer to receive the same, shall be denominated ‘public money’ within the meaning of the act . . .” 1, W. and P. Vol. 6, Page 5798.

By opinion of the Appellate Court of Texas (Tarrant County against Butler, 80 S. W. 856):

“By ‘public money’ as used in Constitution, Article 3, Section 51 . . . the framers of the Constitution most probably meant money received by officers of the State and belonging to the State, derived in the ordinary processes of taxes and in other ways permissible under the Constitution.

By 50 Corpus Juris, Page 854: “The term ‘public funds’ means funds belonging to the State . . . , more specifically taxes, customs, moneys, etc., raised by the operation of some general law and appropriated by the Government to the discharge of its obligations, or for some public or governmental purpose.”

School and lot funds coming to Township Treasurer held ‘public moneys’ coming to him ‘by virtue of office’ within embezzlement statute. (State against Colson, 30 S. W. 2nd 59; 3 W. and P. 260, 4 series).

‘Public funds’ have received further definition as: “all mon-

ey which by law the sheriff in his capacity as such, and as treasurer of the county and district, is authorized to receive, collect and disburse for public purposes." (Bunch vs. Short, 90 S. W. 810). "School district funds and other funds of like character coming into the hands of the Treasurer in his official capacity . . . , it being the official character in which moneys are received" (State vs. McGraw, 240 Pacific 212).

The Attorney General's Department, in prior opinions has seen fit to characterize as 'public moneys': (a) student fees belonging to schools, (b) charges for use of rooms and dormitories of schools, (c) receipts from school cafeterias. The analogy is apparent and the general rule and the application thereof becomes obvious. Paraphrasing the above quotation from *Corpus Juris*, this general rule may be stated as follows:

"Money, the income of fees, the imposition and collection of which is authorized by a general law, received by a properly constituted officer of the State, within the statutory definition thereof, acting within his official capacity, and within an enterprise the proper function of the sovereignty, are public moneys or State funds."

Generally considered, the funds under discussion herein fixed and permitted by law, regulated by law, and are subject to abrogation by the Legislature authorizing their collection. They are transmitted, when received, to an officer of the State of Texas, duly elected, qualified and acting within the scope of the duties exercised by him, pursuant to the purpose of his office. They are collected upon the performance of a statutory duty by various boards and officers, in response to due application for such performance by persons entitled to make same. The department to which the fees are remitted is a coordinate branch of the Government of the State and maintains no status as an independent agency, other than within certain discretionary powers conferred upon it or its officers by statute. It is submitted that the funds under examination fall within the operation of any such rule, and all receipts properly should be placed in the State Treasury.

As to the \$2.00 of the \$4.00 fee, the collection of which is authorized by Article 2879, and retained, supposedly by the County Board of Examiners or the County Superintendent, the disposition of this fee is not regulated by statute. Presumably, it is paid into the county administrative fund. Possibly it defrays the expenses of the County Board or is received as a fee by the County Superintendent. In any case, there is no obvious distinction between this fund being retained and that remitted the State Board of Education, and there appears no reason why the general rule should not apply thereto. This question, however, is not before the Department for consideration.

Having made reference to the operation of general State laws concerning the question submitted, reference is now made to the General Appropriations Bill of the 45th Legislature. The principle that an appropriation bill cannot control or amend a

general law is well substantiated, but such Legislative action can well be helpful in ascertaining the actual intent of the Legislature. In this bill, provision is made for the Board of Examiners Division of the State Department of Education, appropriating the amounts from the General Revenue Fund in the following language:

"It is hereby provided that amounts for the salaries of all persons engaged in the examination and certification of applicants for teachers' certificates and for other expenses incident thereto shall never exceed the amounts of the prior year's balances of fees collected from applicants for certificates plus current fees collected, and that not exceeding the following amounts per year for salaries shall be paid to the following members and employees of said Board: \$3,000.00 to the Chairman-Member; \$2,750.00 to the College Examiner-Member; \$1,800.00 to the Secretary-Member; \$1,600.00 to the Certificate Clerk; all other help at the rate not exceeding \$112.50 per month; also \$3,000.00 each year for maintenance, equipment, travel and contingent expenses; and said balances and fees are hereby appropriated for the purpose of paying said salaries and expenses for each of the two fiscal years ending August 31, 1938, and August 31, 1939."

The fact that the Legislature has exercised, to the extent of making an appropriation therefrom, some control over the funds in question, it appears that this constitutes a Legislative recognition of the fact that such are State funds, and definitely indicates the intent of the Legislature with respect thereto as such.

Statutes are to be construed conformably to the intent of the Legislature. (Kottwitz against Alexanders' Ex'rs., 34 Texas 689).

It may likewise be said in passing, that the fact that the income from said fees are appropriated in the entirety does not constitute them a special fund. (See Attorney General Opinion above cited).

Such appropriation bill likewise is helpful in determining the Legislative intent with regard to the answer to the second question. Undoubtedly the intent is that the funds under consideration are to be a part of the General Revenue Fund, constituting no special fund. Supporting this contention is Chapter 27, Acts Second Called Session, 38th Legislature, 1923, Page 61, General Laws of Texas, Second Called Session of said Legislature, reading as follows:

"Section 1. All special funds in the State Treasury, and all moneys now in such special funds or which, under present laws, or laws hereafter enacted, are to be placed in such special funds, are hereby transferred and made applicable to the general revenue fund and shall be applicable to general warrants against that fund. Hereafter, no special warrants shall be drawn by reason of any such funds, but all warrants on the State Treasury shall be general warrants, and shall be on an equal basis with each other, except that in the event of a question and necessity arising as to the priority of payment of any such warrants, they shall be paid in the order of their serial

number, such warrants to be numbered at all times in the order of receiving the accounts in the Comptroller's office.

"Section 2. The purpose of this Act is to place all moneys now in or to come to the State Treasury in the general revenue fund, and to do away with special funds set aside for particular purposes, and to provide that hereafter all warrants for moneys which would, under present laws, be issued against such special funds, shall be drawn and paid out of the general revenue fund along with other warrants drawn on such general revenue fund, and that no preference shall exist in favor of such warrants, by reason of revenues and moneys being collected for particular purposes to constitute separate and special funds in the State Treasury."

This enactment finds its place in the Revised Statutes as Article 4386, R. C. S. Texas, 1925, which maintains the provision of such bill.

In conclusion it may be said finally, that the funds under consideration, not otherwise having been provided for by law, will be paid into the General Revenue Fund of the State Treasury and constitute no special fund.

Trusting the above satisfactorily answers your query, I am

Very truly yours,

WILLIAM J. KEMP,
Assistant Attorney General.

Considered in conference and approved, this the 21 day of February, 1938.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3013

STATE BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS.

Opinion construing Section 12-c, Senate Bill 74, Acts Regular Session, 45th Legislature, and holding that the last clause of such section which states "and was not practicing professional engineering at the time this Act becomes effective" is so illogical and repugnant to the Act in its entirety as to be void and inoperative.

OFFICES OF THE ATTORNEY GENERAL,
February 12, 1938.

*Hon. F. E. Rightor, Secretary, Texas State Board of Registration
for Professional Engineers, Austin, Texas.*

DEAR SIR: This will answer your letter of February 11, 1938, addressed to Attorney General McCraw, wherein you ask for an opinion on Section 12-c, Senate Bill 74, Acts Regular Session, 45th Legislature, which reads as follows:

“(c) At any time within five (5) years after this Act becomes effective the Board may accept as evidence that the applicant is qualified for registration as a professional engineer a specific record of twelve (12) years or more of active practice in engineering work of a character satisfactory to the Board and indicating that the applicant is qualified to design, to operate, or to supervise construction of engineering work and has had responsible charge of important engineering work for at least five (5) years and provided applicant is not less than thirty-five (35) years of age, and was not practicing professional engineering at the time this Act becomes effective.”

You state that the wording of the last clause “and was not practicing professional engineering at the time this Act becomes effective” is making it very difficult for this Board to carry on the administrative work of passing on applications, and that the real purpose of Section 12-c is nullified if such above mentioned clause is to be given its literal meaning and effect.

You further state that the model law used by the Legislature in writing this bill contained no such clause and that the clause complained of is causing a great deal of trouble in carrying out the intent of Section 21, reciprocity, also it prevents your registering engineers from other states who qualified in those states under Section 12-c as written in their laws and which is in conformity with the model law for professional engineers.

I have carefully read Senate Bill 74, Acts of the Regular Session, 45th Legislature of Texas, and particularly Section 12-c inquired about in your letter. It is apparent from the context of the Act in its entirety and from the particular provision incorporated in Section 12-c thereof that if we should give the clause “and was not practicing professional engineering at the time this Act becomes effective” its literal meaning, all that class of persons who would be otherwise qualified to register as professional engineers under such Section 12-c would be precluded if they were practicing their profession on the date the Act became effective and another class of persons with the same qualifications prescribed for registrants under such section would be eligible if they were not practicing professional engineering at the time the Act became effective. To give said clause last above referred to its literal meaning and import would be manifestly unjust to the first class of persons referred to above and would be so illogical and unreasonable that I do not think any person could contend that the Legislature intended to exclude a class of persons from its operation simply because they were practicing their profession.

It is a rule of general application in our State that a court will never adopt a construction that will make a statute absurd or ridiculous or one that would lead to an absurd conclusion or consequence. Neither will the court adopt a construction that will render a statute fruitless, futile, purposeless or useless when the language can otherwise be construed.

It would be most unreasonable and illogical to conclude that

the Legislature intended to make such a discrimination between persons of the same class and otherwise equally fitted and qualified to practice professional engineering to make their eligibility dependent solely on whether or not such persons were practicing or not practicing professional engineering on the date the law became effective.

You are, therefore, advised that it is the opinion of this Department that the clause above inquired about "and was not practicing professional engineering at the time this Act becomes effective" should be deleted, disregarded and completely ignored in the application and operation of Section 12-c above inquired about as being so in conflict with the manifest legislative intent of the entire Act that it is void.

Respectfully submitted,

H. L. WILLIFORD,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3014

BOARD OF PARDONS AND PAROLES—CREDITS ON
SENTENCES OF CONVICTS FOR OVERTIME HOURS
EARNED UNDER ARTICLE 6166x.

Opinion construing Article 6166x, R. C. S. and holding:

1. Prison Board and Prison Manager authorized to grant credit on sentences of convicts for overtime earned for attending prison school as instructor or as pupil.
2. Prison Board and Prison Manager not authorized to arbitrarily or capriciously designate any kind of activity as necessary and essential work to the organization of convict forces within the terms of said article.
3. The prison Board alone under such article has power to grant credit on the sentences of convicts for overtime hours.
4. Two methods by which overtime hours may be arrived at (1) Actual number of hours served more than ten hours per day. (2) Ascertainment by Prison Board of flat overtime hours for some particular work.
5. Holding that credits on convict's sentence for overtime hours earned must be ascertained by dividing the total amount of hours by 24 as a day means 24 hours long. Ex Parte Neisler, 69 S. W. (2d) 422.
6. Holding that a convict is entitled to credit on his sentence for 100 overtime hours 4 days and 4 hours.
7. Holding that where the term days and hours are used without any other qualifying expression they mean days 24 hours long and so many days as will make a calendar month according to our calendar.

8. Holding that the Prison Board and the Manager of the Texas Prison System do not have power to allow overtime credits on the sentences of convicts for any kind of service except essential and necessary work for the proper organization of convict forces, and that any attempt on the part of the Prison Board to allow overtime credit for service not coming within such classification is an invasion of the pardoning power of the Governor and the Board of Pardons and Paroles of Texas.

OFFICES OF THE ATTORNEY GENERAL,
February 21, 1938.

*Hon. Bruce W. Bryant, Chairman, Board of Pardons & Paroles,
Austin, Texas.*

DEAR SIR: Your letter of November 12, 1937, addressed to Attorney General McCraw, received and referred to the writer for attention.

You state in order that we may properly evaluate the amount of overtime credited to convicts by the officials of the Texas Prison System, which we take into consideration in passing upon the application of convicts for clemency, the following questions are respectively submitted for your consideration and advice.

You further state that assuming there is no constitutional authority for the officials of the Texas Prison System to credit a convict on his sentence for extra hours of work which he has performed, but that such authority must be derived from the legislature, we inquire:

(1). (a) Does Article 6166x, Vernon's Texas Statutes 1936, or any other statute, authorized the General Manager of the Texas Prison System or the Texas Prison Board to allow a convict credit on his sentence as "overtime" earned for attending the prison school; (b) for giving his blood to another convict, or other person, for transfusion; (c) for giving boxing exhibitions before convict, or other audiences; (d) for directing and teaching convicts composing the prison band, or for playing in the prison band; (e) for teaching convicts in the prison school; (f) for participating in rodeo performances given for the entertainment of the convicts or the public?

(2). If you have answered any of the foregoing questions in the affirmative, then please advise, (a) how is the amount of such "overtime" determined, (b) who has the authority to grant the same, the General Manager or the Texas Prison Board?

(3). When a convict has worked in one month fifty-two hours more than he is required to work under the statute, how much time, computed in days and hours, is he entitled to have credited on his sentence as commutation for overtime earned?

To restate the question: A, a convict, not only works in the field every week day (26) in a given month his full ten hours but he works two extra hours each day. At the end of the month he has to his credit, without having violated any prison rule, fifty-two hours of actual overtime. He is, of course, credited with one full month of actual service. How much overtime credit, in addition to his month, is he entitled to receive on his sentence for the fifty-two hours he worked overtime?

A part of Article 6166x reads as follows:

“The Prison Board shall have the power to designate certain fixed overtime hours which it considers sufficient for the efficient performance of any particular work. . . .”

You state that under the authority of the above quoted provision, the Texas Prison Board passed a resolution effective May 1, 1936, and which is still in effect, in so far as we are advised. While we do not have a copy of said resolution before us, we do have a copy of a communication signed by the General Manager, addressed “To the Warden and all Farm Managers”, dated May 1, 1936, in which he refers to said resolution, which communication in part reads as follows:

May 1, 1936

“To the Warden and all Farm Managers

“At the last Prison Board meeting resolution was passed adopting new flat-rate overtime schedule, effective as of May 1, 1936, for the various jobs in the System; that is such jobs as it was considered were entitled to being placed on flat rate basis. The hours given were those that it was felt a man was entitled to when filling the various positions listed and no prisoner shall receive in excess of 300 hours for any one month. Also, no new prisoner received in the System shall receive any overtime on flat-rate basis until sixty days shall have elapsed from the date of his entrance, and they shall be credited only with school time earned, or actual work in the field at the usual rate for time put in over and above ten hours per day. This shall also apply to prisoners serving other than their first term; that is exes, except that they must be in the System six months before receiving overtime except in school and field time. No prisoner shall be turned in overtime on a flat-rate basis that is not provided for in the following schedules:

O. J. S. ELLINGSON,
General Manager.

FLAT RATE OVERTIME SCHEDULE ALLOWED AND
EFFECTIVE MAY 1, 1936.

Huntsville Unit	Hours
All Bookkeepers -----	300
Bull Ring Barbers -----	300
All Car and Truck Drivers -----	300
Truck Drivers Helpers -----	250
.....”	

You state then follows a list of 176 other positions or classes of work performed by convicts for which the “flat-rate overtime” is fixed at from 100 to 300 hours per month.

You further state that on August 6, 1937, you addressed a letter to O. J. S. Ellingson, General Manager, Texas Prison System, in which you asked him to give you his construction of the

above mentioned resolution. On August 8, 1937, he replied to same as follows:

Huntsville, Texas, August 10, 1937.

Hon. Bruce W. Bryant, Chairman, Board of Pardons and Paroles, Austin, Texas.

MY DEAR JUDGE: Thank you for your favor of the 6th.

In construing the flat rate overtime schedule where it is based on a specific number of hours per month, they are credited by days on their sentence figuring each 10 hours of the total hours specified as a day. In other words if the flat rate carries 100 hours, they will be credited 10 days on their sentence.

I believe this answers your question, if not, please advise.

Hoping you will call on us whenever we can be of service to you and with kindest personal regards, I am,

Sincerely yours,

O. J. S. ELLINGSON,
General Manager.

You state bearing in mind the above quoted portion of Article 6166x, which is the only one relating to the subject we have been able to find, the opinion of the Court of Criminal Appeals in the case of *Ex Parte Neisler*, 69 S. W. (2d) 432, and your Departmental Opinion No. 2528, we further inquire:

(4). Has the General Manager correctly interpreted the resolution above mentioned when he construes the same as allowing a convict 10 days credit for overtime on his sentence when he has worked one month at a job which carried a "flat-rate overtime" of only 100 hours per month? If not, what credit on his sentence, computed in terms of days and hours, is such convict entitled to receive for such 100 hours?

(5). When a convict performs "any particular work" for an entire month for which the Texas Prison Board has designated and fixed the overtime for that "particular work" at 300 hours per month, how much credit is such convict entitled to receive at the end of the month in terms of days and hours, for said 300 hours?

(6). Is it not an encroachment upon the prerogative of the Governor (Sec. 11, Art. IV of the Constitution of Texas, as amended in 1936) for the General Manager of the Texas Prison System or Texas Prison Board to allow a convict credit on his sentence for overtime, or for any other reason, not authorized by statute?

In reviewing the legislative history of the subject under investigation, we do not deem it necessary to go back further than the Revised Statutes of 1895.

Article 3716, Chap. 8, Title 79, Revised Statutes of 1895, reads:

"Convicts sentenced to hard labor shall be kept at work, under such rules and regulations as may be adopted; but no labor shall be required of any convict on Sunday, except such as is absolutely necessary, and no greater

amount of labor shall be required of any convict than a due regard for his physical health and strength may render proper; nor shall any convict be placed at such labor as the penitentiary physician may pronounce him physically unable to perform."

The above quoted Article while very meager is all that can be found in said Statutes pertaining to the subject. It will be noted that it does not prescribe the number of hours that convicts shall be required to work each day, but does provide that convicts shall be kept at work, under such rules and regulations as may be adopted by prison officials. The Article inhibits the working of convicts on Sunday, "except such work as is absolutely necessary".

There was no further legislation on the subject until 1910. (Chap. 10, 4th Called Session, Thirty-first Legislature) Secs. 40 and 45 of said Chapter read respectively as follows:

"Sec. 40. No prisoner shall be worked on Sunday except in cases of extreme necessity, and all prisoners so required to work on Sunday shall be paid out of the funds of the prison system the sum of one dollar per day for each Sunday so worked."

"Sec. 45. Prisoners shall be kept at work under such rules and regulations as may be adopted by the Prison Commission; provided, that no prisoner shall be required to work more than ten hours per day, except in case of an extreme and unavoidable emergency, which time shall include the time spent in going to and returning from their work, but not to include the intermission for dinner, which shall not be less than one hour. And in case of such extreme and unavoidable emergency, said prisoner shall receive out of the funds of the prison system the sum of ten cents per hour for such work so performed more than ten hours per day. In going to and returning from work prisoners shall not be required to travel faster than a walk. No greater amount of labor shall be required of any prisoner than his physical health and strength will reasonably permit, nor shall any prisoner be placed at such labor as the prison physician may pronounce him unable to perform. No prisoner upon his admission to the prison shall be assigned to any labor until first having been examined by the prison physician. Any officer or employe violating any provision of this Section shall be dismissed from the service."

It will be noted that said Chapter specifically repeals the first eight Chapters of Title 79, R. S., 1895, and embraced all the law relating to the prison system.

By Section 45 of this Act, the number of hours a convict may be required to work per day is fixed at ten. This was the first time that the Legislature had limited the hours convicts could be required to work each day, except in cases of "extreme and unavoidable emergency". It provided in effect that convicts who worked more than ten hours in one day in "such extreme and unavoidable emergency" should be paid "ten cents per hour for such work so performed".

This Act of 1910 was brought forward without change in the

Revised Statutes of 1911, Chaps. 1, 2, Title 104, Arts. 6172 to 6231, both inclusive. Secs. 40 and 45 of said Act became Arts. 6215 and 6220 of said revision.

There was no further legislation on the subject until 1917 (Chap. 32, 1st Called Session 35th Leg.). By this Act, Articles 6214, 6215, 6220 and other Articles were amended.

Prior to this Amendment, Art. 6214 had no application to the subject under investigation. Arts. 6214, 6215 and 6220, as so amended read respectively as follows:

"Art. 6214. Every prisoner who shall do extra work or work over time shall be entitled to a credit for same and dimunition of time, as hereinafter provided, as commutation time to be allowed to him in addition to the commutation time for good conduct now provided by law in Article 6217 of the Revised Civil Statutes of 1911; provided, such commutation time may be forfeited in whole or in part by the prison commission for mis-conduct or violation of the rules of the prison system.

"Art. 6215. No prisoner shall be worked on Sundays except in cases of emergency or extreme necessity; provided, the prison commission shall be authorized to work prisoners on Sunday at labor that is necessary to be performed, such as cooks, waiters, lot men, and men attending to stock, and men engaged in the necessary operation of machinery; provided, for each Sunday or each hour on Sunday a prisoner is so worked, he shall have deducted from his time two days for one day or two hours for one hour so worked by him as commutation time in addition to the commutation time now provided by law for good behavior.

"Art. 6220. Prisoners shall be kept at work under such rules and regulations as may be prescribed by the prison commission. No greater amount of labor shall be required of any prisoner than his physical health and strength will reasonably permit, nor shall any prisoner be placed at such labor as the prison physician may pronounce him unable to perform. No prisoner upon his admission to prison shall be assigned to any labor until having first been examined by the prison physician. Provided, that no prisoner shall be required to work more than nine hours per day, except that the commission shall be authorized to work the prisoners on the farms of the prison system in accordance with the following plan.

"During the months of December, January and February, nine hours; during the months of March, April, July, August and November, ten hours; during the months of May, June, September and October, eleven hours.

"The commission is further authorized to work prisoners on the farms such time in addition to that stipulated above, as may be agreed on by convicts who are desirous of shortening their terms as hereinafter provided.

"Provided, that for each hour a prisoner may work in excess of nine hours a day, an equal amount of time shall be deducted for the term of his sentence in addition to the commutation for good behavior now allowed by law; for each nine hours of over time he shall be entitled to one day off his sentence.

"The hours of labor shall be computed from the time of arriving at the place of work, where the distance is not greater than one mile and a half from the prison building, till the time of stopping work exclusive of the intermission allowed for dinner which shall not be less than one

hour. Provided, life term prisoners who are worked over or extra time, who, by reason of the nature of the sentence, cannot earn commutation, shall have entered and shown on his record as a credit, the amount of over time worked, which shall be counted as time served on their sentences in addition to the actual time served, on the same rate as prisoners having a term of years, which shall be reckoned in the consideration of their cases when applying for pardon or parole. Any officer or employee violating any provision of this Article shall be dismissed from the service."

By the amendments to the above quoted three Articles, the Legislature, for the first time, provided for crediting the sentence of a convict with the overtime earned by him and established a rule whereby the amount of such credit was to be determined.

Article 6215, as amended, carried the old inhibition against working convicts on Sunday, except in cases of emergency or extreme necessity, but carried a proviso to the effect that the prison commission was authorized to work prisoners on Sunday at labor that is necessary to be performed, "such as cooks, waiters, lot men, and men attending to stock, and men engaged in the necessary operation of machinery". Said Article did not authorize the prison commission to work convicts on Sunday "except in cases of emergency or extreme necessity" and those doing the kind of work enumerated, or of a like kind and character which would be necessarily implied from the language used.

The yardstick prescribed by the Legislature for measuring the amount of time for work done on Sunday to be credited on the sentence of a convict for extra hours of labor was fixed at "two days for one day or two hours for one hour".

By Article 6220, it was provided that "no prisoner shall be required to work more than nine hours per day", except on the farms where they were required to work during the first three months of the year only nine hours per day; through March, April, July, August and November, ten hours; and during the remainder months of the year, eleven hours.

But over time was allowed to the prisoners located on the farms and notwithstanding during certain months they might be required to work more than nine hours per day they were considered as having done a full day's work when they put in nine hours, and for each hour thereafter they were entitled to be credited on their sentence with two hours for each additional hour they worked over nine hours in one day.

It appears that when Articles 6214, 6215 and 6220 are construed together, as they must be, that whenever a prisoner was required to work more than nine hours per day, whether on Sunday or any other day of the week, and regardless of where he worked, in the walls or on the farm, he was entitled to be credited for each hour of work in excess of nine hours in one day with two hours on his sentence and when he had a total credit of nine hours of overtime, he was entitled to be credited with one full day on his sentence.

The Act of 1910, as amended by the Act of 1917, was brought forward without any material changes in the Revised Statutes of 1925 as Title 108, Chapters 2, 3, Article 6166 to 6201, inclusive.

The codifiers consolidated Articles 6214-15-20 and brought the same forward as Article 6193. This Article contains all the provisions of the former Articles, including that provision of Article 6220 which permitted convicts *on the farms* to work longer hours than they were required to do, provided the prison commission consented.

There was no further legislation upon the subject until 1927 (Chapter 212, Regular Session, 40th Legislature). Chapter 212 specifically repealed all of Title 108 of the Revised Civil Statutes of 1925, except Article 6203 thereof, which Article is irrelevant to the subject under discussion. An entire new law relating to the State Prison System was enacted.

Section 25 of said Act superseded Art. 6193. Said Section reads as follows:

"Sec. 25. Prisoners shall be kept at work under such rules and regulations as may be adopted by the manager with the Board's approval; provided, that no prisoner shall be required to work more than ten hours per day, except in case of extreme and unavoidable emergency, which time shall include the time spent in going to and returning from their work, but not to include the intermission for dinner, which shall not be less than one hour. And in cases of such extreme and unavoidable emergency said prisoner shall receive a deduction of time equal to double the hours so worked from the term or terms of sentence. In going to and returning from work, prisoners shall not be required to travel faster than a walk. No greater amount of labor shall be required of any prisoner than his physical health and strength will reasonably permit, nor shall any prisoner be placed at such labor as the prison physician may pronounce him unable to perform. No prisoner, upon his admission to the prison, shall be assigned to any labor until first having been examined by the prison physician. Any officer or employee violating any provision of this Section shall be dismissed from the service."

A casual examination of said Section will disclose that it is materially different from Article 6193. For instance, it provides that no prisoner shall be required to work more than *ten* hours per day except in case of "extreme and unavoidable emergency", while Article 6193 provided that no prisoner should be required to work more than *nine* hours per day, except in case of "extreme and unavoidable emergency". It further provides that in cases of "such extreme and unavoidable emergency" said prisoner shall receive a reduction of time equal to *double the number of hours so worked* from the term or terms of sentence, while Article 6193 provided that a prisoner who had worked *nine* hours of overtime should be *credited with one day* on his sentence. This makes a material difference which was recognized by Judge Lattimore in the case of *Ex Parte Neisler*, 69 S. W. (2d) 422.

Under Section 25, a prisoner who has worked nine hours

overtime is not entitled to a full day's credit on his sentence but *only eighteen hours*.

Said Section 25 is further materially different from Article 6193 in this: Said Section inhibits the prison officials from working a convict more than ten hours per day, except in case of "extreme and unavoidable emergency", but does not attempt to define what constitutes a "case of extreme and unavoidable emergency" as did Article 6193. Said Section omits the provision contained in Article 6193 making a distinction in the hours of labor to be performed by farm convicts during certain months.

There was no further legislation upon the subject until 1929 (Chapter 229, Regular Session 41st Legislature). Evidently after the 40th Legislature had adjourned, it was discovered that Section 25 had failed to define the term "extreme and unavoidable emergency", as used in said Section and that such failure left the prison officials in doubt as to the nature of work they could require convicts to perform requiring longer hours each day than ten hours, and was otherwise defective and for these reasons apparently it was amended and is now Article 6166x, Vernon's Texas Statutes 1936, and, in so far as we are informed, is the last expression of the Legislature upon the subject.

Chapter 212, *supra*, became effective June 15, 1927, and Chapter 229 became effective March 18, 1929.

The pertinent part of said Section 25, or Article 6166x reads substantially as follows:

"Prisoners shall be kept at work under such rules and regulations as may be adopted by the manager with the Board's approval.

"Provided, that no prisoner shall be required to work more than ten hours per day, except on work necessary and essential to efficient organization of convict forces, which time shall include the time spent in going to and returning from their work, but not to include the intermission for dinner, which shall not be less than one hour.

"In cases of such necessary and essential overtime work, said prisoners shall receive a deduction of time equal to double the hours so worked from the term or terms of sentence.

"This 'necessary and essential work' shall be subject to the recommendation of the general manager to the Prison Board *and shall become effective only after approval by said Board*.

"Sunday work on jobs *approved by the Prison Board* shall be considered as 'necessary and essential work.'

"A strict accounting of credit records of all overtime earned shall be kept by the man in charge of the unit on which the work is performed and completed.

"A report shall be rendered to the general manager each month, who shall approve all such overtime before it is placed to the credit of the inmate.

"The Prison Board shall have the power to designate certain fixed overtime hours which it considers sufficient for the efficient performance of any particular work.

"And no inmate shall receive any overtime at all unless same is attested

by the officer in charge of said inmate, who must certify from his own knowledge that said overtime was actually earned."

It is apparent from the above that no inmate is entitled to overtime credit unless the general manager has first recommended and the Prison Board has approved the work done as being "necessary and essential to efficient organization of convict forces."

We presume that in all instances where overtime credit has been allowed an inmate of the penitentiary that the same has been earned by the inmate for working more than ten hours per day on work which has been recommended by the general manager as "necessary and essential to efficient organization of convict forces," and that same has been approved by the Prison Board. In other words, it is presumed that these prison officials have performed their official duties. It is also perfectly clear that the Legislature did not intend that all work done by convicts was "necessary and essential to efficient organization of convict forces" or it would not have placed a limitation on the character of work to be performed by a convict for which he was entitled to credit on his sentence for extra hours of labor per day.

A careful examination of Article 6166x will disclose that it provides two yardsticks for measuring overtime credits. One of these pertains solely to the inmate who works only an hour or so overtime per day. Such a convict is entitled to a credit equal to double the extra hours so worked. The other yardstick is the one fixed by the Prison Board under that provision of said Article, reading as follows:

"The Prison Board shall have the power to designate certain fixed overtime hours which it considers sufficient for the efficient performance of any particular work."

Credit given an inmate under this Section is commonly referred to by prison officials as "flat-rate overtime". A prisoner allowed such flat-rate overtime for a day or month may not have actually worked one-half of the hours to entitle him to the fixed credit allowed, because the extra time, it was thought by the Prison Board necessary for him to complete the duties he was performing, was based on estimate only.

The Prison Board has designated approximately 180 "jobs" under the above quoted provisions for which it has fixed "flat-rate overtime" hours, ranging from 100 to 300 hours per month, according to the particular work performed by the inmate.

It must be remembered that this Article requires inmates to work ten hours each day except Sunday; that inmates are allowed not less than one hour for dinner (the noon meal). This leaves thirteen hours remaining in a day of twenty-four hours. Then of necessity there must be allowed a reasonable time for the inmate to eat his morning and evening meals, including time out in preparing for same, which should require at least two additional hours, leaving only eleven hours out of the twenty-four hours.

The above is important in considering whether an inmate holding a "job" which carries with it a "flat-rate overtime" credit of 300 hours per month is entitled to be credited at the end of the month with that exact number of hours as overtime earned or with double that number of hours.

Apparently such an inmate is entitled to a credit of only 300 hours. The Prison Board evidently estimated that an inmate performing the particular duties of such a "job" would have to work each day an additional five hours to the ten hours the law required him to work before his duties for the day had been fully performed. This would then leave such an inmate six hours for sleep, and none for recreation. It is apparent that no convict can possibly work fifteen hours per day to earn ten hours extra credit on his sentence. It is utterly absurd to contend that an inmate could possibly work twenty hours—ten he must work and ten extra—in a day of only twenty-four hours. It is evident the Prison Board has been very liberal in designating 300 hours as fixed overtime hours for any particular work. Apparently 300 hours per month is the limit to which the Prison Board could go without palpably violating its discretion and usurping the constitutional prerogative of the Governor to grant pardons. *Ex parte Neisler*, 69 S. W. (2d) 422.

Your first question, which contains six subsections, inquires as to the authority vested by Article 6166x, Vernon's Texas Statutes 1936, in the General Manager of the Texas Prison System or the Texas Prison Board with reference to allowing a convict credit on his sentence as "overtime" earned for attending the prison school; for giving his blood to another convict, or other person, for transfusion; for directing and teaching convicts composing the prison band, or for playing in the prison band; for teaching convicts in the prison school; for participating in rodeo performances given for the entertainment of convicts or the public?

The two questions embraced in the 1st and 5th subsections of your first question are answered by Article 6203-b, Vernon's Annotated Civil Statutes, 1937 Supplement. Section 2 thereof provides:

"Each prisoner attending such instruction in good faith, or who shall act as an instructor of such prisoners, shall be allowed as a credit on the term of his sentence one-half hour additional than that now allowed by law for good behavior for each hour in attendance either as receiver or giver of instructions."

As to subsections 2, 3, 4 and 6 of your first question, relating to overtime earned for giving blood to another convict, or other person, for transfusion; for giving boxing exhibitions before convict or other audiences; for directing and teaching convicts composing the prison band, or for playing in the prison band; for participating in rodeo performances given for the entertainment of convicts or the public, you are advised that a careful reading of Article 6166x, above referred to, reveals that

said article contains the word "work" eleven times, and such word taken in its ordinary sense and acceptance, I think means employment in some gainful enterprise or occupation.

The Article above referred to requires that the prisoners shall be kept at work under such rules and regulations as may be adopted by the Manager with the Board's approval; provided, that no prisoner shall be required to work more than ten hours per day except on work necessary and essential to efficient organization of convict forces, and in cases of such necessary and essential overtime work, said prisoners shall receive a deduction of time equal to double the hours so worked from the term or terms of sentence. This "necessary and essential work" shall be subject to the recommendation by the general manager to the Prison Board and shall become effective only after approval by said Board. Sunday work on jobs approved by the Prison Board shall be considered as "necessary and essential work." A strict accounting of credit records of all overtime earned shall be kept by the man in charge of the unit on which the work is performed and completed; a report shall be rendered to the general manager each month, who shall approve all such overtime before it is placed to the credit of the inmate. The Prison Board shall have the power to designate certain fixed overtime hours which it considers sufficient for the efficient performance of any particular work, and no inmate shall receive any overtime at all unless same is attested by the officer in charge of said inmate, who must certify from his own knowledge that said overtime was actually earned.

From the above quoted excerpt from Article 6166x, it is apparent that the Legislature of Texas designed to vest in the Prison Board certain discretionary powers with reference to the fixing of flat overtime hours that such Board might consider essential for the efficient performance of any particular work. This power is in derogation of the pardoning power of the Governor and in derogation of the power of the Board of Pardons and Paroles to advise and make recommendations as to commutations of punishment of prisoners and should be strictly construed. The legislative intent, as manifested by such Article, is clearly a grant of power to the Texas Prison Board to regulate the work of prisoners and to authorize such prison board in the performance of necessary and essential work to grant overtime credit on the sentences of the convicts so working overtime. I do not think that the Prison Board or the Manager of the Texas Prison System can arbitrarily and capriciously designate any kind and character of performance "as necessary and essential work", and by such designation and classification arrogate to themselves the power to grant commutations of sentences of inmates of the prison system. The exercise of the power vested in the Texas Prison Board and the Manager of the Texas Prison System calls for the exercise of a sound discretion in the determination of what shall be necessary and essential work for the efficient organization of

the convict forces, but I do not think that the Prison Board or the Manager of the Prison System have the power to grant overtime credits and deductions from the sentences of convicts as overtime except for necessary and essential work performed by such convict under the orders and supervision of the Prison Board and Manager of such System.

I, therefore, answer your first question, subsections 2, 3, 4 and 6 in the negative, and state in my opinion that the Prison Board or the Manager of the Prison System has no power by virtue of said Article 6166x to grant overtime credits on the sentences of prisoners performing the services inquired about in such subsections of your first question.

Your second question requests that if we answer question No. 1 in the affirmative that we advise (a) how is the amount of such "overtime" determined, (b) who has the authority to grant the same, the General Manager or the Texas Prison Board?

It is the opinion of the writer hereof that there are two methods by which the overtime to be credited on the sentences of convicts referred to in your question No. 1 hereinabove set forth. One method would be the actual time such convict would be employed in such service above the ten hours per day he is required to work and said convict should receive a credit of time equal to double the hours so worked overtime. Another method by which such convicts could receive credit on their sentences for overtime earned for the services performed as set forth in your question No. 1 above quoted would be for the Texas Prison Board by the exercise of its discretionary power to allow a flat rate overtime for the services indicated in question No. 1.

With reference to subsection (b) of question No. 2, you are advised that this overtime could only be allowed by the Texas Prison Board in either instance. Of course the method of the Board allowing the time would be different in that the Board must determine in the first instance that the service is "necessary and essential work for the efficient organization of the convict forces" before the Manager would be authorized to credit such services as overtime on the sentences of the convicts, and in the second instance, it would be necessary for the Texas Prison Board, in its discretion, to determine the flat rate overtime hours which should be allowed for the efficient performance of any of the particular services enumerated in your question No. 1 above set forth.

Your question No. 3 asks: When a convict has worked in one month fifty-two hours more than he is required to work under the statute, how much time, computed in days and hours, is he entitled to have credited on his sentence as commutation for overtime earned? And in your restatement of said question: A, a convict not only works in the field every week day (26) in a given month his full ten hours but he works two extra hours each day. At the end of the month he has to his credit, without having violated any prison rule, fifty-two hours of

actual overtime. He is of course, credited with one full month of actual service. How much overtime credit, in addition to his month, is he entitled to receive on his sentence for the fifty-two hours he worked overtime?

In answer to this question I state by authority of *Ex Parte Neisler*, 69 S. W. (2d) 422 that such convict is entitled to receive as overtime credit on his sentence two days and four hours.

Your question No. 4 asks: Has the General Manager correctly interpreted the resolution above mentioned when he construes the same as allowing a convict 10 days credit for overtime on his sentence when he has worked one month at a job which carried a "flat-rate overtime" of only 100 hours per month? If not, what credit on his sentence, computed in terms of days and hours, is such convict entitled to receive for such 100 hours?

In answer to this question, I will state that Judge Lattimore, in the case of *Ex Parte Neisler*, 69 S. W. (2) 422, said: "It is plain then that in now computing such overtime work, in order to give credit therefor on sentences of convicts, the prison authorities must compute same in terms of hours until double the number of hours of overtime work reach such aggregate as equals a calendar day of twenty-four hours; and equally true that the same method of computation must be pursued in arriving at months or years for credit for overtime upon such sentences. In other words, under our present law the convict must have worked his regular ten hours per day before he could begin to earn overtime if work be then compelled because of press of work 'necessary and essential to efficient organization of convict forces.'"

You are therefore advised that a convict is entitled to a credit of four days and four hours for the 100 hours flat rate overtime because such credit must be computed by calendar days of twenty-four hours each.

Your question No. 5 asks: When a convict performs "any particular work" for an entire month for which the Texas Prison Board has designated and fixed the overtime for that "particular work" at 300 hours per month, how much credit is such convict entitled to receive at the end of the month in terms of days and hours, for said 300 hours?

In answer to this question, I state that such credit must be determined and computed in terms of calendar days twenty-four hours long, which would be twelve days and twelve hours conformable to Judge Lattimore's opinion in *Ex Parte Neisler*, above referred to.

Your question No. 6 asks: Is it not an encroachment upon the prerogative of the Governor (Sec. 11, Art. IV of the Constitution of Texas, as amended in 1936) for the General Manager of the Texas Prison System or Texas Prison Board to allow a convict credit on his sentence for overtime or for any other reason, not authorized by statute?

To this question I answer yes. The manager of the Texas

Prison System and the Texas Prison Board do not have the power under Section 11, Article 4 of the Constitution of Texas, as amended in 1936 to grant reprieves and commutations of punishments and pardons, and what I have said above is what I have considered to be the application of the law as set forth in Article 6166x to the performance of particular duties imposed upon the Texas Prison Board by the terms of such statute. It is clear to me that the Prison Board and the Prison Manager do not have the power under the guise of said statute of giving overtime to convicts arbitrarily or capriciously but that such Board and prison manager must be governed and restricted in the exercise of their powers by the authority vested in them by the terms of such statute. Evidently the Legislature contemplated that such prison officials would perform their official duties in the interpretation and application of such law and so long as there is no abuse of such discretionary power same may be, I think, efficiently and usefully exercised in the management of the State Prison and the convicts confined therein.

Trusting that this satisfactorily answers your inquiries, I am

Respectfully yours,

H. L. WILLIFORD,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3014-A

TEACHERS RETIREMENT FUND—INVESTMENT OF
SAID FUNDS—BONDS OF HARRIS COUNTY
SHIP CHANNEL DISTRICT.

1. Retirement funds received by the Treasury of the State from contributions of teachers and employers as provided by Senate Bill No. 47, Acts of the 45th Legislature, may be invested in bonds of the Harris County Ship Channel District.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 25, 1938.

*MS. Mortimer Brown, Director and Executive Secretary,
Teacher Retirement System of Texas, Austin, Texas.*

DEAR SIR: I am in receipt of your letter of March 24, 1938, addressed to me as Attorney General of Texas, in which you propound the following question:

"Are the bonds of Harris County Ship Channel District eligible for purchase for the Teacher Retirement Fund?"

In connection with the question raised, you make the following statement:

"In this connection we may point out to you that said Navigation District consists of all of Harris County, and if you will refer to your records of the Harris County Navigation District you will see that any bonds issued by the Harris County Navigation District are countywide bonds and are supported by a countywide tax levied by the Harris County Navigation District Board, after the same have been voted by a majority of the qualified voters voting at an election which has been duly called for the purpose of voting on such bond issues that may be submitted by said Board."

You also call attention to an excerpt from Section 7, Subsection 1, of Senate Bill No. 47 of the last Regular Session of the Legislature, reading as follows:

"All retirement funds, as are received by the Treasury of the State of Texas from contributions of teachers and employers as herein provided, may be invested only in bonds of the United States, the State of Texas, or counties, or cities, or school districts of this State, wherein said counties, or cities, or school districts have not defaulted in principal or interest on bonds within a period of ten (10) years, or in bonds issued by an agency of the United States Government, the payment of the principal and interest on which is guaranteed by the United States; and in interest bearing notes or bonds of the University of Texas issued under and by virtue of Chapter 40, Acts of the Forty-third Legislature, Second Called Session; provided that a sufficient amount of said funds shall be kept on hand to meet the immediate payment of the amounts that may become due each year as provided in this Act."

I accept your statement, above quoted, as being true, and, therefore, wish to advise that retirement funds received by the Treasury of the State of Texas from contributions of teachers and employers, as provided in Senate Bill No. 47, Acts of the Forty-fifth Legislature, may be invested in bonds of the Harris County Ship Channel District, provided the County of Harris has not defaulted in principal or interest on bonds within a period of the last preceding ten (10) years. The question as to such default is a fact question which you can determine from the officials of Harris County and the Harris County Ship Channel District.

The foregoing opinion is based upon the proposition that the bonds of the Harris County Ship Channel District are bonds which can only be issued after a majority vote of the qualified voters within Harris County, Texas, and, therefore, the taxable property of the entire County of Harris is behind the bonds issued by the District. This being true for the reason that the boundaries of the County and the boundaries of the Harris County Ship Channel District are identical.

Trusting that this sufficiently answers your inquiry, I am

Yours very truly,

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3015

NOTE STAMP TAX—CHAPTER 495, ACTS 44TH
LEGISLATURE, 3RD CALLED SESSION.

Note Stamp Tax, required by Chapter 495, Acts 44th Legislature, 3rd Called Session, is required on lien instruments recorded after the effective date of such Act irrespective of the date of execution of such instruments.

OFFICES OF THE ATTORNEY GENERAL,
May 25, 1938.

Hon. Charley Lockhart, State Treasurer, Austin, Texas.
Attention: Mr. H. Morris Stevens

DEAR SIR: Your letter of March 23, 1938, addressed to Attorney General McCraw, attention of the writer, received and contents carefully noted.

You also submit an original trust indenture and a first and second supplemental trust indenture securing bonds of the Empire Oil and Refining Company, which company is now known as the Cities Service Oil Company. The Cities Service Oil Company desires to file such original trust indenture and supplemental indentures one and two in the office of the county clerk in several of the counties in Texas and desires to know if the note stamp tax required by Chapter 495, Acts 44th Legislature, 3rd Called Session, is due upon the recordation or registration of such instruments.

None of the lien instruments herein referred to, i. e., the original trust indenture, first and second supplemental trust indentures, have ever had the note stamp tax paid upon them in Texas, and the second supplemental trust indenture has never been recorded in the office of any county clerk in the State of Texas.

This Department has held that the tax imposed by Chapter 495, Acts 44th Legislature, 3rd Called Session, is a tax upon the recordation or registration of lien instruments and not upon the execution of such lien instruments, and that it is immaterial as to when a debt, note or obligation is executed or a lien instrument securing the payment thereof is executed, even though they were executed prior to the effective date of Chapter 495, Acts 44th Legislature, 3rd Called Session, when such lien instruments are filed for recordation or registration, the tax must be paid as a condition precedent to the recordation of same.

You are, therefore, advised that the note stamp tax provided for by Chapter 495, Acts 44th Legislature, 3rd Called Session, above referred to, is due upon such three instruments, and should be required by the county clerk as a condition precedent to the registration or recordation of such instrument in the records in his office.

Trusting that this satisfactorily answers your inquiry, I am

Very truly yours,

H. L. WILLIFORD,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3016

STATE BOARD OF EDUCATION—ELIGIBILITY OF
PURCHASE OF JUNIOR COLLEGE DISTRICT
BONDS BY STATE PERMANENT
SCHOOL FUND.

1. Bonds issued by a junior college district are eligible for purchase by the State Permanent School Fund.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 13, 1938.

State Board of Education, Austin, Texas.

Attention Hon. Gaynor Kendall

GENTLEMEN:

Your letter under date of May 31, 1938, addressed to Attorney General William McCraw has been received and referred to the writer for attention and reply.

In the course of your letter, you propound the following question:

“(1) Under the laws of this State are the bonds of a junior college district eligible for purchase by the State Board of Education as an investment for the Permanent Free School Fund of Texas?”

With reference to this question, your attention is directed to Article 2669 of the Revised Civil Statutes of Texas, 1925, which reads as follows:

“Art. 2669. Investing school fund—The State Board of Education is authorized and empowered to invest the permanent public free school funds of the State in bonds of the United States, the State of Texas, or any county thereof, and the independent or common school districts, road precincts, drainage, irrigation, navigation and levee districts in this State, and the bonds of incorporated cities and towns, and obligations and pledges of the University of Texas.”

The question quoted above was passed upon by a member of this Department on May 31, 1938; however, since that time, the question has been reconsidered by the Department as a

whole in the light of additional authority suggested, and, to the extent of answering this question, the opinion of May 31, 1938, is hereby specifically overruled.

In our opinion, Article 2669 must be so construed as to include those school districts which have the characteristics of either independent school districts or common school districts for purposes of the general law; and inasmuch as a junior college district does have the characteristics of an independent school district as provided by statute in the establishment, maintenance, and control and the further characteristic of being authorized to issue bonds and to assess and collect taxes in the same manner as an independent school district, we are of the opinion that this is such a district as may come within the meaning of Article 2669.

We are, therefore, of the opinion, and you are so advised, that bonds issued by a junior college district are eligible for purchase by the State Permanent School Fund.

Trusting that this is the information desired, we are

Very truly yours,

EFFIE WILSON-WALDRON,
Assistant Attorney General.

This opinion has been read, considered, and approved in conference and is now ordered filed on this the 13th day of June, 1938.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3017

CONSTRUCTION OF ARTICLE 6674q—STATE BOND ASSUMPTION
LAW—BOARD OF COUNTY AND DISTRICT ROAD INDEBTED-
NESS—COUNTY AND ROAD DISTRICT HIGHWAY
FUND—DISPOSITION OF MONEY RECEIVED BY
COUNTY AND ROAD DISTRICT HIGHWAY FUND.

1. So-called "surplus" of funds on hand in County and Road District Highway Fund may be absorbed in current and future years by reason of a different method of allocation of such funds by the Board of County and District Road Indebtedness.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 14, 1938.

*Mr. B. M. Whiteacre, County Auditor, Grayson County, Sherman,
Texas.*

DEAR SIR: This is to acknowledge receipt of your letter of recent date addressed to the Attorney General which has been referred to the writer for reply.

Your question is quoted as follows:

"What disposition can legally be made of money received by the special fund created under the terms of the so-called State Bond Assumption Law, which constitutes a surplus over and above an amount actually needed to meet the current allocation of state funds as previously fixed by the Board of County and District Road Indebtedness?"

This question concerns a matter that was brought to the attention of this Department some time ago, and in order to arrive at a correct solution as to disposition of funds which constitute the so-called "surplus," we have deemed it proper to make a thorough study of the law as it was originally passed, together with the amendments passed to date, and also to inquire as to the methods of distributing funds under authority of this law up to the present time.

A reading of Article 6674q, Vernon's Annotated Statutes of Texas, and with further reference to Chapter 13 of the Acts of the Third Called Session of the Forty-Second Legislature, discloses that the legislature wrote into this law a declaration in the preamble, throughout the body of the bill, and in the emergency clause of the bill, to the effect that it was the desire and the intention of the legislature to reimburse, compensate, and repay the various counties and road districts for the funds contributed by said counties and road districts in the construction of state highways. A further study of the original law and the amendments thereto will disclose the fact that this declaration has been re-written into the law each time it has been re-enacted and/or amended. We quote the following excerpts from the present law which are identical with the wording of the original law. We quote the preamble of the bill in its entirety:

PREAMBLE:--"Whereas, the ownership and control of all designated State Highways are vested in the State, and the construction and maintenance of same are functions of the State; and,

"Whereas, the State, over a period of years, by legislative enactment, exercised such powers and functions through the several counties and defined road districts of the State as its agencies for said purposes, and later resumed full and sole administrative control of, and jurisdiction over, the laying out, establishment, construction and maintenance of all public roads which were, or might become, a part of the system of designated State Highways, and vested in the State Highway Department such full and sole control and jurisdiction; and,

"Whereas, at all of such times an economic necessity existed for speedily developing and extending the system of designated State Highways; and,

"Whereas, the State lacked sufficient funds to adequately prosecute said purpose, and the counties and defined road districts of the State, pursuant to authority of the Legislature, aided the State in the development, construction and maintenance of said system of State Highways, and furnished and contributed money to the State, through the issuance of bonds and warrants and otherwise lending their credit for said State improvements, all for the use and benefit of the State, which retained full administrative

control of, and jurisdiction over, such roads and the State now desires to take over and acquire and/or purchase and retain all interest and equities of the various counties and defined road districts in and to such roads which constitute and comprise a part of the system of designated State Highways; and to reimburse, compensate and repay said counties and defined road districts to the extent and in the manner hereinafter set out for the cost incurred by said agencies in thus aiding the State."

Section 1, first paragraph, and part of second paragraph:

"Section 1. It is hereby expressly recognized and declared that all highways now or heretofore constituting a part of the system of State Highways which have been constructed in whole or in part from the proceeds of bonds, warrants or other evidence of indebtedness issued by counties of the State of Texas or by defined road districts of the State of Texas under the laws authorizing the same, have been and are, and will continue to be, beneficial to the State of Texas at large, and have contributed, and will contribute, substantially to the general welfare, settlement and development of the entire State, and that, by reason of the foregoing, a heavy and undue burden was placed, and still rests, upon such counties and defined road districts and their inhabitants, and both a legal and a moral obligation rest upon the State to compensate and reimburse such counties and defined road districts which, as aforesaid, have performed functions resting upon the State, and have paid expenses which were and are properly State expenses, all for the use and benefit of the State.

"It is further declared to be the policy of the State to take over, acquire and/or purchase and retain the interest and equities of the various counties and defined road districts in and to the roads constituting a part of the system of designated State Highways and to reimburse said counties and districts therefor and to provide for the acquisition, establishment, construction, maintenance, extension and development of the system of designated State Highways of Texas from some source of income other than the revenues derived from ad valorem taxes. . . ."

Part of Section 8 reads as follows:

". . . the provisions hereof are intended solely to compensate, repay and reimburse said counties and districts for the aid and assistance they have given to the State in furnishing, advancing and contributing money for building and constructing State Highways, and to provide for the use and application by said counties and districts of the moneys to which they shall become or be entitled under the provisions of this Act."

Section 12 reads as follows:

EMERGENCY CLAUSE:—"The fact that counties and defined road districts of this State should be immediately given the compensation and reimbursement provided for in this Act and that such relief and reimbursement cannot be given them without the passage of this Act creates an emergency and an imperative public necessity. . . ."

In order to carry out the terms of this law, the legislature

provided that one-fourth of the total occupation or excise tax paid on the business of selling gasoline, as imposed by Section 17, Chapter 98, General Laws, Acts Regular Session of the Forty-second Legislature (after deductions allowed for refunds) shall be placed to the credit of a fund to be known as the "County and Road District Highway Fund."

To further carry out the terms of this law, the legislature created the Board of County and District Road Indebtedness consisting of the State Highway Engineer, State Comptroller of Public Accounts, and the State Treasurer, to be charged with the duty of administering this law, and provided for their guidance certain rules by which the amount of indebtedness eligible for state participation may be determined.

Following the mandate of the law, the Board of County and District Road Indebtedness caused a survey to be made of the outstanding indebtedness coming within the terms of this law and advised each county and road district of the percentage of the then outstanding indebtedness which was eligible for state participation, and the board has from year to year allocated to each county and road district a ratable portion of the funds available.

We arrive now at the question of a so-called "surplus." When the Board of County and District Road Indebtedness first began its operation, the first important step to be taken was to determine the amount of indebtedness eligible for participation by the State. This amount of eligibility was fixed on a percentage basis depending upon the percentage of the original amount of bonds or warrants issued which was spent on state designated highways. Thus, we say that, in our opinion, the actual amount of the State's portion of the outstanding indebtedness became fixed for all time under the law as it was originally passed and as it now exists.

Once the actual total amount of the state's portion of indebtedness was determined, the next step to be taken was the allocation, year by year, of moneys made available for paying the State's portion of this indebtedness. The procedure to be followed under this law was without precedent, and the Board of County and District Road Indebtedness, in an attempt to arrive at a fair method of distribution of the funds received, evolved the plan of allocating the money available on the same percentage basis as had been used in fixing the amount of the entire outstanding indebtedness eligible for state participation. This method of allocation has been followed during the years 1933, 1934, 1935, 1936, and 1937, and in each of these years the State has fallen short of paying its pro rata part of its indebtedness based upon this plan, and it was necessary for the counties to make up the difference in the maturities accruing during these years. This year, however, we find that there is not only a sufficient amount to pay the State's full share of indebtedness based upon the plan now in use, but that there is an additional amount of money available of some five million dollars.

In the opinion of this Department, the question of what to do with this so-called "surplus" is not a question of difficult legal interpretation but is largely a question of mathematics. We quote from the present law, which is a re-enactment of the previous laws with the exception of dates:

"(1) All moneys deposited to the credit of the County and Road District Highway Fund with the State Treasurer up to September 1, 1939, are hereby appropriated to said respective counties and defined road districts and shall be received, held, used, and applied by the State Treasurer as ex-officio Treasurer of said respective counties and defined road districts to the payment of the interest, principal, and sinking fund requirements on all eligible obligations maturing on and from September 1, 1937, to and including August 31, 1939, and each year thereafter until all of such eligible obligations are fully paid and moneys coming into the credit of the County and Road District Highway Fund with the State Treasurer and all moneys remaining therein from the previous year shall be received and held by him as ex-officio Treasurer of said counties and defined road districts and shall be subject to the appropriation for the payment of interest, principal, and sinking funds maturing from time to time, on said eligible obligations."

We are, therefore, of the opinion that the difference in the amount required to meet current maturities under the present plan of allocation and the additional amount of funds on hand may be absorbed this year and in future years by reason of a different method of allocation of State funds available under the terms of this law and, further, that such allocation may be made without regard to any sort of fixed percentage basis being necessary as to the whole amount of indebtedness outstanding, as we believe there is no relation between the yearly allocation of funds and the total percentage of indebtedness which is eligible for State participation.

We further call your attention to the following language in this law:

"... In the event the amount so estimated to be applied to the payment of eligible obligations for any county or defined road district is sufficient to meet all maturing interest, principal and sinking fund requirements, the Commissioners' Court may dispense with the collection of ad valorem levies for such calendar and/or fiscal year for such interest, principal, or sinking fund requirements. . . ."

This language, we believe, clearly expresses the basic purpose of this law, which purpose is to lift the burden of ad valorem taxes from the citizens of the various counties and road districts for the construction of state highways and place it upon those who make the most use of said highways. We are, therefore, of the opinion that until the entire amount of the State's portion

of this indebtedness is paid there can be no actual "surplus" in this fund.

Very truly yours,

EFFIE WILSON-WALDRON,
Assistant Attorney General.

This opinion has been read, considered, and approved in conference and is now ordered filed on this the 15th day of June, 1938.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3018

RURAL AID LAW—TRANSPORTATION AID FOR
NON-CONSOLIDATED SCHOOL DISTRICTS.

Non-consolidated school district containing area less than one hundred square miles is entitled to receive transportation aid of \$1.00 per month per pupil for transporting pupils within district, provided such pupils reside more than 2½ miles from school.

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, June 15, 1938.

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

DEAR SIR: This will acknowledge receipt of your letter of June 10, 1938, addressed to Attorney General William McCraw, which has been referred to the writer for attention. Your letter is quoted as follows:

"Will you please give me, at your earliest convenience, a conference opinion on the following question:

"May a non-consolidated school district, with an area of less than 100 square miles, receive transportation aid on those pupils who live more than 2½ miles from the school, and the district is otherwise eligible for aid, when the bus which transports these pupils is operated as a part of the county transportation system, but does not cross the district line in covering its designated route?"

Section 11 of the Rural Aid Law, which said Section provides for the payment of transportation aid, gives to the County Superintendents and County School Boards authority to set up a system of transportation for the purpose of transporting high school pupils from their districts, and within consolidated districts, to the nearest convenient accredited high school, or to any near high school of higher classification than the sending district, when designated by the County Board. It is clear that the type of district described in your letter is not eligible to

receive transportation aid under the terms of the foregoing provision.

If such district is eligible for transportation aid at all, it must claim such eligibility from the following quoted provision of Section 11:

"It is further provided that the districts through which these buses travel may make provisions with the County Superintendent and the County School Board to have any other children not provided for herein transported within and between their respective districts, and said district may make application for State aid thereon to an amount not to exceed one dollar (\$1.00) per month per pupil."

It is contended that these districts are qualified to receive transportation aid by reason of the fact that the County Superintendent and County Board have set up a system of transportation for the purpose of transporting pupils within the district. With this contention we do not agree, for the reason that the County Superintendent and County Board have no authority to set up a system of transportation in this type of district, their authority being restricted by the terms of the Rural Aid Law to setting up a system of transportation for the purpose of transporting high school pupils from their districts and within consolidated districts.

Prior to the passage by the Second Called Session, 45th Legislature, of House Bill 133, which amended the Rural Aid Law, the State Department of Education and the State Board of Education were charged with the duty of administering the Rural Aid Law. Under the terms of House Bill 133, supra, it is now the duty of the State Auditor to audit the grants made under the Rural Aid Bill to the various school districts by the State Superintendent and State Board of Education.

Our attention has been directed in your brief to the fact that for a period of several years the State Superintendent of Public Instruction, in administering the Rural Aid Law, has interpreted the transportation clause contained therein to include the type of district described in your letter and accordingly has granted to such districts transportation aid upon the showing by such district of a need therefor. The Rural Aid Law, insofar as it provides for transportation aid, has not been substantially changed by the Legislature, and at this time contains practically the same provisions as contained in it during the period when such interpretation mentioned herein was placed upon it by the State Superintendent. It might be said that the clause quoted herein providing for transportation aid is ambiguous in that it is not clear just what is meant by the term, "the districts through which these buses travel may make provisions with the County Superintendent and the County School Board to have any other children not provided for herein transported within and between their respective districts."

"The courts will ordinarily adopt and uphold a construction placed upon a statute by an executive officer or department charged with its administration, if the statute is ambiguous or uncertain, and the construction given it is reasonable. The rule above stated is particularly applicable to an administrative construction of long standing where valuable interests or rights have been acquired or contracts have been made, or where a law that has been uniformly construed by those charged with its enforcement has been re-enacted without a change in language." (Texas Juris. Vol. 39, paragraph 126, and cases cited thereunder, including *Slocomb, et al, vs. Cameron Independent School District, et al*, 288 S. W. 1064 Sup. Ct.)

As hereinbefore stated, the State Department of Education, during the period which said Department was charged with the duty of administering the Rural Aid Law and prior to the re-enactment of said Rural Aid Law by House Bill 133, construed such act to include such districts as the one described in your letter as being eligible for transportation aid. Because of this construction such districts anticipated that transportation aid would be paid to them this year as it had been done in the past. Upon this assumption such districts entered into contracts for the operation of school buses and are now obligated in various amounts for expenditures made in the operation of such buses. The Legislature was cognizant of the construction placed by the State Department of Education upon this phase of the Rural Aid Law at the time the Rural Aid Law was amended and re-enacted by House Bill 133, but did not make any substantial changes in Section 11 of said Act. Had the construction placed upon Section 11 by the State Superintendent been contrary to the views of the Legislature, it is reasonable to assume that Section 11 would have been amended to meet such contrary view. *Slocomb, et al, vs. Cameron Independent School District, et al*, supra.

Because of the construction heretofore placed upon this act by the State Superintendent of Public Instruction, together with the fact that the school districts involved have, upon the strength of such construction, entered into contracts and assumed obligations, it is our opinion that such construction should be followed in granting transportation aid, and such districts, provided they comply with the other provisions of the Rural Aid Law, should be granted transportation aid of one dollar (\$1.00) per pupil per month. This opinion is further strengthened by the fact that the Legislature, with full knowledge of such construction, did not see fit to amend or change the provisions of Section 11 at the time the Rural Aid Law was re-enacted.

A prior opinion rendered by this Department to the State Auditor held that a school district of the type described in your letter was not entitled to transportation aid. At the time such opinion was rendered the writer thereof was not aware of the construction given by the State Superintendent to Section 11.

In view of the additional facts presented, said prior opinion is now withdrawn and this opinion substituted in lieu thereof.

Yours very truly,

JAMES N. NEFF,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 3019

FEDERAL LOANS—STATE EDUCATIONAL INSTITUTIONS—FEES

Under the provisions of Chapter 459, Acts 44th Legislature, 2nd Called Session, (Article 2603c R. C. S. 1925) Boards of Regents of State Educational Institutions have authority to make compulsory payment of certain fees for the use of buildings constructed by federal loans in order to repay said loans.

OFFICES OF THE ATTORNEY GENERAL.
June 22, 1938.

Hon. C. N. Shaver, President, Sam Houston State Teachers College, Huntsville, Texas.

DEAR SIR: Your letter of June 20, 1938, addressed to the Honorable William McCraw, Attorney General of Texas, has been received.

In your letter you state that the Sam Houston State Teachers College has made application for a grant and loan of money from the Federal Government for the purpose of building a gymnasium and physical education building by virtue of Vernon's Article 2603c. You further state that it is the purpose of this College to repay this loan out of fees and charges to be made of students for the use of this building and request a departmental opinion from this Department upon the question of whether or not the Board of Regents has authority to make compulsory the use of the building and the payment of the fees and charges not to exceed the maximum set out under Section 2 of Vernon's Article 2603c aforesaid. You also call our attention to the fact that the use of this additional building and gymnasium is a part of the Physical Education required by your college of all students attending it.

The objection that must necessarily be considered in determining the authority of the Board of Regents to make compulsory fees and charges to be paid by students for the use of the gymnasium and physical education building referred to in your letter is that raised by the provisions of Chapter 237, Acts 40th Legisla-

ture and Chapter 196, Acts 43rd Legislature (Vernon's Articles 2654a and 2654c, respectively). These Acts of our Legislature were enacted for the specific purpose of specifying the maximum amount of tuition fees and other fees and charges that could be collected from students attending State educational institutions supported in whole or in part by public funds. The most casual perusal of these Acts of our Legislature shows that while the Legislature made allowance for the voluntary payment by students of fees and charges to cover the expense of student activities, it specifically prohibited the compulsory collection of any other fees than those named in said Acts which do not include the type of fee specified in your letter.

However, our real problem is to determine the effect of Chapter 5, Acts 43rd Legislature, 2nd Called Session, as amended by Chapter 459, Acts 44th Legislature, 2nd Called Session, (Vernon's Article 2603c) upon this blanket prohibition by our Legislature against the collection of any compulsory fee or charge other than those named in said Acts, in so far as the collection of the compulsory fee specified in your letter is concerned. Vernon's Article 2603c reads, in part, as follows:

"Section 1. That the Board of Regents of the University of Texas and its branches, and the Board of Directors of the Agricultural and Mechanical College, and its branches, and the Board of Directors of Texas Technological College, and the Board of Regents of the State Teachers Colleges, and the Board of Regents of the College of Industrial Arts, and the Board of Directors of the College of Arts and Industries are hereby severally authorized and empowered to construct or acquire, through, and only through, funds or loans to be obtained from the Government of the United States, or any agency or agencies thereof, created under the National Recovery Act, or otherwise created by the Federal Government, such funds to be acquired **only through the Federal Government** or such agencies, and not otherwise, without cost to the State of Texas, and accept title, subject to such conditions and limitations as may be prescribed by each of said Boards, dormitories, kitchens and dining halls, hospitals, libraries, student activity buildings, gymnasias, athletic buildings and stadia, and such other buildings as may be needed for the good of the institution and the moral welfare and social conduct of the students of such institutions when the total cost, type of construction, capacity of such buildings, as well as the other plans and specifications have been approved by the respective Governing Boards."

"Sec. 2. That said Boards are further authorized to fix fees and charges for the use of the buildings erected under authority of the law amended by this Act. The charges to be made and the fees to be assessed against students using said buildings shall be in amounts deemed to be reasonable **by the respective Boards**, taking into consideration the cost of providing said facilities, the use to be made of them and the advantages to be derived therefrom by the students of the respective institutions; provided that the fee to be assessed against a student for the use of a library, or for the use of a student activity building, or for the use of a hospital, or for the use of a gymnasium, shall not exceed Four Dollars (\$4.00) for any one of said

purposes for any one semester or for any one summer session. The fees and charges thus fixed along with all other income therefrom shall be considered as revenue derived from the operation of the buildings thus constructed.

"That said Boards are further authorized to make any contract with reference to the collection and disposition of the revenues derived from any building so constructed in the acquisition or construction, management, and maintenance of any building or buildings acquired hereunder. In reference to the acquisition of student activity buildings, stadia, gymnasias, and all character of athletic buildings, said Boards are authorized also to make contracts with reference to the collection and disposition of revenues to accrue to such respective institutions from activities, athletic events, and games in which said respective institutions participate away from said institutions, as well as at said institutions: and in anticipation of the collection of such revenues, and for the purpose of paying the cost of the construction or acquisition of said building or buildings and grounds, said Boards are severally empowered by resolution to authorize, sell, and deliver its negotiable bonds or notes from time to time and in such amount or amounts as it may consider necessary. *The fees and charges so fixed for the use of any such buildings shall not be collected after payment in full shall have been completed for the building or buildings for which said fees shall be pledged. Thereafter the right of said respective Boards to fix charges and fees shall depend on laws other than this Act as hereby amended.* Any bonds or notes issued hereunder shall bear interest at not to exceed six (6%) per cent per annum, and shall finally mature not more than forty years from date. (Underlining ours).

"Sec. 11. To to the extent that this Act specifies the inclusion of the power to build libraries, student activities buildings, gymnasias, athletic buildings and stadia, it shall be considered as declaratory of the existing law which by the use of general terms already included the power to acquire said buildings. This Act shall not repeal any statute now in effect but shall be cumulative of all other statutes affecting said institutions, and shall not modify or abridge any powers now held by any of said institutions to control or pledge its funds, *provided, however, that to the extent that the provisions of this Act may be in conflict with the provisions of any other law, including those of Chapter 237, Acts of the Fortieth Legislature (Art. 2654a), Chapter 196, Acts of the Forty-third Legislature (Art. 2654c), and Chapter 221, Acts of the Regular Session of the Forty-third Legislature (Art. 2654d; P. C. Art. 419b), the provisions of this Act shall take precedence and prevail, it being the intention of the Legislature to confer authority on the governing boards of said institutions to establish fees and charges to be made for the use of the buildings to be constructed under the law amended hereby, and to pledge said revenues as herein provided.* (Underlining ours).

It is apparent to the most casual reader that the primary purpose behind the enactment of the above legislation was to enable the various public educational institutions of this State to avail themselves of the loans and grants then and now being offered by the Federal Government for the purpose of constructing certain public buildings. This authority was first granted by the enactment of Chapter 5, Acts 43rd Legislature, 2nd Called

Session, (Sec. 1, Vernon's Article 2603c). Having granted the Board of Regents of the various institutions the authority to contract for and to secure these loans, it necessarily followed that some provision for their payment must be made. This was done by the enactment of said Chapter 5, Acts 43rd Legislature, 2nd Called Session, and by the enactment of Chapter 459, Acts 44th Legislature, 2nd Called Session. Our only problem is to determine whether or not the authority granted by the above legislation extends to the collection of said compulsory fees not to exceed the maximum set out in said legislation or whether this authority merely extends to the collection of those fees voluntarily paid by the students for the use of said buildings.

In view of the primary purpose behind the enactment of Vernon's Article 2603c, the fact that voluntary payment of fees in an unlimited amount to cover student activities was already permitted under the provisions of Section 4 of Vernon's Article 2654a, the fact that some assurance of a steady guaranteed income from the buildings would have to be made in order to secure the federal loan, the fact that the Legislature placed a maximum of Four (\$4.00) Dollars per semester on these various fees, it is the opinion of this Department and you are accordingly advised that under the provisions of Vernon's Article 2603c the various governing boards of the institutions named in Section 1 of said Article have the authority to make compulsory the payment of certain fees fixed by said boards for the use of said buildings whose use is made compulsory by the rules and regulations of said institution and to be used in payment of the loan secured by said institution for the construction of said building.

This opinion, we believe, is further sustained by the fact that the Legislature in the concluding part of Section 2 of Vernon's Article 2603c provides that after payment in full has been completed for the building that the right of said Board to fix charges and fees shall depend on "laws other than this Act as hereby amended," showing to our mind that the Legislature intended to remove the collection of these fees from the operation of Vernon's Article 2654a and its provision for "voluntary payment." Further in concluding said Vernon's Article 2603c, in its amendment by the enactment of Chapter 459, Acts 44th Legislature, 2nd Called Session, the Legislature saw fit to provide for the provisions of this latter act to take precedence over the provisions of Vernon's Article 2654a to the extent of any conflict between them, saying "it being the intention of the Legislature to confer authority on the governing boards of said institutions to establish fees and charges to be made for the use of the buildings to be constructed under the law amended hereby . . ." Restricting this authority to the collection of voluntarily paid fees, there is no conflict with the provisions of Vernon's Article 2654a, and Chapter 459, Acts 44th Legislature, 2nd Called Session, as amending Chapter 5, Acts 43rd Legislature, 2nd Called Session, need never have been enacted. In other words, to restrict the authority granted by said Chapter 459

to the collection of voluntarily paid fees is to deprive said Chapter 459 of any operative effect as this authority already existed under and by virtue of the provisions of Vernon's Article 2654a and Chapter 5, Acts 43rd Legislature, 2nd Called Session.

In conclusion, we again state that it is the opinion of this Department that your Board of Regents has the authority to make compulsory the payment of the fees and charges, not to exceed the statutory maximum set out under Section 2 of Vernon's Article 2603c, fixed by your Board for the voluntary use of the building or where such use is compulsory as part of the Physical Education required by your college of all students attending it. Such fees, however, in our opinion, should be required only of those students who actually make use of such buildings, either voluntarily or in keeping with the curriculum requirements of the college, and such fees should be assessed against each student only for such terms and semesters as he makes use of said buildings.

Trusting that this satisfactorily answers your inquiry, we are,

Very truly yours,

RUSSELL RENTFRO,
Assistant Attorney General.
HENRY S. MOORE,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

H. GRADY CHANDLER,
Acting Attorney General.

No. 3020

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS

An opinion construing resolution passed by the State Board of Registration for Professional Engineers; holding such resolution beyond the powers of such Board to adopt; defining the practice of professional engineering; defining the practice of professional architects; holding that if the Acts creating the State Board of Professional Engineers and State Board of Architectural Examiners conflict, the Act creating the State Board of Architectural Examiners will govern as being the last expression of the legislative will; holding that professional architects can not practice the profession of engineering without complying with the law with respect to registration of professional engineers.

OFFICES OF THE ATTORNEY GENERAL.

June 30, 1938.

Hon. F. E. Rightor, Secretary, State Board of Registration for Professional Engineers, Austin, Texas.

DEAR SIR: I have your letter of May 16, 1938, and May 31, 1938, addressed to Attorney General McCraw, requesting the

opinion of this Department with respect to a resolution adopted by the Board of Registration for Professional Engineers on January 10, 1938, which is as follows:

"RESOLVED: That in the opinion of this Board such professional engineering as may be involved in the regular practice of architecture, and subordinate thereto, is implied in that practice, and the Board will not require registration as a Professional Engineer of a Registered Architect, so registered in the State of Texas, provided he does not use the title of Professional Engineer."

and you further advise that a vigorous protest has been made against this action by numerous professional engineers in Texas.

You ask to be advised if the Board, in passing this resolution, has overstepped its authority under Senate Bill No. 74, Acts Regular Session, 45th Legislature, and you especially direct my attention to the second paragraph of Section 2, Section 19, and Section 20 (f), Senate Bill No. 74, above referred to, defines what shall constitute the practice of professional engineering within this State, and Section 2 of such bill reads, in part, as follows:

"The practice of professional engineering within the meaning and intent of this Act includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the public welfare, or the safeguarding of life, health or property is concerned or involved, when such professional service requires the application of engineering principles and interpretation of engineering data."

I especially direct your attention to the last two lines of the above quoted excerpt from Section 2, which says: "When such professional service requires the application of engineering principles and interpretation of engineering data." Every person practicing professional engineering in Texas is required to be registered by the provisions of Senate Bill No. 74, unless such persons are expressly exempted from the operation of the provisions of such Act.

Article 3271a, Vernon's Annotated Civil Statutes, 1937 Supplement, Section 25, provides in part:

"Provided, however, that this Act shall not be construed as repealing or amending any law affecting or regulating licensed state land surveyors; and such licensed state land surveyors in performing their duties as such shall not be subject to the provisions of this Act; nor shall this Act be construed to affect or prevent the practice of any other legally recognized profession by the members of such profession licensed by the State. . ."

Article 249a, Vernon's Annotated Civil Statutes, 1937 Supplement, provides for the creation of the Board of Architectural Examiners for the State of Texas and defines in such Act what shall constitute the practice of architecture in Section 11 thereof as follows:

"Any person, or firm, who for a fee or other direct compensation therefor, shall engage in the planning, or designing, or supervising the construction of buildings to be erected or altered in this State by or for other persons than themselves, as a profession or business, and shall represent or advertise themselves as architects, architectural designers, or other title of profession or business using some form of the word "architect," shall be considered as practicing the profession of architecture in this State. . . ."

Such Section also provides in part:

"Nothing in this Act shall prevent qualified professional engineers from planning and supervising work, such as railroads, hydro-electric work, industrial plants, or other construction primarily intended for engineering use or structures incidental thereto, nor prevent said engineers from planning, designing, or supervising the structural features of any building, but such engineers shall not employ the title "architect" in any way, nor represent themselves as such, nor shall any engineer practice the profession of architecture as defined herein, unless he or she be registered as an architect under the provisions of this Act."

I do not find in the law creating the State Board of Registration for Professional Engineers where architects who practice engineering are exempt from the provisions of the Texas Engineers' License Law, but I think that an architect should be measured by the definition of what constitutes the practice of a professional architect above set forth which is any person or firm who prepares plans and specifications for the erection or alteration of a building or to supervise the erection or alteration of a building, and you will note that in such definition there is nothing said with respect to constructing a building or project by an architect, and with respect to the practice of professional engineering, whenever the service or undertaking of an architect invades the engineering field, he should be required, as a condition precedent to such engineering work, to comply with the provisions of the Engineers' License Law.

From a careful reading of the definition as to what shall constitute the practice of professional engineering and as to what shall constitute the practice of professional architecture, it will be seen that the statutory definition with respect to the practice of professional engineering is comprehensive enough to include within its terms the services to be performed by an architect, but on account of the above quoted excerpt from Section 11, Article 249a, above referred to, professional engineers are prohibited from employing the title "architect" in any way or represent themselves as such. A professional architect can practice his profession as above defined without registering as a professional engineer, and in so far as House Bill No. 144 conflicts with Senate Bill No. 74, creating the State Board of Registration for Professional Engineers, House Bill No. 144, creating the Board of Architectural Examiners, will govern because it is the last expression of the legislative will, being last in point

of time in its enactment. However, architects, by the definition of that practice in Article 249a, above referred to, are not authorized to practice the profession of engineering generally, but only to the extent and within the province prescribed by the Legislature in the definition of what shall constitute the practice of the profession of architecture.

You are, therefore, advised that it is the opinion of this Department that the State Board of Registration for Professional Engineers is without power to authorize the practice of professional engineering in Texas unless such person has complied with the requirements of the Texas Engineers' License Law or is expressly exempt therefrom by the plain provisions of law. I, therefore, state that the Board, in entering the resolution above quoted, exceeded its authority because the resolution conflicts with the law as written and expressed in Senate Bill No. 74, quoted above.

Respectfully yours,

H. L. WILLIFORD,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

H. GRADY CHANDLER,
Acting Attorney General.

No. 3021

SUPPLEMENTING CONFERENCE OPINION NO. 3017 UNDER DATE OF
JUNE 14, 1938—CONSTRUCTION OF ARTICLE 6674q—STATE
BOND ASSUMPTION LAW—BOARD OF COUNTY AND DISTRICT
ROAD INDEBTEDNESS—COUNTY AND ROAD DISTRICT
HIGHWAY FUND—DISPOSITION OF MONEY
RECEIVED BY COUNTY AND ROAD DISTRICT
HIGHWAY FUND.

1. When issue of bonds bears 100% State aid and State paid only portion of such 100% during years 1933 to 1937, if all available revenue was used, then obligation of State was discharged.
2. Where the State paid less than percentage eligible for State participation on an issue of bonds which have been retired, if all available revenue was used, the obligation is discharged.
3. Where an issue of bonds eligible for State participation outstanding on January 1, 1933, begin to mature in a future year, the percentage of State participation will be the same as that determined on January 1, 1933.
4. Where an issue of term bonds are refunded into serial bonds, the percentage of State participation remains the same as that determined for the term bonds.
5. Board of County and District Road Indebtedness has ample power and authority to make such distribution of so-called "surplus" or "balance" in the County and Road District Highway Fund as will absorb same in

future years over the lifetime of various issues now outstanding and eligible for State participation.

OFFICES OF THE ATTORNEY GENERAL.
Austin, Texas, August 11, 1938.

Hon. W. H. Gordon, Chief Accountant, Board of County and District Road Indebtedness, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of July 14 addressed to the Attorney General of Texas which has been referred to the writer for reply. I shall quote the questions asked in your letter and attempt to answer them in their proper sequence as follows:

"1. 'A' County has outstanding \$275,000 eligible for 100% participation. During the years 1933 to 1937, the difference between what the State paid and what they were eligible to pay amounts to \$55,416.67. Since this issue is eligible for 100% participation and the State is now paying all of its eligible portion and so long as the State's portion is being paid in full what distribution shall the State make of the \$55,416.67 to 'A' County?"

In answer to this question, you are advised that, in the opinion of this Department, the State did pay as much as could be paid, based upon the amount of available revenue, on this issue of bonds during the years 1933 to 1937, and in doing so, it fully discharged its obligation to this county. We base this reasoning upon the fact that the only obligation that the State assumed was the payment of such an amount as may have been possible out of the revenue derived from one-fourth of the gasoline tax.

"2. 'B' County had outstanding on January 1, 1933, \$150,000.00 eligible for 29.34% participation maturing \$50,000.00 each year for 1934, 1935 and 1936. During the years 1934 to 1936, the difference between what the State paid and what they were eligible to pay amounts to \$21,271.50. Since this issue has now been retired and no bonds outstanding, what distribution shall the State make of the \$21,271.50 to 'B' County?"

The answer to this question, we believe, will be found in the answer to question No. 1, in that, since the State did participate as far as it could with the amount of money available during those years and inasmuch as there are no bonds outstanding of this issue which are eligible and which might now receive benefits from money at present on hand or to be available in the future, this obligation has been fully discharged by the State.

"3. 'C' County has outstanding \$250,000 eligible for 55.42% participation maturing on and after the year 1939. Since this issue has not had any principal maturities during the years 1933 to 1937, when the State was not able to meet its full portion of the principal maturing, what interest does this issue have in the distribution of the funds on hand?"

We answer this question by stating that, inasmuch as the full

amount of the issue outstanding on January 1, 1933, is still outstanding and inasmuch as the amount of eligibility determined when this law became effective was 55.42%, this issue of bonds is still eligible to the extent of 55.42%.

"4. 'D' County had outstanding January 1, 1933, \$543,000.00 in term bonds eligible for 36.50%. On June 10, 1934, these bonds were called for the purpose of refunding and cancellation, \$427,000.00 of this issue being refunded into serial maturities, the remaining bonds cancelled against the sinking fund requirement. During the years 1933 and 1934 the difference between what the State set aside as their portion of the annual sinking fund requirement amounts to \$6,858.95. Since this issue was originally a term issue and has been refunded into serial maturities, shall the State increase the percentage of participation on the refunding issue in the amount of \$6,858.95, or shall the State allocate these funds proportionately on the refunded issue as if they were originally serial maturities?"

In the opinion of this Department, the State should allocate to this issue an amount of funds over the future years in a sufficient amount to finally discharge the original percentage of eligibility, which in this case was 36.50% of the indebtedness outstanding January 1, 1933. We believe that this may be done without regard to whether this is a term or serial issue.

5. In answer to your further inquiry, and after conferences held by your Board and also by members of this Department, we desire to supplement our Conference Opinion on the above subject under date of June 14, 1938, No. 3017, as follows:

This inquiry concerns the present so-called "surplus" or "balance" that may be on hand and subject to distribution by your Board. We wish to advise that, in the opinion of this Department, the Conference Opinion above referred to may be more specifically interpreted or extended by advising that the Board of County and District Road Indebtedness has ample power and authority to make such distribution of this fund as will cause whatever balance there may be on hand at any time to be absorbed in the future years over the lifetime of the various issues now outstanding and which are eligible for state participation.

Very truly yours,

EFFIE WILSON-WALDRON,
Assistant Attorney General.

This opinion has been read, considered, and approved in conference and is now ordered filed on this the 11th day of August, 1938.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 3022

AMERICAN NATIONAL BANK CLAIM—CONSTRUING ARTICLE III,
SECTION 44, OF THE CONSTITUTION OF TEXAS.

An opinion construing Section 44, Article III of the Constitution of Texas and holding that such constitutional provision does not prohibit the Legislature from making an appropriation to pay a claim which at the time of its origin was based upon pre-existing law.

Holding that the Legislature in making an appropriation of \$8,861.62 to pay the claim of the American National Bank in the Miscellaneous Claims Bill, Senate Bill No. 179 of the 45th Legislature, was acting within the constitutional powers of such body in making such appropriation, and that such appropriation was valid.

OFFICES OF THE ATTORNEY GENERAL.
August 22, 1938.

Hon. Tom C. King, State Auditor, Austin, Texas.

Re: Claim of American National Bank of Austin, Texas, in the amount of \$8,861.62—Miscellaneous Claims Bill.

DEAR SIR: With further reference to your letter of August 27, 1937, wherein you state:

"Senate Bill No. 179, passed by the Regular Session of the Forty-fifth Legislature, included an appropriation of the claim of the above mentioned bank. The claim arose out of an appropriation of \$100,000.00, appropriated to A. & M. College for the building of a dormitory, by the Thirty-fourth Legislature, First Called Session in 1915.

"The claimant has filed the claim under the assumption that the amount above stated lapsed in the appropriation. We find that there was no lapsed part of the appropriation of \$100,000.00, for the purpose mentioned, the additional amounts over and above the contract on which the claim was filed having been properly expended on other contracts and obligations, the entire \$100,000.00 appropriation having been expended."

You ask to be advised after review of the claim file what pre-existing law would bring this claim under Section 44, Article III of the Texas Constitution, requiring such pre-existing law.

This Department has elected to reconsider and review the claim mentioned in your letter above referred to, and it is thought necessary that the following preliminary statement of the facts attendant upon such claim be stated as the basis for this Department's opinion on the validity of such appropriation inquired about.

The First Called Session of the 34th Legislature of Texas in 1915, at pages 104 and 105 of the Acts of such Legislature made an appropriation of \$100,000.00 for a college auditorium for the A. & M. College of Texas. Regular Session of the 45th Legislature at page 919 of the Session Laws made an appropriation of \$8,861.62 to pay the American National Bank of Austin, Texas,

to reimburse said bank for money advanced for the construction of the auditorium building at A. & M. College, said building having been authorized by the Acts of the 34th Legislature, 1st Called Session 1915, page 104, and said sum being the unexpended balance of said appropriation.

Thereafter the Board of Directors of A. & M. College entered into a contract with Ledbetter and Greathouse of Austin, Texas, for the erection of a fire proof auditorium building at College Station, Texas, said contract being of date November 29, 1916, for a consideration of \$91,138.38.

Thereafter on April 6, 1917, the United States declared war upon Germany and appropriated men and material and railroads for use in the prosecution of such war.

Thereafter in the spring of 1918, the contractors for such building, Ledbetter and Greathouse, defaulted in the performance of such contract and left the building uncompleted. The Surety Company on such contractor's bonds refused to proceed with the construction of such building and claimed to have been released from such contract by the advent of the war that the United States had with Germany which had so augmented the cost of labor and materials as to make it manifestly impossible to complete such building for the contract price.

Thereafter several members of the Board of Directors of A. & M. College and a representative of the Governor's Office procured an interview with Major Littlefield, President of the American National Bank at Austin, Texas, and importuned Major Littlefield to advance money to complete the building, and representing to Major Littlefield that such building could not be finished by the contractors and that the contract price had been expended and that the bonding company could not be forced to complete the construction of such building except at the end of a long drawn out law suit, and that there was an unexpended balance in the appropriation made by the Legislature but that the college authorities could not expend this balance for the work included in the original contract without the consent of the Legislature but that they would recommend that the Legislature authorize the repayment of such money so advanced by the American National Bank out of the unexpended balance of such \$100,000.00 appropriation, and Major Littlefield for the bank agreed to advance sufficient money to complete the construction of the auditorium and did advance money in payment of approved estimates of labor and material had and performed on such building to the extent of \$23,000.00, which was sufficient to complete the construction of such building in conformity with the plans and specifications set forth in the original contract for construction of same.

It is inferable from the subject matter of the affidavits of Houghton Brownlee, H. A. Wroe and R. C. Roberdeau, which appear in the file, that the Board of Directors of A. & M. College and contractors, Ledbetter and Greathouse, had mutually agreed that the contract originally executed for the conclusion

of the college auditorium was impossible of performance on account of the increased cost of labor and materials incident to the declaration of war by the United States, and the appropriation by the United States of men, materials and railroads in the prosecution of the war, and that the agreement of the Board of Directors of A. & M. College and Major Littlefield, hereinabove alluded to, by which the American National Bank was to furnish money for the completion of such building, was a new and independent contract, the terms and conditions of which have been fully ratified and confirmed by the Acts of the 45th Legislature, Senate Bill No. 179, which appropriated \$3,861.62 to pay the claim of such bank originating as above described, and the following letter is persuasive and corroborative of the affidavits relating to such transaction hereinabove referred to.

On July 1, 1919, the President of the Board of Directors of A. & M. College, L. J. Hart, and F. M. Law, J. R. Kubena and R. L. Young, members of the Board of Directors of A. & M. College wrote the contractors as follows:

"July 1, 1919

"Messrs. Ledbetter and Greathouse, Austin Texas.

"GENTLEMEN: In answer to representations made to us by Hon. E. R. Pedigo we beg to advise you that as the Board of Directors we have no power to indemnify you for the loss which you have suffered on the construction of the Auditorium and Experiment Station Buildings at the Agricultural and Mechanical College, although we appreciate the fact that caused changed conditions growing out of the world war, which resulted in a greatly increased cost of labor and material entering into the construction of those buildings, that you were placed at a great disadvantage and that it was impossible for you to complete the contracts at the close bid which you made without suffering a loss at the contract price entered into under date of November 29, 1916.

"As we understand in presenting your claim for \$34,837.20 you are only asking to be indemnified for the actual advance in the cost of labor and material and not seeking any compensation for your own services in connection with those contracts. While this Board is without authority to act in the premises we hope that you may receive careful and serious consideration in the just claim which you are making and we desire to express our appreciation of the honest and straight-forward manner in which you met all the requirements of your contracts.

Sincerely yours,

L. J. HART,
President Board of Directors.
F. M. LAW
J. R. KUBENA
R. L. YOUNG."

On May 18, 1937, Honorable John McKay, Assistant Attorney General, advised Senator J. Manley Head, Chairman of the

Claims Committee of the Senate, with respect to the claim of the American National Bank, as follows:

"May 18, 1937

"*Hon. J. Manley Head, Senator, Austin, Texas.*

"DEAR SIR: Your letter to Attorney General McCraw, of this date, has been referred to me for attention.

"With regard to the claim of the American National Bank, I report as follows: This claim is in the total amount of \$31,875.53 and arises from supplemental contracts entered into out of the necessities created by the world war. This claim is properly divided into two parts, the first part being for expenditures in the construction of the auditorium at A. & M. College, and the second part being for expenditures in the construction of an experimental station. The claim with regard to the auditorium is as follows:

"\$100,000.00 was appropriated by Act of the First Called Session of the 34th Legislature, page 104. This amount was appropriated for the specific purpose of a College Auditorium. The original contract price was in the amount of \$91,138.38, which amount was paid. However, as the facts show, the subsequent disbursements by the contractors necessary to the final construction of this building amounted to \$23,258.77."

"As you know, the authority of the Legislature to appropriate funds for payment of a claim of this nature is controlled by Section 44, Article 3, reading in part as follows:

. . . "nor grant, by appropriation or otherwise any amount of money out of the Treasury of the State to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; . . ."

"There are but few cases on the construction of this constitutional provision. However, there are two cases in point: *Nichols vs. State*, 32 S. W. 452, and *State vs. Haldeman*, 163 S. W. 1020. Both of these cases state the same principal of law and the *Haldeman* case holds in part as follows:

"It is true in the *Nichols* case, *supra*, the act expressly provided that the amount to be expended for the building therein provided for should not exceed the sum of \$40,000.00; but we hold that, when the Legislature appropriates a specific amount for a public building, this is equivalent to limiting the amount to be expended on such building to the amount named in the Appropriation Bill."

"In so holding, the court excluded the amount of the claim since the same was in excess of the appropriation for the building construction. In the *Nichols* case the appropriating act limited the construction cost to \$40,000.00. The original contract was for \$39,663.00. The claim was for \$7,000.00, being the amount expended in addition to the contracts for completion of the building. The court allowed the claim in the amount of \$337.00, but on appeal the case was reversed on a different point, namely, the authority of the Legislature to appropriate in excess of the valid debt.

"In view of these cases, it is the opinion of the writer that the portion of this claim relative to costs on the A. & M. Auditorium is valid in the amount of \$8,861.62, being the total of \$100,000.00. Your appropriation of this sum would be best made, however, subject to a more complete check of the appropriation by the Comptroller. The other portion of the claim

of the American National Bank is for expenditures on the State Experimental Station.

"Due to the fact that this fund was appropriated for several varied purposes, and due further to the fact that I have been unable to check the 1917 records of the Comptroller's Department upon such short notice, I am unable to advise you with regard to its validity.

"The Bank's claim for some \$11,000.00 with regard to this building should be held over until a complete check of the departmental records could be made.

Yours very truly,

JOHN J. MCKAY,
Assistant Attorney General."

Subsequent to the Attorney General's Opinion of May 18, 1937, the House and Senate Free Conference Committee adopted the following resolution:

"To pay the American National Bank, of Austin, Texas, to reimburse said bank for money advanced for the construction of the auditorium building at Agricultural and Mechanical College, said building having been authorized by the Acts of the Thirty-fourth Legislature, First Called Session, 1915, page 104, and said sum being the unexpended balance of said appropriation . . . \$8,861.62.

"In view of the Attorney General's opinion of date May 18, 1937, in response to our committee's request for an opinion, we the undersigned conferees on the Miscellaneous Claims bill hereby agree that Senator Head may add to the said bill the above item as written.

For the Senate: Head, Winfield, Newton, Sulak, Redditt.

For the House: Herzek, Waggoner, T. S. Ross, Wood."

Pursuant to such Attorney General's opinion and concurrent resolution of the House and Senate, on May 21, 1937, the Legislature made an appropriation of \$8,861.62 to pay the claim of the American National Bank as hereinabove set forth.

From an examination of the State Auditor's report on the disbursement of the \$100,000.00 appropriation, it is perceived that in the spring of 1918, at the time of the agreement of the Board of Directors with the contractors, Greathouse and Ledbetter, and with the American National Bank of Austin, Texas, acting by and through Major Littlefield, its President, there was an unappropriated and unexpended balance in said \$100,000.00 appropriation of \$8,861.62.

There is no doubt of the authority of the Board of Directors of A. & M. College to make a valid contract for the construction of a college auditorium for such college within the legislative appropriation and authority for such purpose. The first contract made by the Board of Directors of such college, Ledbetter and Greathouse, has been terminated by default of such contractors and Surety Company on the Contractor's bond. It was competent for the Board of Directors to make another contract for the completion of the construction of such auditorium, and to the extent

that such \$100,000.00 appropriation was unexpended, said second contract was as valid and binding as the first contract for the construction of such building. And when this contractual obligation attached, the legal effect of same was to appropriate the unexpended moneys in such fund for the specific purpose of satisfying the contractual obligation existing with the American National Bank.

There is no doubt expressed as to the competency of the Legislature to make the \$100,000.00 appropriation for the specific purpose of constructing a college auditorium. There is no doubt of the authority of the Board of Directors of A. & M. College to make a valid contract with Greathouse and Ledbetter for the construction of such building for a contract price of \$91,138.38.

It is further clear that the State in making such appropriation and in authorizing such contract acted in a proprietary capacity rather than in the performance of a governmental function, and in so acting the State has the same status with respect to responsibility and liability as any other person, individual or corporation would have under the same circumstances, and it follows that if the Board of Directors of A. & M. College could make one contract for the erection of one building lawfully, they could make two contracts or more for such purpose, and it is the view of the writers of this opinion that at the time the members of the Board of Directors of A. & M. College solicited Major Littlefield and the American National Bank in the spring of 1918 to advance sufficient funds for the completion of the construction of the college auditorium after such directors had acknowledged and recognized the default of the contractors and the bonding company under the original contract of construction; that there was a novation of such contract and a new agreement, and contract entered into, with such contractors and the American National Bank, wherein the bank agreed to advance sufficient funds for the completion of such building upon the assurance of the members of the Board of Directors of A. & M. College, that there remained in the \$100,000.00 appropriation a sufficient unexpended balance to reimburse the bank for such advances. It is the view of the writers that a new contract and agreement was made at this time between competent parties for a valuable consideration, unquestionably to the extent of the unappropriated balance of \$8,861.62 and that this second contractual obligation was as valid and binding and enforceable as the first contract for construction hereinabove referred to.

If the writers should be in error as to this under the doctrine of ratification, the Legislature has the power, if it sees fit, to ratify and adopt a contract that is made within the scope of legislative authority, and the legislature by the enactment of the appropriation of \$8,861.62 followed by a recitation fully explaining the purposes for which such appropriation was made is ample evidence of the legislative intent to adopt and ratify the agreement to the Board of Directors with the American National

Bank of Austin, Texas, to the extent of the unappropriated balance of the \$100,000.00 appropriation.

In support of the opinion hereinabove rendered, the writers cite the case of *State vs. Elliot*, 212 S. W. 695, (Writ of error refused) wherein the court states:

"No one can deny that when the State makes a contract she is as much bound by it as a citizen would be bound by a like contract. It is well settled that so long as the State is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes a suitor in its own courts, or a party to a contract with a citizen; the law applies to it as under like conditions governs the contracts of an individual. Citing numerous authorities."

In the case of *Nichols vs. State*, 32 S. W. 452, the Court announces the following proposition:

"As said before, the State could not ratify this additional contract for an amount greater than was authorized by pre-existing law; but, as to a contract that covered an amount that did not extend beyond the sum limited by the law in the expenditure for the plan of contracting required by law was not pursued, provided the facts show a ratification. The State may ratify the unauthorized acts and contracts of its agents and officers which are within the scope of corporate authority. The power of the state to make a contract authorizes it to ratify one when made, although entered into without its express authority, *Blum vs. Looney*, 69 Tex. 3, 4 S. W. 857. The state had the power, through its legislature in the first instance, to dispense with the requirement that the contract should be let to the lowest and best bidder; and, having that power, it could ratify a contract that was entered into without a compliance with that requirement."

In the case of *Fort Worth Cavalry Club, Inc., vs. Sheppard, Comptroller*, 83 S. W. (2d) 660, relator applied for a writ of mandamus to compel the Comptroller to issue a state warrant in the sum of \$1,710.00. The claim was based upon the lease contract made by the Adjutant General of Texas with such Club whereby such officer purported to lease a building belonging to the relator for the agreed rental of \$285 per month. After such contract was made, the appropriation for the Adjutant General's Department was exhausted on account of maintaining a considerable portion of the National Guard in the East Texas Oil Field and the contract purported to be for a period of five years. The court held the Adjutant General was without authority to make such contract because not expressly authorized by law and because no express appropriation was made by the Legislature for the payment of such lease rights. The Court says, however, in such opinion:

"In the case at bar, the Adjutant General was limited in his right to contract to the amount of his appropriation bill. He was also limited by the terms of such appropriation. When he attempted to go beyond the

power conferred upon him by law, he acted without authority of the law, and such act was and is void, and does not bind the State."

This case is distinguished from the claim of the American National Bank which is treated in this opinion in that the Legislature in making an appropriation to pay the \$1,710.00 claim in the Cavalry Club case, had no pre-existing law to predicate same, no specific appropriation having been made for this purpose, and the general appropriation for the Adjutant General's Department having been exhausted, prior to the inception of such claim. It is also distinguishable by reason of the fact that at the time the Adjutant General attempted to execute a five year lease contract he had no authority from the State or by virtue of his office to execute such a contract and having no such authority the contract was void from its inception and had no pre-existing law to support it.

In the case of *Nichols vs. State*, 328 S. W. 452, suit was brought on the alleged contract between Nichols and the State. It appears that the Legislature passed an act appointing commissioners to contract for the erection of what is now known as the Old General Land Office Building at a cost not to exceed \$40,000 and an appropriation for that amount was made. The commissioners let the original contract to Nichols for a sum slightly less than the amount appropriated. After the contract was made, and after the contractor had progressed to some extent in the erection of the building, the commissioners and Nichols entered into a further contract for certain additions and enlargements thereto, which increased the cost about \$12,000 over the original contract. The commissioners promised Nichols that the State would pay this sum, and that they would recommend its payment to a subsequent Legislature. This case is not analogous to the facts evidencing the claim of the American National Bank hereinabove discussed; the Legislature did not make any appropriation to pay the claim, but passed an act permitting the State to be sued thereon to the extent of \$7,000, and it is also distinguishable from the claim of the American National Bank in that in the Nichols case the commissioners exceeded the amount of the legislative appropriation by \$12,000, and they did this after a contract had been entered into for slightly less than \$40,000 to construct such building, and when there was no showing that the contractor was unable to complete such building for such contract price and when there was no showing that the contractor had defaulted or abandoned the performance of such contract; but the commissioners simply took it upon themselves to increase the legislative appropriation by \$12,000, which action of the commissioners was not supported by any pre-existing law. The court in the Nichols case, however, does state:

"The law that authorized the commissioners to make a contract binding upon the State for the erection of the land office building, in express terms, declared that the cost of the building and furnishing it should in no case exceed the sum of \$40,000. This was an express limita-

tion upon the authority of the agents representing the State, and their efforts in this direction in attempting to impose upon the State a contract that increased its liability beyond the amount stipulated was clearly unauthorized, and an act not binding on the government."

The court further says in such case:

"The claim of appellant to the extent of about \$12,000 that grew out of the additional contract for the extra service was in excess of the amount provided by law for the construction of the building; hence there was an absence of a pre-existing law upon which to base this claim."

It will be noted that in case, the appellant obtained a judgment in the district court of Travis County for the sum of \$337 which was the amount between the original contract price of such building and \$40,000 appropriation, and the court inferentially says in the last above quoted paragraph that this amount was recoverable by appellant because the court says that the claim of the appellant to the extent that it was in excess of the amount provided by law for the construction of the building, was unauthorized because of absence of a pre-existing law. The converse of this proposition would be that such an amount as did not exceed the amount originally provided by law for the construction of the building would be considered as a valid claim, and this last proposition is similar to the claim of the American National Bank herein under consideration.

In the case of *State vs. Haldeman*, 163 S. W. 1920, the Legislature appropriated \$10,000 for the construction of one building and \$37,500 for the construction of another building. The contracts to erect these buildings were let to one John F. Hart. By reason of changes made in the plans and specifications after the original contract was let the contractor, at his own expense, furnished material and labor amounting to the aggregate sum of \$13,393.44, not included in the original contract. Claim for this amount was presented to the Legislature. The 31st Legislature, 2d. Ex. Sess., c. 28, p. 523, passed an act making an appropriation of \$11,000 to pay the claim, but provided that the claim should first be established by suit against the State. The act gave permission to sue the State on the claim. The court of Civil Appeals held that the officers of the State were limited in contracting for the construction of these buildings to the amount appropriated by the Legislature, and that the contract above such appropriation was invalid and not a valid claim against the State.

This case is distinguishable from the claim of the American National Bank herein referred to because the claim was in excess of the amount appropriated by the Legislature for the construction of the two buildings referred to and because the legislative appropriation to pay the claim was conditioned upon the establishment of such claim by such against the State, and the holding of the Court of Civil Appeals in such case that contracts for the construction of buildings within the amount ap-

propriated were valid sustains and upholds the opinion of the writers herein.

None of the three cases above referred to deny the proposition that the agents of the State may contract and bind the State, within the limitation of legislative appropriation, in carrying out the legislative purpose and will, in the construction of a public building, and question of ratification is not in any of such cases except the Nichols case; and in the Nichols case there was no legislative appropriation to pay the claims therein sued upon but simply legislative authority was obtained for appellant to bring a suit for \$7,000 against the State and on account of the fact that the Acts of the several state officers and agents referred to in the three cases above cited, being either in excess of the legislative appropriation provided or altogether outside of the duties and powers of such agents, the appellate court held that there was no pre-existing law to authorize or support such claims under the provisions of Section 44, Article 3. In this case, however, the Legislature appropriated \$100,000.00 to build a college auditorium and the Board of Directors of A. & M. College pursuant to such appropriation made a contract for the construction of such building with Greathouse and Ledbetter for something over \$91,000. After the default and abandonment of such contract by Greathouse and Ledbetter and after the refusal of the surety company on the contractor's bond to proceed with the completion of such building, assigning as their reason therefor that the advent of the war that so augmented the labor, materials and transportation that the performance of such contract for such agreed sum of \$91,000 was impossible, and after some of the members of the Board of Directors had met with Major Littlefield, President of the American National Bank, in the spring of 1918, and reported to him all of the facts hereinabove stated relative to such building contract and had further represented to him that there remained in such appropriation sufficient unexpended and unappropriated money to complete such building, and after such directors had agreed with him that they would recommend to the Legislature that he be repaid out of the unexpended portion of such \$100,000 appropriation for advancements to be made by the American National Bank for the completion of the construction of the college auditorium, and after the bank had advanced \$23,000 to complete the construction of such building and after the Legislature had been apprised of these facts and after the Legislature had ratified and confirmed the act of such members of the Board of Directors of A. & M. College and made an appropriation to the extent of the difference between the original contract price and the \$100,000 appropriation to pay such claim, it is clear to the writers hereof that the contractual obligation of the State in the agreement had with Major Littlefield, acting for the American National Bank and some members of the Board of Directors of A. & M. College is valid and binding and based upon pre-existing law to the extent of \$8,861.62, and should be paid.

Can it be doubted that if the Board of Directors of A. & M. College made the original contract for the construction of such building, and then spent the entire \$100,000.00 for some other purpose, that the obligation of the State would nevertheless obtain to pay for such building; likewise, when the Directors of A. & M. College agreed with the American National Bank to recommend the repayment of advancements for the purpose of completing such building out of the unexpended balance of \$100,000.00 appropriation, such agreement impounded and appropriated such unexpended balance of \$8,861.62 for the purpose of paying this obligation, and constituted pre-existing law for such claim.

As to whether or not there was pre-existing law under Article 3, Section 44 of the Constitution of Texas, sufficient to support the appropriation made by the Legislature to pay the American National Bank \$8,861.62, we have three distinct reasons for answering this question in the affirmative.

First, the Board of Directors of A. & M. College were authorized to contract for construction for such auditorium building within the \$100,000.00 appropriation made by the Legislature for such purpose, and the legislative appropriation of \$100,000.00 for such purpose was sufficient pre-existing law to authorize such contract.

Second, the Board of Directors of the A. & M. College was authorized under the existing conditions hereinabove detailed to make a novation of such construction contract, and enter into an additional contract for the completion of such building to the extent of the unappropriated and unexpended balance of such \$100,000.00 appropriation in the spring of 1918, and the legislative appropriation of \$100,000.00 for the purpose of constructing such college auditorium was sufficient pre-existing law for the creation of such contract and claim arising thereunder.

Third, where money is advanced for the benefit of the State in an emergency at the request of officers of the State, and the person making the advance did not act officiously, a quasi-contractual obligation is created against the State, and the party making the advance is entitled to restitution of the money advanced under the doctrine of unjust enrichment. This proposition is supported in the case of Austin National Bank of Austin vs. Sheppard, 71 S. W. (2d) 242, and the rule is clearly announced, "Restatement of the Law of Restitution (Quasi-Contracts and Constructive Trusts), Section 1, p. 12, as follows:

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

The rule of liability for restitution growing out of emergency is stated in the Restatement, Section 112, p. 461, as follows:

"A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons."

The rule of liability on the part of the State for restitution is the same as in the case of an individual. This is the express holding of the case cited as authority by the Supreme Court in the Austin National Bank case, *supra*. The case cited is *State vs. Elliott*, 212 S. W. 695 (writ ref.).

The Court of Civil Appeals in the last case adopts the brief of a former member of the Supreme Court, Judge Williams, and says,

"No one can deny that when the State makes a contract she is as much bound by it as a citizen would be bound by a like contract." Citing many cases.

And that rule applies to quasi-contract is held in the same case, as follows,—

"That the liability of the State may arise out of a contract implied in law as well as from an express undertaking is held in *U. S. vs. Palmer*, 128 U. S. 263, 9 Sup. Ct. 104, 32 L. Ed. 442; *U. S. vs. Berden Fire Arms Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530; *U. S. vs. Buffalo Pitts Co.*, 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1296."

The Legislature having authorized the construction of the college auditorium for A. & M. College and made an appropriation of \$100,000.00 therefor and the advent of the war having made impossible the construction of such building as originally contracted for by reason of augmented costs of labor and material and by reason of the appropriation of the railroads by the Government of the United States in the prosecution of the war. The Board of Directors of A. & M. College in their agreement with Major Littlefield and the American National Bank whereby the State received \$23,000.00 in labor and materials for the completion of such building created a common law obligation against the State of Texas which by Article 1, Revised Civil Statutes of Texas, is made the law of the State when not inconsistent with our Constitution and laws, and it is our opinion that a common law right is such a right under a "pre-existing law" within the meaning of the Constitutional provision under discussion here. *Austin National Bank vs. Sheppard*, 71 S. W. (2d) 242.

You are, therefore, advised that in the opinion of the writers of this opinion, the legislative appropriation inquired about does not contravene with the provisions of Article 3, Section 44, of the Constitution of Texas, and the opinion of the Honorable Robert McKissick, Assistant Attorney General, of date August 30, 1937, is hereby overruled in so far as it conflicts with this opinion.

It may be further noted that the duty of this Department and the courts of this State to uphold and sustain the acts of the Legislature and to resolve any reasonable doubt in favor of the constitutionality and validity of such acts and in view of this legal presumption and duty, this Department is constrained by reasons of all the matters hereinabove mentioned to hold that

the Legislature is authorized to make the appropriation inquired about for the purpose therein recited.

Yours very truly,

H. L. WILLIFORD,
Assistant Attorney General.
HENRY E. PHARR,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.
By H. GRADY CHANDLER,
First Assistant Attorney General.

No. 3023

ELECTIONS—INDEPENDENT CANDIDATES

UNDER THE PROVISIONS OF ARTICLE 3159, AN INDEPENDENT CANDIDATE MUST FILE AN APPLICATION FOR A PLACE ON THE BALLOT WITHIN THIRTY (30) DAYS OF THE PRIMARY, WHETHER FIRST OR SECOND PRIMARY, AT WHICH A CANDIDATE FOR THE OFFICE WHICH THE INDEPENDENT CANDIDATE SEEKS IS NOMINATED.

CONSTRUING ARTICLE 3159, R. C. S.

OFFICES OF THE ATTORNEY GENERAL.
Austin, Texas, August 31, 1938

Hon. Edward Clark, Secretary of State, Austin, Texas.

DEAR SIR: We have received your letter of this date reading as follows:

"I am in receipt of the following telegram from Howard Dailey of Dallas, Texas:

"Do you construe Article Thirty-one, Fifty-nine Vernon's Annotated Texas Statutes providing independent candidate must file petition with requisite number of voters within thirty days from primary election day to mean thirty days from first primary election or from Saturday Stop Please answer collect via Western Union."

"Please furnish me with an opinion as to such inquiry."

The telegram above quoted does not state the office to be filled, but from our construction of Article 3159, as set out below, you will be able to determine the time in which it is necessary to file an application for a place on a ballot as an independent candidate.

Article 3159 of the Revised Civil Statutes of Texas, 1925, was

a part of the original Terrell Election Law of 1905, (Section 94, Chapter 11, Acts of the First Called Session of the 29th Legislature). This article provides for printing the name of an independent candidate on the official ballot after a written application has been delivered to the Secretary of State *within thirty days after primary election day*. It becomes necessary to determine whether "primary election day," as used in this statute, means (1) the regular primary election held on the fourth Saturday in July (2) the runoff primary held on the fourth Saturday in August, or (3) the primary election at which a candidate for the particular office for which the independent candidate has filed was nominated.

At the time of the enactment of what is now Article 3159 the Statutes of Texas did not provide for what is known as a runoff primary; the present runoff primary election law was not enacted until the year 1918. The Legislature has never changed the original act requiring independent candidates to file an application within thirty days after primary election day. Prior to 1918 all parties which were required to hold primary elections nominated their candidates on the fourth Saturday in July. It was contemplated that after a candidate had been nominated at a primary by a political party, an independent candidate could wait for a period not exceeding thirty days after the primary election day to file his application for a place on the ballot at the general election. In other words, it appears that the statute intended to allow a person or a group of persons to wait until political parties making nominations by primaries had made their nomination, and to give such person or group of persons thirty days to procure the proper petition for a place on the ballot as an independent candidate. This brings us to a determination of the question of whether the act is to be construed as giving an independent candidate only thirty days in all events from the date of the first primary election, or thirty days in all events from the date of the second primary election, to file an application for a place on the ballot. It is our conclusion that the statute is to be construed as giving a period of thirty days from the date of the primary at which a candidate for the particular office filed for by the independent candidate was nominated at a primary, whether such primary be the first or second primary.

Article 3100 provides that the term "primary election" means an election held by members of an organized political party for the purpose of nominating candidates of such party to be voted for at a general or special election.

Article 3101 provides for the nomination by primaries of candidates of certain political parties.

Article 3102 provides that the fourth Saturday in July, 1926, and every two years thereafter shall be general primary election day, and further provides that if at the general primary election a candidate has not received a majority of the votes, if for a State or a District office, a second primary election shall

be held on the fourth Saturday in August succeeding such general primary election, and that only the names of the two highest candidates shall be placed on the ballot of the second primary. The term "primary election day" as used in Article 3159 with reference to the filing of an independent candidate, in view of the provisions of Article 3102, providing that the fourth Saturday in July shall be general primary election day, might, if strictly construed, be held to mean only the first primary election day in all events. We believe, however, that the statute is not susceptible to such strict construction in view of what has already been said with reference to the apparent intention of Article 3159 to allow a person thirty days in which to file an application as an independent candidate for office. If no candidate of a political party required to hold a primary is nominated in the first primary, the apparent purpose of allowing thirty days under Article 3159 to file an application of an independent candidate will be defeated for the reason that the person who might desire to become an independent candidate will in all probability desire to know who is to be the candidate of the party holding the primary. In view of the fact that the minimum time intervening between the first and second primaries is twenty-eight days (thirty-five days this year) a proposed independent candidate will not be allowed the thirty days contemplated by Article 3159 to procure and file an application within thirty days from the date that a candidate might be nominated at a primary.

We also believe that the statute is not to be construed as allowing thirty days from the date of the second primary as in all events. As already stated, the apparent intention of the statute is to allow a proposed independent candidate thirty days in which to file an application for a place on the ballot. If the party at the first primary election has nominated a candidate for the office which the Independent candidate is seeking we see no reason why the apparent intention of Article 3159 to allow only thirty days from the day the candidate is nominated is to be disregarded. The situation might also arise where no second primary will be required on account of each candidate receiving a majority in the first primary. Under such circumstances why should an independent candidate be given more than sixty days to file an application. We also notice that under the provisions of Article 3162 an independent candidate for a county office must meet the requirements provided by Article 3159 for securing a place on the ballot for the general election. It is optional with the County Executives Committee as to whether a runoff primary should be held as to county offices even though the candidates at the county primary election do not receive a majority vote. If any candidates for a State or a District office, however, have not received a majority vote, the runoff primary is mandatory. Would it be said that because there is a runoff primary election for State offices that an independent candidate for a County Office would be allowed to wait until thirty days after

the second primary election to file his application for a place on the ballot?

In conclusion you are advised that it is our opinion that the answer to the question propounded is that the term "thirty days after primary election day," as used in Article 3159, is to be construed as meaning thirty days from the primary, whether the first or second primary, that a candidate for the office which the independent candidate seeks is nominated. The question propounded does not state for which office the independent candidate desires to file an application for a place on the ballot, and for this reason, we cannot say whether you are now authorized to accept a petition of an independent candidate in view of the fact that more than thirty days have expired since July 23, 1938, the date of the first primary election. You will, however, be able readily to determine whether any petition may now be received by you as you know for which offices candidates were nominated at the first primary, July 23, 1938, and according to our conclusion all applications for places on the ballot as independent candidates for such offices must be filed within thirty days from July 23, 1938, and all applications for offices for which candidates were nominated at the second primary may be received within thirty days from August 27, 1938.

Yours very truly,

WILLIAM McCRAW,
Attorney General of Texas.