THE FOLLOWING ARE SOME OF THE MOST IMPORTANT OPINIONS RENDERED BY THE DEPARTMENT BETWEEN THE DATES OF SEPTEMBER 1, 1908, AND SEPTEMBER 1, 1910.

OPINIONS CONSTRUING ANTI-NEPOTISM LAW.

ANTI-NEPOTISM LAW.

Act applicable to county officers who have absolute ownership in fees collected by them, and are prohibited from making appointments of any person or persons related to them by affinity or consanguinity within the third degree.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 11, 1908.

Hon. E. B. Robertson, County Attorney of Bosque County, Meridian, Texas.

DEAR SIR: I am in receipt of your letter of the 3d inst., and also your letter to one of the assistants on the 7th inst., relative to the application of the Nepotism Law to the county officers of your county, stating in your letter that under the provisions of what is known as the Fee Bill your county has never cast the vote necessary to bring the county officers within the limitations prescribed in that act; and that you therefore desire to know if the Nepotism Act can apply to those county officers who have absolute ownership to the fees collected by them for the performance of their official duties.

Your questions require a consideration of the whole of the Nepotism Act, or most of the important sections thereof.

Section 1 makes it unlawful for any executive, legislative, ministerial or judicial officer of this State to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the State, district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office.

Section 2 makes it unlawful for any such executive, legislative, ministerial or judicial officer to draw or authorize the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, pay or compensation of any such ineligible person, knowing him to be ineligible; and makes it unlawful for any such executive, legislative, ministerial or judicial officer to pay out of any public funds in his custody or under his control the salary, wages, pay or compensation of any such ineligible person, knowing him to be ineligible.

Section 4 of the act is as follows:

"Under the designation executive, legislative, ministerial or judicial officer, as mentioned herein, are included the Governor, Lieutenant Governor, Speaker of the House of Representatives, Railroad Commissioner, all the heads of the Departments of the State government, judges of all the courts of this State, mayors, recorders and aldermen of all incorporated cities and towns, public school trustees, officers and boards of managers of the State University, and its several branches, State Normals, the penitentiaries and eleemosynary in-

stitutions, members of the commissioners court and all other officials of the State, district, county, cities or other municipal subdivisions of the State."

Section 6 makes it unlawful for any executive, legislative, ministerial or judicial officer to appoint and furnish employment for any person whose services are to be rendered under his direction and control, and paid for out of public funds, and who is related by either blood or marriage within the third degree to any other executive, legislative, ministerial or judicial officer when such appointment is made in part consideration that such other officer shall appoint and furnish employment to any one so related to the officer making such appointment.

It is manifest that the Legislature by this act intended to prohibit the employment by the officers mentioned, and within the degree mentioned, of any such person to any clerkship, office, position, employment or duty in any department of the State, district, county, city or municipal government, and intended to make ineligible any such person for such employments, clerkships, offices or positions.

The act is as broad as language can make it and its purposes are clear and beyond question, except a part of Section 1 thereof, which is as follows:

"When the salary, wages, pay or compensation of such appointee is to be paid for out of public funds, *or fees of office.*"

This Department has heretofore, in a number of instances, in construing the act, given effect to the language or sentence just above quoted and held that the whole act was limited thereby and that unless the compensation of such appointee was to be paid out of public funds or fees of office they were disqualified, construing the words "or fees of office" as synonymous with the words "public funds," and that where the compensation of such appointee was paid by the officer appointing him out of fees belonging wholly to such appointing officer and in which the county or State was not interested, or out of his private funds, then in such cases the appointee was not within the prohibition of the act. To give an illustration: A county clerk who is under the Fee Bill and the compensation of his deputies is paid from the receipts of his office over and above what such officer is allowed to retain, an appointee within the degree mentioned would be within the prohibitions of the act, but if such county clerk was not within the Fee Bill, then he could pay the employe out of his fees of office without subjecting him to the pains and penalties of the act.

This question has been considered again, and it is my opinion that the act should not be so construed; it is clear that the Legislature did not intend that there should exist in this State a condition whereby it would be lawful for appointments to be made to public offices or to public positions by certain classes of county officers when it would be unlawful for the same character of officers to make appointments to the said positions in other counties of the State. The whole intent and purpose of the act was to prohibit appointments or employments by any of the officers mentioned of persons within the third degree, and my conclusion is, after a further consideration of the whole act, that the words "fees of office" mean, and would be construed by the

courts to mean, those fees of office received by any officer of the State, whether he be within the Fee Bill or not.

My conclusion is that the prohibited employment is from the nature of the employment, namely, public employments by a public officer and by those public officers who are named in the act, and that the words "public funds, or fees of office," were used as a further designation of those officers who receive for their compensation in the public service either funds appropriated by the Legislature, such as the head of any department of the State government, or from fees of office for public services, performed by them under the statutes of our State.

I therefore, advise you that this act applies to those county officers who have absolute ownership to the fees collected by them for the performance of their official duties, and that they are prohibited from making appointments of any person or persons related to them by affinity or consanguinity within the third degree.

I have, therefore, recalled my several letters to several correspondents where a different construction was placed upon the act as above stated.

Yours very truly,
R. V. DAVIDSON,
Attorney General.

CONSTRUCTION OF LAWS—ANTI-NEPOTISM.

Trustee can not vote for teacher who is, by marriage, the uncle of his wife.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 19, 1910.

Mr. W. H. McIlveen, School Trustee, Fairfield, Texas.

DEAR SIR: We have your favor of the 16th instant, from which we quote as follows:

"I have been elected trustee in the school here (Fairfield Independent District.) One of the applicants for principal in the school married my wife's aunt. Please give me your opinion as to whether I can vote upon the matter of selecting him as the principal. (Understand, my wife is no kin to him but is a niece of his wife.)"

In aswer to your inquiry we have to advise you that you are related to the husband of your wife's aunt in the second degree by affinity, and hence the school board of which you are a member cannot legally employ him as teacher. If you should refrain from voting and the other members of the board should elect him, they would be guilty of violating the law against nepotism.

Acts 1909, page 85.

Stringfellow vs. State, 61, S. W. Rep., 719.

Page vs. State, 22 Texas App., 551.

Kelley vs. Neely, 55 Amer. Dec., 288.

Foot vs. Morgan, 1st Hill (N. Y.), 654.

Section 1 of Chapter 40, page 85, of the Acts of 1909, is as follows:

"Subject to the exceptions set forth in Section 4 of this act, it shall hereafter be unlawful for any officer of this State, or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, district, county, city, school district or other municipal board or judge of any court, created by or under authority of any general or special law of this State, to appoint, or to vote for or to confirm, the appointment to any office, position, clerkship, employment or duty, of any person related within the *second degree by affinity* or within the *third degree by consanguinity* to the person so appointing or so voting, or *to any other member of any such board or court* of which such person so appointing or voting may be a member, when the salary, fees, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatever."

The method adopted by the common law of England for computing degrees of collateral relationship was to begin with the common ancestor and count as one degree each step downward from such common ancestor to that one of the person in question, who was farthest removed from the common ancestor. The common law was adopted in Texas, and with it this method of computing kinship. Therefore, in the case you put, we would begin with the grandparents of your wife; from them to your wife's aunt is only one step, but from them to your wife there are two steps. Hence, your wife and her aunt are related by consanguinity in the second degree, and you and the husband of the aunt are related to each other by affinity in the same degree.

According to some authorities no affinity is created between two men by the fact of their marrying women who are blood relatives, but other authorities, including the courts of Texas, hold the contrary.

In the above cited case of Stringfellow vs. State, 61 S. W. Rep., 719, the Court of Criminal Appeals held that because the juror Hanks and the deceased Monkhouse had married cousins, the former was disqualified by the relationship thereby created from sitting on the jury to try the defendant for killing Monkhouse.

Yours very truly,
R. M. ROWLAND,
Assistant Attorney General.

ANTI-NEPOTISM LAW.

Parties, the wives of whom are second cousins, are related by affinity within the prohibited degree under anti nepotism law.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 22, 1909.

Governor T. M. Campbell, Capitol.

DEAR SIR: You state that your wife and the wife of Mr. T. E. Durham are second cousins, and you ask whether or not, in the

opinion of this Department, you and said T. E. Durham are related to each other by affinity within the third degree.

Replying, I beg to say that under the rule of the civil law you are not so related, but under the rule of the common law which has been approved and followed by the courts of Texas, you and Mr. Durham are related by affinity within the third degree.

Page vs. State, 22 Texas App., 557.

Bouvier's Law Dictionary, Rawle's Revision, p. 400.

Truly yours,

WM. E. HAWKINS,
Office Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-NEPOTISM LAW—TEACHER, TRUSTEES.

A trustee may, without violation of the anti-nepotism law, vote for his brother's wife's sister as teacher.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 30, 1910.

Mr. C. F. H. V. Blucher, Corpus Christi, Texas.

DEAR SIR: We have your letter of the 28th instant in which you submit the following statement and question:

"I am one of the trustees of the Corpus Christi Independent School District, and on next Thursday we will elect our teachers for the ensuing year. One of the applicants for position as teacher is the sister-in-law of my brother. Would her relationship to me, through my brother, debar her under the anti-nepotism law from being elected by our board as a teacher for our school?"

You are advised that the law recognizes a relationship by affinity between your brother and his wife's sister and between you and your brother's wife, but not between you and the sister of your brother's wife.

We beg to make the following quotations from first Words and Phrases Judicially Defined, title "Affinity," pages 246 and 247:

"There is no affinity between the blood relatives of the husband and the blood relatives of the wife, and hence a judge who is a brother of the husband of the sister of a petitioner is not disqualified to take action in the cause by reason of affinity. Ex parte Harris, 7 South, 1, 2, 26, Fla., 77, 6 L. R. A., 713, 23 Amer. St. Rep., 548."

"There is no affinity between the husband's brother and his wife's sister, which is called by the doctors *affinitas affinatis*, because then the connection is formed, not between one of the spouses and the kinsman of the other, but between the kinsmen of both. Chinn vs. State, 26 N. E., 986, 987; 47 Ohio St., 575, 11 L. R. A., 630."

"Relationship by affinity does not extend to the nearest relations of a husband and wife so as to create a mutual relation between them. The consanguineous relations of relatives by affinity are not related at all. Thus the sister of a man's wife is not related by affinity to that

man's blood relatives. Oneal vs. State, 47 Ga., 229, 248; Hume vs. Commercial Bank, 78, Tenn. (10 Lea) 1, 2, 43 Amer. Rep. 290; Blodget vs. Brinsmaid, 9 Vt. 27, 30; Ex parte Harris, 7 South, 1, 2, 26 Fla. 77, 6 L. R. A., 713, 23 Amer. St. Rep. 548; Higbe vs. Leonard, 1 Denio 187; Paddock vs. Wells, 2 Barb. Ch. 331, 333; Doyle vs. Commonwealth, 40 S. E., 925, 926, 100 Va. 808; Waterhouse vs. Martin, 7 Tenn. (Peck) 374, 389; North Arkansas & W. R. Co. vs. Cole, (Ark.) 70 S. W., 312, 313."

To the same effect is the decision of the Supreme Court of Texas in the case of Johnson vs. Richardson, 52 Texas, 481, where it was held (but without any discussion of the point) that the fact of the sister and the niece of a juror being the wives of two of the brothers of a party to a suit would not disqualify the juror to sit in said case.

Therefore, we hold that it will be no violation of the statute against nepotism for you and the other members of the board of trustees of the Corpus Christi Independent School District to elect as teacher the sister of your brother's wife if you see fit to do so.

Yours very truly,
R. M. ROWLAND,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-NEPOTISM LAW—SPEAKER OF HOUSE.

Speaker comes within inhibition of said law. Member of House may not vote in selection of applicant for position when such applicant is related to him within the prohibited degree, but members who are not so related to said applicant may elect him.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 5, 1910.

Hon. John Marshall, Sherman, Texas.

DEAR SIR: I am in receipt of your favor of the 27th ultimo from which I quote as follows:

"Please render me an opinion with reference to the employment of relatives of the members of the House and Senate in the capacity of pages, clerks or stenographers.

"Especially with reference to the appointment of the members' sons as pages. Is not this a violation of the Nepotism Act?

"If it is not, it should be, and I will appreciate a full construction of the law along this line, as I think it unwise to have the members of the House have their boys in the service.

"Would like permission to publish your opinion if the occasion arises."

Section 1 of the law against Nepotism, as amended by the Acts of 1909, page 85, is, omitting such parts as are unnecessary to be considered in connection with the present question, as follows:

"Sec. 1. Subject to the exceptions set forth in Section 4 of this Act, it shall hereafter be unlawful for any officer of this State, or for

any officer of any district * * * or for any *officer* or *member* of any State, district, county, city, school district or other *municipal board* * * * created by or under authority of any general or special law of this State, to appoint, or to vote for or to confirm, the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such *board* of which such person so appointing or voting may be a member, when the salary, fee, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatever."

Following is a copy of Section 2 of said Law:

"Sec. 2. The inhibitions declared by and set forth in this Act shall apply to and include the Governor, Lieutenant Governor, *Speaker of the House of Representatives,* Railroad Commissioners, heads of Departments of the State Government, Judges and members of any and all *boards* and courts established by or under authority of any general or special law of this State, mayors, commissioners, recorders, aldermen, and members of school boards of incorporated cities and towns, public school trustees, officers and members of boards of managers of the State University and of its several branches, and of the various State educational institutions and the various State eleemosynary institutions and of the penitentiaries; but this enumeration is not intended or shall not be construed or held to exclude from the operation and effect of this Act any person included within its general provisions."

The Speaker of the House of Representatives is, of course, a State or a district officer and as such is forbidden by said law to appoint to a public position or clerkship anyone who is related to himself by affinity within the second degree or by consanguinity within the third degree. A member of the House of Representatives is a district officer and as such is forbidden from appointing or voting for the appointment or confirming the appointment of any person who is related to him within the prohibited degree.

This brings us to the question of whether or not there is any prohibition in this statute against the Speaker appointing some one not related to himself but related within the degrees mentioned to some member of the House; and whether or not this law prohibits the member of the House from employing some person not related to the members voting for the employment but who is related within the degrees mentioned to some other member of the same body who does not participate in the vote or action by which the employment is made. The only prohibition found in the law against an officer or a member of a body appointing or voting for any person not related to him but related to some other member of the same body is confined to such action on the part of an officer or member of some State board or other board mentioned in the law or a court. It is clear that the House of Representatives cannot be denominated a court, and we have failed to find any legal warrant for holding that it comes within a definition of a "board" as that word is employed in this statute. Therefore, we are compelled to conclude that it would

not be a violation of this law for the Speaker to appoint some one not related toh imself, but related to a member of the House, nor for the members of the House to elect some one as an officer under said body who is not related to any member participating in his employment but is related within the degrees mentioned to some other member of the House who takes no part in his employment.

Yours very truly,

JEWEL P. LIGHTFOOT,

Attorney General.

ANTI-TRUST OPINIONS.

ANTI-TRUST—REPORT OF ATTORNEY GENERAL IN RE AMERICAN BOOK COMPANY, AT INSTANCE OF STATE TEXT BOOK BOARD.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 1, 1908.

Hon. T. M. Campbell, Governor, and Chairman State Text Book Board, Austin, Texas.

MY DEAR SIR: I beg to submit herewith our report in pursuance to a resolution passed by the State Text Book Board February 25, 1908, requesting that the Attorney General "make a thorough, full and complete investigation of the question as to whether the said American Book Company be a trust, and that said Attorney General make his report on same to the Governor as Chairman of this Board, said report to be made and filed with the Governor at the earliest practicable moment, and not later than May 1st, 1908. * * * which said report shall show the extent of the investigation made, the result and the findings and opinion of the Attorney General thereon * * *"

You are respectfully advised that on account of the fact that the Attorney General was actively engaged in representing the interests of the State before the Supreme Court of the United States in certain important litigation during the period of this inquiry, he was unable to engage in a personal investigation of this subject, and inasmuch as the subject matter thereof being within the province of my duties, the Attorney General directed that I make an exhaustive investigation and report the results to Your Excellency in accordance with the request of the Board. The report would have been filed on May 1st, but the decision of the Board to adjourn until May 18th before taking it up for consideration allowed me to take a few days extra time to consider my report.

EXTENT OF INVESTIGATION.

On account of the pressing official duties which could not be postponed I was unable to enter into this investigation before April 6th and the resolution of the Board requiring the report to be filed by May 1st, 1908, allowed only three weeks which could be devoted to this work. The investigation was conducted in the city of New York and the facts herewith submitted were secured from an inspection of a portion of the records of the American Book Company, Newson & Company and Chas. Scribner's Sons, statements made by their officers and attorneys, and from agents and officers of other publishing concerns.

Several publishing concerns having more or less interest in the result of the investigation voluntarily offered suggestions, but in most instances they were so desirous of concealing their activities that their usefulness to me in securing reliable legal data and information was practically nullified.

RESULT OF INVESTIGATION.

The origin and development of the American Book Company covers a period of more than a third of a century, when consideration is given to the establishments that formed the foundation of that concern and made its creation possible. Its growth has been marked by so many ramifications, touching so many of the great publishing houses of this nation, that a thorough investigation naturally brought many things to my attention while not included within the scope of the resolution under which I was acting, yet their very nature are such as vitally concern the public schools of this commonwealth and affect the welfare of the educational interests of the entire country. Such matters in some respects also involve the laws of this State, the enforcement of which devolves upon this department, and leads me to the conclusion that my duty to the State, to your Excellency and to the interests of public education, demand that such matters as are pertinent to a proper understanding of the conditions that exist, and to the administration of the laws enacted to safeguard the welfare of the public schools, should also be included in this report in order that they may receive such consideration as their tenor suggests to the Board is meet and proper.

I will first deal with this subject generally. The school book business has during the past twenty-five years experienced the same process of development through consolidations and combinations incident to the history of many other important industries of this country. This process has been more or less evident in the career of nearly all the large publishing houses. There is scarcely a publishing house that does not carry on its list books acquired from concerns many of which were absorbed and eliminated from the field of competition.

The methods employed by some houses in securing adoptions of their books have been so notorious, in some of the States, as to bring the business into public reproach.

It is believed that collusion and fraud have in many instances controlled the adoption in many of the States. That some of the smaller and supposedly independent houses are controlled either indirectly or through financial obligations to large concerns is evident from the facts.

I will explain more in detail hereafter the general statements above set forth, and will now proceed to a discussion of the status of the American Book Company.

In order that Your Excellency may properly judge of the conclusions reached it is necessary to state some of the facts established which necessarily must include a brief outline of the history of the American Book Company.

The American Book Company represents the highest development that any establishment has yet attained through combinations and consolidations of rival concerns engaged in the book business. The sources of its development place it practically in the same relative position in the field of its activities that the United States Steel Corporation, Amalgamated Copper, Standard Oil Company, National Packing Company and the International Harvester Company bear to the trade in their respective lines.

The elements entering into the structure of the American Book Company compel this conclusion, yet, I am not prepared to affirm that its management has gone to the length of some of the concerns mentioned in attempting to secure commercial supremacy, nor does it bear the same degree of reproach among its competitors that is shared by the Standard Oil Company and such others of like character, nor has it achieved such a monopoly in its line as those mentioned. The spirit of combination has ever been the predominant force in the development of the American Book Company manifested before and subsequent to its organization in 1890. In 1890 five of the strongest houses publishing school books combined their school book business in a corporation organized for that purpoe known as the American Book Company, a New Jersey corporation, with a capital stock of $5,000,000.

The companies in the combination consisted of:

1. Van Antwerp, Bragg & Co.
2. Ivison, Blakeman & Co.
3. D. Appleton & Co.
4. Harper Bros.
5. A. S. Barnes & Co.

The American Book Company acquired all the school book publications of the first three, both common and high school, and all the common school publications of the last two companies named for which stock was acquired in the American Book Company by certain stockholders of each of the five companies entering into the combination.

Prior to the organization of the American Book Company the following combinations were effected by companies entering into the combination:

Van Antwerp, Bragg & Co. acquired the school book business of two firms, viz:

1. Jones Bros.
2. Wilson, Hinkle & Co.

Ivison, Blakeman & Co. acquired the school book business of:

Chas. Scribner's Sons.

A. S. Barnes & Company acquired the business of:

Knight & Co.

Knight & Company had previously acquired:

Potter, Ainsworth & Company.

Commencing almost immediately after its organization the American Book Company began to acquire a controlling interest in rival and competing concerns, and subsequently organized other subsidiary corporations, as necessity required, which were operated as independent concerns.

Among the concerns partially or wholly acquired by the American Book Company, after its organization and prior to 1898, might be mentioned:

1. Taintor Bros.
2. Werner School Book Co.
3. Sheldon & Co.
4. E. H. Butler & Co.
5. University Publishing Co.

6. F. F. Hansell & Bro.
7. The Standard School Book Co.
8. D. D. Merrill & Co.
9. The Franklin Publishing Co.
10. The Prang Educational Co.

The spirit of consolidation had been at work in many of the above companies prior to their absorption by the American Book Company, as witness:

1. Taintor Bros. absorbed:
(a) Brewer and Tileston.
(b) H. I. Courley & Co.
(c) J. H. Butler & Co.
(d) Taintor Bros. & Merrill.

They also controlled, as agents:
Williams Ware & Co.
A. L. Bancroft & Co.

All the business of Taintor Bros. was consolidated by the American Book Company with the business of Sheldon & Co. and Taintor Bros. put out of business.

The Werner School Book Co. had the following history:
The Werner Company absorbed:
Porter & Coates.

The Werner School Book Company absorbed the school book business, in turn, of:
The Werner Co.,—and afterwards acquired Van Winkle & Co.
F. H. Butler & Co. absorbed:
Cowperthwait & Co.

The University Publishing Co. absorbed the school book business of:
Lippincott & Co.
The Standard School Book Co. absorbed certain rights of:
D. D. Merrill & Co.

The stock of many of the companies acquired by the American Book Company was secretly held for years, and the several concerns operated as competing establishments, notably:
E. H. Butler & Co.
Sheldon & Co.
The Werner School Book Co.
The Standard School Book Co.
The University Publishing Co.
Franklin Publishing Co.
Prang Educational Co.

In 1898, owing to the enactment of stringent anti-trust laws in several of the states and prospective legislation in others the American Book Company decided to divest itself of the legal title to the stock in these concerns. It was attempted to be accomplished in the following manner:

The American Book Company decided to organize another corporation under the laws of New Jersey, known as the Eclectic Press. They declared a dividend of 4 per cent on their capital stock of $5,000,000 amounting to $200,000. This money was used to pay for stock in the Eclectic Press. The corporation took the money and

paid it back to the American Book Company for its printing plant and some other property at Cincinnati. The American Book Company then sold to the Eclectic Press its interest in the following companies, viz:

University Publishing Company.
E. H. Butler & Co.
Sheldon & Co.
Standard School Book Co.
Franklin Publishing Co.
Prang Educational Co.

The American Book Company received the note of the Eclectic Press for $1,800,000 in payment for its stock in said concerns. It was the purpose of the American Book Company in organizing the Eclectic Press to have the corporation wind up all the above corporations and put them out of business. They have practically succeeded in their purpose which was accomplished as follows:

The Eclectic Press consolidated the business of:
E. H. Butler & Co.—and
Sheldon & Co., under the name of
Butler, Sheldon & Co.

They afterwards sold to the American Book Company all the publishing rights of Butler, Sheldon & Co., The Standard School Book Co., Franklin Publishing Co., and those three concerns were wound up and existence ceased.

While the Eclectic Press was closing out—
Butler, Sheldon & Co.
The Franklin Publishing Co., and
The Standard School Book Co. the American Book Company was also winding up the affairs of the Werner School Book Company which was completed in January, 1903.

In December, 1906, we find the following companies remaining under the same control:

The American Book Co.
The Eclectic Press.
University Publishing Company.
Prang Educational Co.

The last three being for all purposes subsidiaries of the American Book Company, which company also had close contractual relations with the Indiana School Book Company. It was evidently clear to the managers of the American Book Co. that the maintenance of the several companies mentioned, coupled with the closing out of the other concerns under its influence and control was illegal under the laws of many of the States. Therefore, in order to purify its organization of the taint of illegality a process of further consolidation was decided upon to finally end in complete reorganization, and the incorporation of a new company to hold singly all the business and property of the consolidated concerns.

Hoping that by this process to escape the legal consequences of all former illegal holdings in other concerns and by reducing their affairs into the hands of a new corporation to comply with the technical requirements of law, this decision was then put into effect as follows:

In 1906 a portion of the publishing list of the University Pub-

lishing Co., including Maury's Geographies, was bought by the American Book Company. The remnant remaining was purchased recently by Newson & Co. and D. C. Heath & Co., the capital stock of the University Publishing Co. reduced to $50,000. It has been divested of all its publishing rights and can no longer compete.

The stock of the Prang Educational Co. was sold to the corporation itself and merely its note, unsecured, given in payment therefor.

All the payments received by the Eclectic Press for the sale of these properties were turned back to the American Book Co. as a credit upon its original note of $1,000,000, practically all of which were merely paper transactions.

The University Publishing Co., and the—

Prang Educational Company being thus eliminated, in December, 1907, the American Book Co. by resolution of its Board of Directors ordered the organization of a new corporation under the laws of the State of New York with the same name, same capital stock and other identical features. This was accordingly done and all the franchises, publishing rights and property of every kind and charatcer, real and personal, was transferred to it, and the New Jersey corporation is to be extinguished. Both, however, are existing today and have permits to do business in Texas.

The New Jersey corporation is filling a State contract for Maury's Geographies. The New York corporation is seeking to contract with the State for the same book. However, it is quite likely that by the time the Board considers this report the American Book Co. of New Jersey will have ended its existence, leaving its successor, the American Book Co. of New York, the owner of the contract with this State originally entered into by the State with the University Publishing Co., as all necessary legal steps to that end have been completed. Therefore, we find that the publishing rights, franchises and property, both real and personal, tangible and intangible, of a large number of firms and corporations have been finally consolidated into the present corporation recently organized for that specific purpose, and out of a total of 3289 publications now on the active list of the American Book Company nearly 2000 were acquired from rival concerns through this process.

The question now presented is whether this new corporation is an illegal concern which can be held responsible for carrying out illegal contracts and agreements made by its stockholders and other corporations prior to and subsequent to its organization.

The question has been somewhat complicated by reason of some technical advantages growing out of such reorganization, and it is but just to say that the eminent counsel of the corporation, both in New York and Texas, are sincere in their opinions and belief that the Company has met the legal requirements of our laws. Their assumption must rest upon the theory "that the corporation is a legal entity separate from its stockholders, that in it are vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf, by its corporate agencies acting within the legitimate scope of their powers; that the new corporation not having any connection with any other corporation it could not sin."

The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is universally accepted in all cases where the question at issue is one within the scope of the legal powers of the corporation. But when the stockholders of a corporation do acts that are ultra vires, or if the stockholders in conjuction with the corporation, or acting for its benefit in their personal capacity, engage in an undertaking prohibited by law the legal fiction of a separate entity is abrogated and the act of the stockholders is to be regarded as the act also of the corporation for which it is amenable to the law.

The clearest expression to be found upon this point is in the language of Mr. Justice Minshal of the Supreme Court of Ohio in the case of State ex rel. vs. Standard Oil Co., 49 Ohio Reports, 177.

This was an action to oust the Standard Oil Co. of the right to be a corporation on the ground that it had abused its corporate franchises by becoming a party to the Standard Oil Trust Agreement. The defendant answered that the corporation as such did not become a party to the agreement, but admitted that certain of its stockholders did transfer their stock to the Trust, but the act was the individual act of the stockholders for which the corporation was not responsible and could not control.

In treating the fiction that a corporation is a legal entity, existing separate and apart from its stockholders, the learned Judge in that case, said:

"Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and because convenient, should not be called in question; but where it is urged to an end subversive of its policy or such is the issue, the fiction must be ignored, and the questions determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such, but as a matter of fact to control the corporation, and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise then, in one department of the law, fraud would enjoy an immunity awarded to it in no other."

It therefore follows that when acting within the scope of its legal powers the corporation may be regarded as a separate legal entity, but when engaged in an undertaking not expressed in its charter powers or necessarily incident to such powers, and when the quality of the act is unlawful within itself or is intended to evade legal responsibility for former acts, then, in that case the corporation will not be regarded as a separate entity but is clearly chargeable with all the preceding acts of its stockholders in furtherance of the common design.

Again, Justice Minshal, speaking in the same case, says:

"The idea that a corporation may be a sparate entity, in the sense

that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, where the question is, as to whether a certain act was the act of the corporation, or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false, as to a true result."

Now let us consider the facts and purposes incident to the organization of the new corporation, with a view to determining whether it, as a corporation, is chargeable with the acts and purposes of the persons organizing it.

It will be borne in mind that soon after the organization of the American Book Co. in 1890, at which time five leading houses combined their business, that the company embarked upon the policy of acquiring a controlling interest in rival and competing concerns, such as the—

University Publishing Co.
The Werner School Book Co.,
The Standard School Book Co.,
E. H. Butler & Co.,

Sheldon & Co., and perhaps others, and continued to operate same as competing concerns: that in 1898 in an attempt to evade the effect of anti-trust legislation the Eclectic Press, another corporation, was organized by the American Book Co. and the stock in all of its subsidiaries, except the Werner School Book Co., was transferred to the Eclectic Press for which it merely executed its note.

The instructions given to the Eclectic Press required that concern to put the companies transferred to it out of business as it could conveniently wind up their affairs.

The Eclectic Press being controlled by the American Book Company was compelled to obey its will, and proceeded to sell to the American Book Co., its master, the publishing rights and other property of such corporations, the last of its holdings not being disposed of until 1907. It was then decided by the stockholders controlling the American Book Co. to destroy that corporation and organize a new one by the same name, having the same capital stock and to transfer to it all the property acquired through this process of consolidation and otherwise.

The corporation acquiesced in this determination and entered into an understanding with its stockholders that it should be done. In order to prepare itself for regeneration, it divested itself of many of its relations with other concerns, and then by resolution of its board of directors ordered that the American Book Co. of New York should be organized. This occurred December 10, 1907. On December 23rd, 1907, it was announced at a meeting of the board of directors of the old company that the new company was organized.

It will not be successfully denied that up to this point many of the acts of the old company and its subsidiaries were in violation of law. The old corporation is still in existence unless it has been been finally destroyed within the last few days. We therefore find that since December 23rd, 1907, the old corporation, the new corporation and the shareholders and directors of both concerns have been mak-

ing contracts, agreements and transfers of properties and franchises from one corporation to another; that it is the purpose and intention of the new corporation to maintain and carry out all the contracts made by the old concern or made between the two corporations; that all the property and franchises that had been illegally acquired or held by the old company would be held by the new company. The same minds which conceived and executed all the illegal transactions incident to the history of the old company are the same minds that are behind the affairs of the new company.

The new corporation possessing no will of its own, being incapable of acting independently of the will of its stockholders, the stockholders being the identical stockholders who consolidated the competing concerns into the old company, then willed its death and the creation of the new concern, it must follow that such process was incapable of any power of regeneration, but whatever of taint of illegality corrupted the old organization, was transferred with the corpus of the property and franchises which were conveyed bodily and undivided from one holding to the other and the whole transaction became a contract or agreemet between two corporations and a body of shareholders, for which said stockholders, directors and the present corporation may be held legally liable.

If the old corporation was amenable to the law for any of its acts, its directors and stockholders having a knowledge of and agreeing to its illegal transactions were also guilty under the law. The stockholders and directors of the new corporation being the same individuals, if they incurred legal liability while with the old company, are still liable, for the statute of limitation does not run against the State for offenses against the anti-trust laws, and the attitude of the new corporation is that of a new party coming into a conspiracy already formed.

The theory that having organized an entirely new corporation and transferred to it all the property of the old, that the new entity cannot be an illegal concern is untenable.

This action was taken as the result of an agreement between the old corporation and its shareholders, which agreements were afterwards ratified by the new corporation and its shareholders by proceeding in accordance with the original plan and purpose to take over the property and assets of the old concern and carrying out all the agreements incident to the original plan. This action constituted a combination between the two corporations and their shareholders.

In the case of Ford vs. Chicago Milk Shippers Association, 27 L. R. A., 302, the Supreme Court of Illinois declared that a corporation and its individual stockholders may in controlling it, together with it, create such a trust or combination that will constitute it, with them alike, guilty. In that case some 1500 milk men organized a corporation which handled the milk for all its members, who in each instance were shareholders in the corporation. At the time of the organization of the corporation there was no anti-trust law in force in that State. Subsequently an act was passed prohibiting the formation of pools, trusts, etc.

This corporation was adjudged an illegal concern, a trust maintained by an illegal combination between the corporation and its

stockholders. Mr. Justice Phillips, in the course of his opinion, says:

"When the acts of the corporate body are violative of the statute of the State which would be a misdemeanor which would subject to punishment in accordance with law, such acts are wholly without the lawful power of the corporation, as the State will create no body with authority to violate its laws, and when the organization of the corporate body, or the control exercised by the stockholders in determining the agencies selected for managing its business, the business as thus conducted, managed and controlled, is against public policy, or in contravention of the statute of the State. Such acts of the corporate body and of the individual shareholders are the combined acts of all, and the courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be no immunity to evasion of the policy of the State by its own creations."

In the creation of the new corporation the State did not bestow immunity upon the stockholders of the old corporation for the illegal acts thereofore enacted through the instrumentality of the old corporation, and as one of the purposes of the shareholders in organizing the new concern was to destroy legal liability for former transgressions, to that extent the purposes of its organization and the objects sought to be accomplished were illegal and unauthorized by the laws governing the creation of corporations, and was not a purpose which a corporation may include in the scope of its powers.

It is a well settled rule that where a corporation, either directly or indirectly, identifies itself with and unites in carrying out an agreement, understanding or purpose the performance of which is injurious to the public or unauthorized by the powers conferred upon it, it thereby offends against the law of its creation and forfeits all rights to its franchises and judgment of ouster may be rendered against it.

People vs. N. R. S. R. Co., 121 N. Y., 626.
People vs. N. R. S. R. Co., 54 Hun., 386.
State vs. Pa. & O. Canal Co., 23 Ohio St., 121.

An individual who offends against the law cannot escape the consequences of his unlawful act by changing his name. Likewise an aggregation of individuals operating through the instrumentality of a corporate entity cannot escape the consequences of their transgressions by changing the name of their entity. It is the same aggregation of individuals in each case. While the effect of such a change may abate the cause against the old corporation as such, yet the new corporation is liable for carrying out the agreements for the time expired since its creation, and the stockholders for the entire period before and since covered by such unlawful acts. But if for any reason any doubt should exist as to the foregoing conclusions, other facts equally important will sustain the opinion reached, among which may be mentioned the following:

The stockholder owning a majority of the stock of the new American Book Co. also own a majority of the stock of the Eclectic Press. The Eclectic Press is a corporation of even more extensive charter powers than the American Book Co., possessing the right to publish

books and do every act necessary to make it a competing concern with the American Book Co., but by reason of its control and domination by both the old and new book company it has never been permitted to exercise its power in that direction, but has actually been employed as an instrument to destroy competition between the book companies and the other subsidiary companies acquired by the American Book Co. This clearly violates the anti-trust laws of this State.

Again, the American Book Company sustains certain contractual relations with the Indiana School Book Co. that do not meet the spirit of our laws.

The American Book Co. also has an exclusive contract not to publish any other Latin grammar in competition with the one now on their list, whihc is also not permitted under the laws of this State.

There are other pertinent facts which might be mentioned, but I deem it unnecessary for the purposes of this report to extend its length further on this phase of the question.

It is my opinion that the foregoing facts will exclude the American Book Co. from the right to do business under the laws of this State, and while some of the things complained of may not violate the laws of other States, yet if it can be said that a concern may pursue a career such as marks the history of the American Book Co., and after years of secret alliance with supposed competitors, and after their final destruction through its will, many of which doubtless would have remained active competitors in that business, it can escape legal and moral responsibility for such acts by merely going through the form of securing a new charter for its business, then indeed do the people stand helpless before the predatory aggression of corporate ingenuity.

ADDITIONAL STATEMENT.

I consider it my duty to call your Excellency's attention to the American Publishers' Association, an organization embracing ninety-five per cent of the business of the trade in literature and fiction. The objects of this association were to adopt a net price system for all copyright books published or controlled by any member of the association, and to maintain such prices. The association undertook to fix the prices both at wholesale and retail and agreed not to furnish or sell any dealer who failed to maintain such prices.

They also organized what is known as the American Booksellers' Association, an organization of dealers in books, which co-operated in carrying out the purposes of the Publishers' Association. The president of the Publishers' Association, until recently, was Mr. Charles Scribner's Sons, and the headquarters of the association is opposite their place of business, 153 Fifth avenue, New York.

The following publishers who submitted bids in Texas at the recent adoption are members of that asosciation:

Charles Scribner's Sons, New York.
D. Appleton & Co., New York.
Houghton, Mifflin & Co., Boston.
The McMillan Co., New York.
Little, Brown & Co., Boston.

Longmans, Green & Co., New York.

In February, 1904, the association was declared to be an unlawful combination in restraint of trade under the laws of New York by the highest court in that State in the case of:

Isador Straus vs. American Publishers Association et al.

Their agreements were also held to be violative of the Sherman anti-trust act by the United States Circuit Court, February, 1905, in two cases:

Bobbs-Merrill Co. vs. Straus et al., 139 Federal Rep., 155.

Chas. Scribner's Sons vs. Straus et al., 139 Federal Rep., 193.

In 1907 the association made some modification in their printed by-laws; nevertheless the organization and membership are still maintained.

I also discovered during my investigation that the connection between the American Book Co. and the University Publishing Company that a very close relationship existed between Newson & Co., who were awarded the contract for language and grammar at the recent adoption, and the president of the University Publishing Co., Mr. C. L. Patton.

For the last several years Mr. Patton held the controlling interest in the University Publishing Co. in his name for the use and benefit of the American Book Company. Newson & Co. recently purchased the publishing rights for a large list of books from the University Publishing Co. Newson & Co. and the University Publishing Co. occupy the same offices at 27 West 23rd Street, New York. They have the same telephone number.

Mr. J. W. Manson was, until recently, the secretary and treasurer of both companies at the same time and a stockholder in each company until January 18th of this year, when he sold his stock in the University Publishing Co. in order to be qualified to make the oath required by the Text Book Board. He sold his stock to Mr. H. C. Dukeshire, his brother-in-law, who resides in the same house with himself in Brooklyn.

The Beuhler Grammar, published by Newson & Co., and adopted in this State, was acquired by Newson & Co. from the American Book Co. Many of the books submitted in Texas were secured from other publishers, notably the King's geographies offered by Scribner's, were acquired from the Lothrop Publishing Co. of Boston. The Morse readers offered by Silver-Burdette & Co. were acquired from the Morse Publihsing Co. Many other transactions of the same nature by other publishers might be cited.

The most important matter outside of the investigation of the American Book Co. which came to my attention and which I feel it my duty to call to your attention is the method employed by some of the book concerns in evading the anti-trust laws of the several States. It is accomplished by the agents in the field pooling their interests by means of . . . . which the business is divided, a slate made and the parties in the pool uniting their strength in securing the adoption of books represented in the pool. These methods were employed in several recent State adoptions, notably in Montana and Kansas. In Montana the scheme was exposed in an open meeting of the board by

the Superintendent of Public Schools of Helena, who was a member of the board. In a letter relating to the episode he said:

"A plan of campaign was temporarily attempted here and came to light which made it necessary for our commission to hew the line and to discard the books which had been 'slated' for adoption by the people who were trying to 'pull off the deal.'"

Some of the same agents operating in Montana were active in the recent adoption in this State, and some of them secured contracts.

The text book law provides that the State may cancel contracts for fraud or collusion upon the part of either party to the contract, or any person, firm or corporation, or their agents. The law authorizes the Attorney General to bring such suits.

You are respectfully advised that I am instructed by the Attorney General to say that he will in due time file suits for the cancellation of such contracts as in his judgment may have been secured through fraud or collusion.

We have therefore considered it proper to bring this matter before your Excellency in this report for the information of yourself and the Text Book Board for such consideration as may be deemed proper and for such action as you may desire to take. The operations of some of these parties in other jurisdictions have been reprehensible and the methods empolyed to secure adoptions are far from commendable and will meet with your Excellency's condemnation. No cause has excited a deeper interest than our public schools. Next in importance to the selection of proper teachers is the selection of the best text books. The founders of this State bequeathed to the cause of education a domain equal in extent to an empire. No people ever bestowed a more munificent endowment upon unborn generations or left to posterity such a heritage, a perpetual guaranty of enlightenment throughout all the generations of the earth.

The fact that many of the publishing houses have not scrupled to employ in other states the most questionable means in securing adoption of their books, methods that resolve the selections into a species of favoritism that eliminates merit, will challenge the careful consideration of your Excellency and those interested in safeguarding the welfare of the children of Texas. When such influences are employed in the selection of books and demoralizing agencies are thus directed at the very foundation of educational institutions, and are thereby brought within impressionable range of the child mind, well may it behoove constituted authority to impose a strong arm into a situation fraught with such consequences to the future of the State and nation.

Respectfully submitted,

JEWEL P. LIGHTFOOT,
Assistant Attorney General.

Conclusions approved by

R. V. DAVIDSON,
Attorney General.

ANTI-TRUST LAW—EFFECT OF, UPON CONTRACTS OF LABOR UNIONS WITH MERCHANTS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 3, 1909.

Mr. L. B. Brewster, President Sherman Retail Clerks' Union, Sherman, Texas.

MY DEAR SIR: The Supreme Court of the United States having affirmed the judgment of the courts of the State of Texas upholding the constutionality of the anti-trust laws of this State and the validity of Chapter CLIII of the Acts of the Legislature of 1899, the same being "An Act to protect working men in the right of organization and the purposes thereof," I will now pass upon the question submitted by you relating to the legality of the contract which your union has made with certain merheants in the city of Sherman.

It has been the uniform custom of this Department not to render official opinions upon questions, when similar questions, or the statutes upon which they depended for their validity, were pending before the courts for adjudication, hence the necessary delay in responding to the question submitted by you.

The contract in question, in substance, provides that the union shall lease to the merchant a "union store card," and to advise all local labor organizations of the city of such action, for and in consideration of which the merchant agrees not to employ any except members of such union, or such as will within a certain period of time become members of such union, and the merchant further agrees to close his place of business on certain holidays and at certain hours in the evening.

You desire to be advised whether such a contract violates the anti-trust laws of Texas.

You are respectfully advised that Chapter CLIII of the Acts of 1899 provides as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That from and after the passage of this act it shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service in their respective pursuits and employments.

"Sec. 2. And it shall not be held unlawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit in which such person may then be engaged: provided, that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

"Sec. 3. But the foregoing sections shall not be held to apply to any

combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose of restraint of trade; *provided, that nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employes;* provided further, that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies."

By the express terms of this statute in section three the Legislature has exempted from the provisions of law, contracts "with regard to the time of service, and other stipulations between employers and employes."

The Court of Civil Appeals of the Third Supreme Judicial District, in the able and well considered opinion of Judge Key, in the case of the State vs. Waters Pierce Oil Co., 106 S. W., 918, held that the above statute did not create any exemptions in our anti-trust laws.

Under this decision, which was affirmed by the Supreme Court of the United States, it follows that this statute and the anti-trust laws are in consonance. The above statute authorizes contracts between employers and employes relative to time of service and *other stipulations*.

The contract does not attempt to fix or affect the prices of commodities to be sold, does not attempt to affect competition in the sale of goods, it is not an agreement or contract between two or more merchants who might be competitors.

We are, therefore, of the opinion that the contract submitted does not violate the anti-trust laws of the State of Texas.

Yours very truly,
JEWEL P. LIGHTFOOT.
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-TRUST—SUNDAY LAW—AGREEMENT BETWEEN BREWERIES AND WHOLESALE BEER MEN.

An agreement between breweries and wholesale beer agencies not to sell beer to any one guilty of violating the Sunday law, or one who is charged with violating said law, until said charge has been acted upon by the grand jury or the courts, is in violation of Sub. 1 of Sec. 3 of the anti-trust laws of this State.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 27, 1909.

Mr. W. H. Perrett, Chief of Police, Galveston, Texas.

DEAR SIR: We are in receipt of yours of the 24th, from which I quote the following language:

"The breweries and wholesale beer agents doing business in Galveston are willing to lend their assistance in enforcing the Sunday law here by mutually agreeing between themselves, in writing, that they will not sell or supply either keg or bottled beer to any one operating under a license in this city who may be arrested for violating the Sunday law and will discontinue the sale of same, either directly or indirectly, to such person, until the charge against him has been acted upon and disposed of either by the grand jury or the courts."

You desire to know whether such an agreement and acting jointly under it would violate the anti-trust laws of the State of Texas.

You are respectfully advised that Subdivision 1 of Section 3 of the anti-trust laws of this State provides, among other things, as follows:

"That either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons who are engaged in * * * selling any article of merchandise * * * enter into an agreement or understanding to refuse to * * * sell to any other person, firm, corporation or association of persons, any article of merchandise * * * ."

This language is plain and unambiguous, and prohibits persons engaged in the sale of any article of merchandise from making any agreement or reaching any understanding with their competitors that they will not sell to any other person. The statute makes no exceptions under which such an agreement might be lawfully made. Again, the licensed dealers have a legal right to sell their goods on the six days of the week, excluding Sunday. They have a right to purchase goods for sale on such days and any agreement or understanding to refuse to sell to such persons on such days would undoubtedly violate the provisions of our laws. However laudable the motives actuating the parties concerned, the policy of the law is that the courts and not individuals shall punish persons for violating the criminal laws of the State.

In a former opinion of the Attorney General delivered in August, 1908, it was held that the breweries and agents of breweries might make a lawful agreement not to sell their goods to perosns to be resold by them within prohibited territory defined by the ordinances of the city of Galveston until such ordinances could be tested in the courts. In that case the beer was intended for sale in a prohibited territory in violation of law. The persons purchasing same had no legal right to sell it on any day within the limits of the territory for which the purchase was made, and having prior knowledge of the fact that the persons intended to make sales in violation of law in a territory where they were not authorized to sell, it was held that such an agreement was not violative of the anti-trust laws.

But in the case now presented the dealers propose to suspend all sales, either directly or indirectly, to any person who may be arrested for violating the Sunday law and to refuse to sell to such person until the charge against him has been acted upon and disposed

of either by the grand jury or the courts. Under such an agreement a person may be depirved of the right to purchase for many months, and upon final trial of the case establish his innocense.

The licensed dealer, as aforesaid, has the legal right to purchase and sell such goods on the six working days of the week. The agreement would operate to prevent him from purchasing supplies during the period when he may lawfully sell, which clearly violates the provision of law above set forth.

If the breweries and agents desire to co-operate with the city authorities in suppressing violations of the Sunday law they may legally do so without any agreement or understanding such as is proposed. Where they have information that the law is being violated by one of their patrons there is nothing in the law to prevent the brewery from refusing on his own initiative and responsibility to sell goods to such person, but the law will not permit any agreement between out of the agreement which constitutes the offense and which is prohibited by the law.

Yours very truly,
JEWEL P. LIGHTFOOT,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-TRUST LAWS—CORPORATIONS—MERGER OF INSURANCE COMPANIES.

Merger of two foreign fire insurance companies, each of which has heretofore been granted permit to do business in this State, is unlawful, and Commissioner should refuse to grant new certificate to consolidated company.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 19, 1910.

Hon. William E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Some time since you submitted to us the following statement and query:

"The Fidelity Fire Insurance Company of New York, N. Y., and the Phenix Insurance Company of Brooklyn, N. Y., were each organized under the insurance laws of the State of New York and for the last several years each has been granted a certificate of authority authorizing it to transact business in this State.

"On the 25th day of January, 1910, said companies entered into an agreement which is hereto attached, whereby said corporations were merged and consolidated, the name of the corporation formed under said merger and consolidation being 'Fidelity-Phenix Insurance Company of New York.'

"Under the anti-trust laws of Texas does such consolidation constitute valid and sufficient reason for now refusing to such new corporation a certificate of authority to do business in this State?"

Replying to same, we wish to say that Chapter 94 of the General Laws of 1903 defines a trust as follows:

"Sec. 1. That a trust is a combination of capital, skill or acts by two or more * * * corporations * * * for either, any or all of the following purposes: 1. * * * To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State. 2. To fix, maintain, increase or reduce * * * the cost of insurance. 3. To prevent or lesson competition in * * * the business of insurance."

Section 2 of said act defines a monopoly in the following manner: "That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act."

These are probably the only provisions of our anti-trust law which are pertinent to the inquiry made.

It appears from your letter that the Fidelity and Phenix Insurance Companies, both organized under the insurance laws of the State of New York, have been transacting a fire insurance business in this State for several years past under certificates of authority from your Department. The effect of the consolidation of these two companies and their merger into a new corporation is to withdraw the activities of said companies as independent and competing concerns in the transaction of the business of fire insurance in this State. The further effect of such consolidation and merger, if the new company be granted a certificate of authority, is to pool the interest of the hitherto independent and competing companies in the field of fire insurance in this State.

It is true that at the time of the said merger and consolidation the practical effect of the act of the Thirty-first Legislature, commonly known as the State fire rating law, was to obliterate competition in the matter of charges and collection of premiums on fire insurance, and it might be argued that the said action of the two insurance companies named, in forming the new corporation, could not be deemed to have had the purpose or effect of affecting or lessening competition in such business or of creating restrictions in the free pursuit thereof, or of fixing, maintaining, increasing or reducing the cost of insurance. Under the decision of our Supreme Court in State vs. Shippers Compress Company, 95 Texas, 603, it must be conceded that this argument is entitled to some weight, but we do not consider that case as decisive of the question here presented. Indeed, we know of no authoritative decision of this or any other State, nor of any Federal decision, which affords a conclusive answer to your question. The matter is one of much doubt, and we do not feel prepared to advise you to grant a certicate of authority to do business in this State to the "Fidelity-Phenix Insurance Company of New York," as it is by no means certain that our courts would not hold illegal the transaction of fire insurance in Texas by such new corporation, under and in pursuance of the agreement made by the two insurance companies and under and in pursuance of the merger and consolidation resulting from such

agreement. Upon the contrary, we are of the opinion that the said action of these insurance companies affords valid and sufficient reason for your refusing the new corporation a certificate of authority to do business in Texas. If thereby the new corporation feels aggrieved and considers that the agreement, merger and consolidation referred to does not authorize you to refuse this certificate, it has an easy and adequate remedy and may apply to the courts for redress. This suggestion is made in view of the conceded doubtfulness of the question.

We return herewith the agreement and charter submitted to us.

Yours very truly,

WM. E. HAWKINS,
Assistant Attorney General.

OPINIONS CONSTRUING ANTI-PASS LAW.

ANTI-PASS LAW.

Railway company can not legally furnish free transportation to employes of its contractors who make uniforms for its trainmen, not being bona fide employes of railway company.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 19, 1909.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: We are in receipt of yours of the 13th inst., enclosing copy of letter addressed to you by W. B. Drake, vice president and general manager of the St. Louis, San Francisco and Texas Railway Company, submitting a question under the Anti-pass Law. Mr. Drake desires to know whether a railway company may furnish free transportation to the employes of its contractors who make uniforms for its trainmen.

It is our opinion that such persons are not bona fide employes of railway companies within the meaning of the Anti-pass act of this State. It appears from a quotation in Mr. Drake's letter that the Interstate Commerce Commission published a ruling on March 2, 1909, wherein it was held that a railroad company could grant free transportation to the employes of persons contracting to furnish railroad companies' employes with uniforms without violating the act of Congress commonly known as the Hepburn Act. Whether the above decision was correct under the act referred to, it is not necessary for us to consider. We do not think that our statute is subject to such construction.

It has been held that the term "employes" indicates persons hired to work for wages as the employer may direct and does not embrace the case of the employment of a person carrying on a distinct trade or calling to perform services independent of the control of the employer. (See Canfield vs. Lang, 25 Federal, 128, 131.)

In the case of Vance vs. Newcombe, 132 United States, 22, the Supreme Court of the United States held that an "employe" is a person bound in some degree at least in the duties of a servant and not a mere contractor bound only to produce or cause to be produced a certain result. To the same effect see Tod vs. Kentucky Union Ry. Co., 52 Federal, 241; 18 L. R. A., 305.

In the case of Ney vs. Dubuke & S. C. Ry. Co., 20 Iowa, 347, it was held that "employe", as used in a statute requiring the payment of the employes of the railroad, refers to conductors, agents, superintendents, those engaged in operating the road, and the like, and not to contractors or persons building or constructing the road bed or laying down the ties and rails. To the same effect see Foley vs. Chicago, Rock Island & Pacific Railway Company, 21 Northwestern, 124.

Yours very truly,

JAS. D. WALTHAL,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-PASS LAW—RAILROADS.

A contract between a railroad company and a contractor under which contractor undertakes to furnish meals for his employes working upon the railroad, the railroad company furnishing boarding cars free of charge and furnishing transportation for the contractor and his employes is in violation of the anti-pass law of this State.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 18, 1909.

Messrs. Terry, Cavin & Mills, Galveston, Texas.

GENTLEMEN: We have delayed answering your letter of the 8th inst., because of the importance of the question involved and the consideration due it:

In said letter you say:

"A railway company can not secure men to work along the line of the road without in some way providing a method by which the men can secure meals. It has been the custom of the railway company to make a contract with some contractor, under which, in substance, the railway company supplies boarding cars which are moved up and down the line of the road as may be required and under which the railway company carries, without charge, the supplies of the contractor used in supplying the men with meals and furnishes transportation without charge to the contractor and his employes and furnishes to the contractor, without charge, the necessary water, ice and fuel. On the other hand, the contractor undertakes to furnish wholesome meals to the men for a certain amount per week. Of course the price that the contractor charges for the meals is figured in part on the free service as above indicated which he receives from the railway company and so in effect this free service is furnished to the employes of the company who no doubt to some extent consider the amount which they have to pay for meals in determining what charges they are willing to work for.

"We had in effect a number of these contracts when the anti-pass law took effect, which of course, under the decision of our Supreme Court, must be complied with. We, however, now reach the point where it is necessary to make some new contracts, and we will be obliged for the opinion of the Attorney General's Department on the point whether such contracts are prohibited by the anti-pass law."

It is our opinion that a contract such as the one referred to above would be in violation of the anti-pass law. It can not be upheld upon the theory that the free services would be a part of the consideration of the contract, because the anti-pass law provides that none of the companies embraced within its provisions shall sell any transportation for anything except money.

The contract could be sustained if it could be held that the contractor and its employes would, in effect, be employes of the railroad company; but this we think they would not be, should the contract be entered into. An employe is a person bound in some degree

at least to the duties of a servant of the employer and whose services are preformed under the direction and control of the employer. It has been held that the term "employes" indicates persons hired to work for wages as the employer may direct and does not embrace the case of the employment of any person carrying on a distinct trade or calling, performing services independent of the control of the employer. See Campfield vs. Lang, 25 Federal, 128-131; Vance vs. Newcombe, 132 U. S. 22.

In the latter case the plaintiff having contracted with the company to erect certain telegraph wires on the company's poles and furnish the labor of himself and others in doing the work claimed a priority lien under a statute of Indiana, which gave a lien to employes of croporations.

The Supreme Court said:

"It seems clear to us that Vane was a contractor with the company, and not an employe, within the meaning of the statute. We think the definition pointed out by the Circiut Court is a sound one, namely, that to be an employe, within the meaning of the statute, Vane must have been a servant bound in some degree at least to the duties of a servant, and not, as he was, a mere contractor, bound only to produce or cause to be produced a certain result—a result of labor to be sure—but free to dispose of his own time and personal affairs according to his pleasure, without responsibility to the other party."

See also Todd vs. Kentucky Union Ry. Co., 18 L. R. A., 309, and note; Clarke vs. Renninger, 44 L. R. A., 413; Frick vs. Norfolk & O. V. R. Co., 86 Federal, 738.

By the Century Dictionary an employe is defined to be one who works for an employer, a person working for a salary or wages, usually clerks, workmen, laborers, etc. A contractor, by the same authority, is defined to be one who contracts to furnish supplies or to construct work or erect buildings or perform any work or services at a certain price or rate.

The significant element in the relation of an employe and his employer specifically considered is personal services, while the significant element in such relation between a contractor and his principal is work as an entity to be performed by him.

In the case of Balch vs. New York O. M. R. Co., 46 New York, 521, it is held that the word "employe" implies the personal service and work of the individual, that it does not include one who contracts for and furnishes services of others or who contracts for and furnishes a team or teams for work, with or without his own services.

See also Fidelity & Deposit Company vs. Parkinson, 94 Northwestern, 120-122; Foley vs Chicago, R. I. & P. Ry. Co., 64 Iowa, 644; 21 Northwestern, 124; Ney vs. Dubuke & S. C. R. Co., 20 Iowa, 347-357.

Yours very truly,

JAS. D. WALTHAL,
Assistant Attorney General.

RAILROADS—CONSTRUCTION OF LAWS—ANTI-PASS LAW —CONTINENTAL CASUALTY COMPANY—PRE-EXISTING CONTRACTS.

Contract between railway and Continental Casualty Company, entered into in 1903, to run for two years, and thereafter to be renewed yearly by mutual consent of parties is not a pre-existing contract as applied to anti-pass law which was enacted in 1907.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 5, 1910.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: We are in receipt of your letter of the 23rd ult., in which you request the opinion of this Department in reference to the question contained in a letter written by Mr. J. W. Donalson, dated February 21st, in which Mr. Donalson refers to a contract executed on the 2nd day of October, 1902, between certain Texas railroad companies and the Continental Casualty Company, and requests to know whether or not the railroad companies who are parties to said contract may legally issue free transportation to the agents of the said Continental Casualty Company in accordance with the stipulations contained in said contract.

It is not necessary to here set out said contract in full or to refer to all of its covenants.

The contract bound the railroad companies to permit the authorized agents of the Casualty Company to solicit and place accident insurance among the employes of said companies and gave them access to the railroad shops and round houses of such companies for the purpose of soliciting such business. The companies also undertook to make collections of premiums due by its employes. The Casualty Company agreed to write said policies at the regular tariff rates, dividing the premiums into three or six annual installments and released the employes from the last payment in cases where the premiums were divided into three equal payments and released the last two payments when the premiums were divided into six annual payments, thereby, reducing the regular tariff rates of insurance to the employes of the railroad companies by one-third, this, in consideration of the several stipulations contained in said contract. The railroad companies among other things agreed to furnish in furtherance of the business of the Casualty Company free transportation for one supervising officer and one adjuster and for the necessary soliciting agents to properly attend to such insurance business. Said contract contains the following stipulation:

"This contract is to be in force for a period of two years, from January 1, 1903, unless sooner terminated by mutual consent of the parties in writing or by failure of the second party to comply with any provisions hereof on its part to perform and from year to year after the expiration of said period of two years subject to the additional condition that the first parties or second parties may, by 90 days' notice in writing, terminate this agreement by the end of any year after the expiration of said period of two years."

I take it for granted that it would not be contended that a contract containing the provision referred to, binding a railroad company to furnish free transportation to the officers and agents of the insurance company, would, if made since the enactment of the Anti-Pass Law by the Thirtieth Legislature, be valid as to such agreement. In other words, there can be no question but that since the enactment of the Anti-Pass Law it would be unlawful for a railroad company to enter into a contract binding itself as a part of the consideration moving from it to grant to the contracting party free transportation, unless the contracting party be included in one of the exceptions contained in Section 2 of Chapter 42, Acts of the general Laws of the Thirtieth Legislature.

The only question, therefore, is whether or not the contract under consideration, having been executed prior to the passage of the Anti-Pass Law, would be subject to its provisions. It has been frequently given as the opinion of this Department that the Anti-Pass Act was not intended and did not violate obligations in existence at the time of its enactment. We are of the opinion, however, that the stipulation as to the life of said contract above quoted shows the intention of the parties to be that said contract should only be binding for two years and thereafter to be renewed by the consent of both parties, if mutually agreeable. Any renewal either expressly or implied by the parties continuing to perform under it would have the effect only to extend said contract for one year subject to the further provision that by 90 days' notice in writing either party would have the right to terminate it. In other words, the Casualty Company had no vested right in the stipulations contained in said contract beyond January 1, 1905. At that time said parties by continuing to perform the terms of said contract would have continued its terms until the first of January, 1906, and so on, the contract being renewed on the first of January each year after the first of January, 1905.

Mr. Donalson in his letter states that since the Anti-Pass Law went into effect the railway company ceased to issue the transportation, believing that if it did so it would be in violation of that law. The parties having adopted this view on the first day of January, 1908, and on the first day of January, 1909, and on the first day of January, 1910, it would seem that on those several days the contract had been mutually renewed with the exception of the stipulation contained in the contract whereby the railway companies undertook to furnish free transportation to the agents of the Casualty Company.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-PASS LAW—TRANSFER COMPANY.

Not a discrimination against the public for a railway company to permit transfer man, or give him the exclusive privilege of going upon its trains for the purpose of soliciting baggage, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 9, 1910.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: We have your letter of February 28th, enclosing a letter from Messrs. Anderson and Dumas, of San Angelo, Texas, of date of February 25th, in which it is stated that:

"The Santa Fe Railway Company has made a contract with an individual transfer man, not a corporation, giving him the exclusive privilege of going upon the trains for the purposes of soliciting baggage and transfer business from the passengers upon the trains coming into San Angelo. The transfer man has a contract by the terms of which he pays regular fare for an employe who goes upon the train and solicits this class of business, he in turn carries the United States mail to and from the railroad company trains to the postoffice at this place, and at stated times receives a compensation for carrying such mails, an amount equal to the amount of passenger fare paid by his employe who goes upon the train for the purpose of selling passenger and baggage transfers at this place."

The opinion of the Commission is requested as to whether or not the contract constitutes a violation of Section 4 of the Anti-Pass Law contained in Chapter 42 of the Acts of the Regular Session of the Thirtieth Legislature "as being a device or exchange by which there is a discrimination."

You request the opinion of this Department upon the above question.

Section 4 of the act referred to is as follows:

"No company subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device or exchange, demand, charge or collect or receive from any person, firm, association of persons or corporation a greater or less or different compensation for any service rendered or to be rendered, in the transportation of passengers, property or messages than it charges, demands, collects, or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions, and any such company violating these provisions shall be deemed guilty of a misdemeanor, and for each offense, on conviction shall pay to the State of Texas a penalty of $5000."

The fact that under the contract entered into between the Santa Fe Railway Company and the "transfer man" the company pays back to the transfer man as a consideration for the delivery by the transfer man of the mails at the postoffice exactly the same sum of money which the railroad receives from the transfer man as fare at

the regular rates for carrying him upon the trains of the company while he is engaged in soliciting patronage from the passengers upon the company's trains, strongly indicates that the real agreement between the parties is, and should be treated as if in express terms it stated, that the railroad company agreed to transport the "transfer man" upon its trains for the purpose of permitting him to solicit business from its passengers in consideration of the transfer man's agreement to deliver the mail carried by the railway company from the railway station to the postoffice in the city of San Angelo.

For the purposes of this opinion, we will treat the contract as if it had been expressed in the term last above mentioned.

We conceive that the purpose of Section 4, above quoted, is to prevent and make unlawful discriminations, it matters not how affected, upon the part of railway companies, in performance of their duties, as common carriers, in the transportation of either passengers or freight. We do not think its purpose extends beyond this. Permitting a person to board its trains for the purpose of soliciting transfer business is not a duty the common carrier owes to the public. This principle was substantially decided in the case of Lewis et al. vs. Weatherford, M. W. & N. W. Ry. Co., 81 S. W. Rep.: 111. In that case, speaking of a common carrier, the court says:

"He may carry on in connection with his business of carrier any other business, and may use his property in any way he may choose to promote his interest, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons. For instance, the sale of books, papers, or refreshments are common incidents to the business of a carrier by certain modes of conveyance; and the carrier may avail himself of the opportunity which his business gives him to supply the special wants of travelers in these and other respects, and appropriate to himself the profits of the business and exclude third persons from entering the car or vessel to carry on the same business in opposition to him. He may grant or refuse the privilege at his option. In this no right of the passenger is invaded. The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that, in matters not falling within the contract of carriage, the carrier shall surrender in any respect rights incident to his ownership of his property. So also, a carrier may establish for the convenience of passengers and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and exclude all other persons from entering to solicit or receive orders from passengers in competition with the agency established by him."

A railroad company having the right to regulate and restrict the business of soliciting for transfer business upon its trains, its granting the privilege to do such business to a certain person which it refuses to other persons can not be said to be a discrimination in favor of the person to whom such privilege is granted, for the rea-

son that it does not owe the duty of granting such privilege to the public, or to any person at all. It was further said in the case above quoted:

"A properly regulated transfer service on passenger trains in this day is not only a convenience, but practically a necessity. The means adopted by appellee in this case, or some similar method, is practically the only plan by which such business can be regulated at all. To admit all transfer agents would amount not only to an inconvenience to the traveling public, but would render it well nigh impossible to establish any rules or regulations in regard to the business whatever."

It is a well settled rule that in construing a statute in order to ascertain the intention of the Legislature we would look to "the old law, the mischief and the remedy," and thereby try out the right intendment of the law.

In the case of Russell vs. Farquhar, 55 Texas, page 355, the Supreme Court says:

"If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction to, in fact, abrogate their own power and usurp that of the Legislature, and cause the law to be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise by the Legislature to express its intent, and to follow which would pervert that intent."

The well known purpose of the Legislature in the enactment of the Anti-Pass Law was to prevent discrimination by railroad companies in their business of serving the public in the carriage of passengers and freight.

If it should be held that the agents of transfer companies come within the terms of the Anti-Pass Law and that a railroad company by a special contract with a transfer company would be guilty of discriminating against other transfer companies, the result would probably be to deny the traveling public the convenience which has for many years been afforded by railroad companies to its passengers in making arrangements, whereby such passengers upon their trains before reaching their destination could make arrangements for the prompt delivery of their baggage at the place to which they were destined.

You are, therefore, advised that in our opinion the contract between the Santa Fe Railway Company and the "transfer man" at

San Angelo does not violate the Section 4 of the Chapter 42 of the Acts of the Thirtieth Legislature.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ANTI-PASS LAW— RAILROADS —TRANSPORTATION OF CORPSE.

Railway company may issue free transportation for remains of an employe or dependent member of his family. Said privilege may be extended by other companies upon request.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 3, 1910.

Hon. Allison Mayfield, Chairman Railroad Commission of Texas, Capitol.

DEAR SIR: In compliance with a verbal request made by the Commission, we have given consideration to the three questions stated in the letter of Mr. D. B. Keeler, Vice President of the Fort Worth & Denver City Railway Company, of date of May 4, 1910, and have reached the conclusions hereinafter stated. The questions are as follows:

"1. Can we issue transportation over our own line, and can other lines issue transportation for the remains of an employe of this company whether such an employe is killed in an accident or dies a natural death, such transportation to be used immediately after death occurs?

"2. Can we issue transportation over our own line, and can other lines issue transportation on our request for the entirely dependent members of the immediate family of a deceased employe of this company, such transportation to be used immediately after the death of such employe?

"3. Can we issue transportation over our own line, and can other lines issue transportation on our request for the remains of a member of the family of one of our employes, such person before death having been entirely dependent for support upon such employe, such transportation to be used immediately after death occurs?"

We find that the first question was practically passed upon by this Department in an opinion to the Commission written by the Honorable Claude Pollard, then an Assistant Attorney General, dated October 14, 1907, in which it was stated that the Anti-Pass Law of 1907 would not permit transportation free to the place of burial of an employe who is killed at some point along the line or road other than his home or who dies of disease at such point. The opinion then given was based upon a construction of the following exemption contained in Section 2 of the Anti-Pass Law (Chapter 42, General Laws, 1907), to wit:

"Also persons injured in wrecks along the road of any such company immediately after such injury and the physicians and nurses attending such persons at the time thereof."

The exemption from the general prohibition provisions of the act given in the first part of said Section 2 to "the actual bona fide employes of any such companies and the dependent members of their immediate families" was evidently not thought at the time to permit railway companies to transport to their homes for burial the bodies of their employes who might be killed in accidents upon the railway, or who might die away from their homes.

Upon a careful re-consideration of the subject, we have reached the conclusion that the former opinion of the Department above referred to was erroneous. We believe that the erroneous view adopted arose from a failure to give proper construction to the exception contained in the first part of said Section 2 of the act referred to. Said exception is in the following language:

"That the provisions in Section 1 of this act shall not be held to prohibit any steam or electric or interurban railway company or chartered transportation company or sleeping car company or the receiver or lessees thereof or person operating the same or the officers or agents or employes thereof, from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited to the following persons: The actual bona fide employes of any such companies and the dependent members of their immediate families. The term employe shall be construed to embrace the following persons only: All persons actually employed and engaged in the service of any such companies, including its officers, bona fide ticket, passenger and freight agents, physicians, surgeons and general attorneys and attorneys who appear in courts of record to try cases and who receives a reasonable annual salary, and also ex-employers (ex-employes) within four months after leaving the service of any of such companies and while seeking employment".

The view of the Department at the time of the former opinion above referred to was given that the language above quoted did not extend to permitting a railway company to transport for burial the body of a person who died in the service of said company, was doubtless based upon the assumption that the word "employe", as used in this connection, would not include the corpse of a person who had been in the employ of the company but whose death had severed the relation of employer and employe and that the dependent members of the family of such deceased employe could not claim to be the members of the family of an actual bona fide employe of the railroad company after the death of such employe. Such a construction of the language quoted is undoubtedly in consonance with the literal meaning of the language employed. However, we do not believe that this literal interpretation of the language employed represents the intention of the Legislature in enacting the law. It is well established in the authorities that a literal interpretation of a statute will not be adopted by the courts whenever from proper consideration the courts reach the conclusion that such literal interpretation does not represent the will of the Legislature.

We take the following language from Sedgwick on Construction of Statutory and Constitutional Law, page 256:

"And the intention is sometimes to be collected from the cause or necessity of such statute and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason, and discretion the construction of the statute, although such construction seems contrary to the letter of the statute; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."

Lewis' Sutherland Statutory Construction, Section 347, contains the following language:

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention."

From the same work we quote further:

"If a statute is valid it is to have effect according to the purpose and intent of the law maker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may be not consistent with the strict letter of the statute. Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act." (Section 363).

Revised Statutes of this State, Article 3268, lays down certain rules of construction. The 6th rule is as follows:

"In all interpretations the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

The Anti-Pass Law, enacted by the Thirtieth Legislature, was passed pursuant to a platform demand of the dominant political party of this State. While it is not necessary to go outside of the act itself to find with reasonable certainty the evils intended to be corrected, it is still permissible that we consider the facts within the memory of all which created in the minds of the people of the State the conviction of the necessity for remedial legislation of the character of that enacted. It was the common opinion before the passage of the law that the custom of railway companies in favoring certain persons with free transportation had grown to be an evil which affected the well being of the citizenship of the State. It was recognized that such practices resulted in discrimination in favor of certain persons to the injury of other persons who were not the recipients of such favors.

This, for the reason that the Railroad Commission of the State is vested with authority to reduce rates for the transportation of freight

by railroad companies to a point that will yield to such companies only a just compensation for the value of their property employed in the service of transportation. It is readily seen that if railway companies may render services to certain persons without charge, the proportion that other persons who are charged must pay for services rendered them will be greater considering that the revenues of the railroad must reach a certain level before they may be reduced in the interest of the public.

A second evil was that it was believed, whether justly or not, that the giving of free passes to persons in official position and to persons influential in political affairs had a tendency to make such persons favorable to the contentions of transportation companies in matters of proposed legislation where the interests of such companies were involved and in matters where the interest of such companie might be involved in the proper administration of the laws. That the Legislature recognized that the above mentioned evils were the evils to be corrected, clearly appears from the act itself. It is so apparent that we deem it unnecessary to elaborate upon this statement.

Section 1 of the act contains a general prohibition making it unlawful for any steam or electric railway company, street railway company, interurban railway or other chartered transportation company, express company, sleeping car company, telegraph or telephone company, etc., to knowingly haul or carry any person or property free of charge or give or grant to any person, etc., a free pass, frank or privilege or a substitute for pay or a subterfuge which is used or which is given to be used instead of the regular fare or rate for transportation or any authority or permit whatsoever to travel or to pass or convey or transport any person or property free, or sell any transportation for anything except money or for any greater or less rate than is charged to any and all persons under the same conditions over any railway or other transportation line or part of line in this State, etc., and penalities are prescribed.

Section 2 contains various exceptions to the general prohibition contained in Section 1. The first of these exceptions is the one in favor of actual bona fide employes, as above quoted. The exceptions provided for in Section 2 evidence the fact that in the opinion of the Legislature such exceptions constituted no part of the evil, for the correction of which the law was enacted. Prior to the passage of the law it had been the custom of railway companies to transport their own and the employes of other railroads free of charge. This was the custom not only in Texas but over the United States generally. The railroad companies not only transported free their employes, but the dependent members of such employes. It was also customary on the part of railroads to grant free transportation to ex-employes for a limited time after such employes had left the service of the railroad companies. These privileges on the part of the employes of railroads, having been so long enjoyed, while probably not forming any express condition of the contract between railroad companies and persons entering their employment, doubtless in most cases influenced such employes in accepting positions with railroad

companies as part of the consideration they expected to receive for their services rendered the companies. Among the privileges extended by railroad companies to their employes of the character we are considering were the free transportation of the dead bodies of the employes to the place designated by their relatives for the burial of such employes, and the free transportation of dependent relatives of such deceased employes to and from burial service. It may be said that the railroad companies by this custom recognized the duty on their part to treat as existent the relation of employer and employe in cases where death overtook their employe while engaged in their service, until the last rites of burial of such employe had been performed, and in this regard recognized the bonds of a common humanity binding between employer and employe. At any rate, such was the custom of railroad companies in Texas at the date of the passage of the Anti-Pass Law.

The question for our consideration is whether or not it was the intention of the Legislature by the terms of the Anti-Pass Law to abolish this custom. We think not and believe that when they provided that railroad companies could, notwithstanding the general prohibitions of the act, give free transportation and free franks and privileges to employes and the dependent members of the families of such employes, that they intended to include such privileges in reference to the free transportation of the dead bodies of employes as had been before the passage of the act customary.

Applying the rule, above quoted from Sutherland, that when the general intent of a statute is understood the words may be held to embrace or effectuate that intent, we believe that the word "employes" and "the dependent members of their immediate families" as used in the language above quoted from Section 2, should be so construed as to permit railroad companies to carry free to the place of burial the dead bodies of their ex-employes as well as dependent members of their immediate families. The law clearly exempts employes of railroad companies, and the exemption is even extended to a period of four months after a person leaves the service of the company. Now, if the company can legally carry an ex-employe alive four months after the termination of his services, I can not find it logical to say that the Legislature intended that the company be denied the right to carry the dead body of an actual bona fide employe to the place of burial.

The intention of the Legislature in enacting the Anti-Pass Law was to prevent discrimination and to prevent railroad companies by granting free passes or franks to influential persons or to persons charged with the administration of the law, from indirectly gaining advantages in matters of legislation affecting their interests or in matters of the due administration of the law. That in order to effectuate these purposes the Legislature did not consider it necessary to entirely prohibit the issuance of free passes and franks, is evidenced by the exceptions contained in Section 2. In other words, the Legislature did not deem the giving of free passes or franks to actual employes and the dependent members of the families of such employes an evil that needed correction. Certainly no distinction can

be drawn between the character of the act of a railway company in giving privileges of the kind under consideration to an employe and his family immediately before the death of such employe and the act of transporting free to the place of burial the body of an employe, who has died in the service of the company and the free transportation of members of the family of such employe to the place of burial, except that the latter act upon the part of the railway managers, because moving more entirely from humanitarian impluses, would more readily be commended by generous minded men. It is not to be conceived that the Legislature intended that this custom of railway companies in contributing to the expense incurred in honoring with proper burial the bodies of their deceased employes should be forbidden and made subject to a penalty by a narrow or a strict construction of the language which we have above considered.

In view of the above considerations, we are of the opinion that the first question above stated should be answered in the affirmative. That in answer to the second question it may be stated that railway companies may transport over their own line free dependent members of the immediate family of a deceased employe to the place of the burial of such employe, and that other companies, upon request, may likewise grant free transportation to such members of the family of the deceased employe.

The third question should be answered in the affirmative. The case stated is clearly within the language contained in Section 2 of the Anti-Pass Law, permitting railway companies to grant free franks and privileges to their actual bona fide employes and permitting other companies to grant free such franks and privileges to the employes of other roads.

Truly yours,

JEWEL P. LIGHTFOOT,
Attorney General.

OPINIONS RELATING TO BOND MATTERS.

CONSTRUCTION OF LAWS—DRAINAGE DISTRICT ACT DEFECTIVE.

Refusal of Department to approve bonds of Port Arthur drainage district; reasons therefor.

Port Arthur Drainage District Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 14, 1909.

Hon. R. W. Wilson, County Judge of Jefferson County, Beaumont, Texas.

DEAR SIR: In the matter of the application of the above district to this Department for the approval of a certain issue of drainage bonds, I beg leave to advise you that I have duly considered the act of the Thirtieth Legislature, approved March 23rd, 1907, and known as Chapter 40 of the published laws.

After a very careful consideration I am of the opinion that I cannot approve any bonds of any drainage district created and issued under that act for the following reasons:

First. Section 2 of said act provides that upon the presentation to the county commissioners court of a petition signed by the persons therein authorized to present such petition for any proposed drainage district the commissioners court shall at the session when said petition is presented set same down for hearing at some regular or special session called for the purpose not less than thirty nor more than sixty days from the presentation of said petition, and shall order the clerk of said court to give notice of the date and place of said hearing by posting a copy of said petition and the order of the court thereon in five public places in said county, one of which shall be at the court house door and four of which shall be within the limits of said proposed drainage district.

From the above recitation of Section 2 of the act it appears that the Legislature has attempted to create what is known in law as constructive notice of this hearing to be had by the commissioners court for the drainage district, but failed to provide the length of time or the number of days such notice should be posted before the date of such hearing.

It is well settled law that in all statutes providing or attempting to provide for constructive notice such statutes and the proceedings thereunder are to be strictly construed, and that no court will hold constructive notice as complete and binding and effective, unless the statute providing for such notice is explicit, certain and complete in every respect.

Section 5 provides that after the hearing of the petition for said drainage district as provided in Sections 3 and 4 of the act, if the court should find in favor of the petitioners for the establishment

of a district according to the boundaries as set out in said petition, or as *modified by said court*, then the court shall appoint a competent civil engineer, etc.

It appears that the Legislature has attempted by this section (5) to authorize the commissioners court to change or modify the limits of the proposed district for which application has been made, without at the same time requiring or providing for a notice of any kind to be given of the contemplated action of the commissioners court in changing or modifying the limits of said district; in other words, as the law now stands, if the first notice had been legally provided for and had been completed and the commissioners court had the power to pass upon the application for the drainage district as outlined in the application or petition, yet if such court should thereafter change the limits of the district as attempted to be authorized by the act, persons whose property was not in the original drainage district, but which was placed therein by this modified order would have no notice or hearing whatever of such change.

Second. Section 10 of said act provides that when the report of the engineer shall have been filed with the clerk of the county commissioners court, it shall be the duty of said court to set such report down for a hearing at some regular or special session not less than twenty nor more than thirty days from the date of such setting, and to instruct the clerk of said court to give notice of said hearing by posting notices in the same manner as provided for in Section 2 of the act in regard to the original notices of the hearing on the original petition.

The same objections to this section are made as made to Section 2 as to the absence of any law fixing the length of time for the posting of notices of each hearing.

Section 11 of said act authorizes the commissioners court after the hearing to approve the report of the engineer. It is provided, however, in the same section that the commissioners court shall not be confined to this report of the engineer, but shall make such changes as to drains, ditches, canals and levees as it may deem necessary and proper.

In the event the commisisoners court should seek to exercise this power and modify or change the report of the engineer, there is no pretense of any provision in this section requiring the notice by the commissioners court of any such propoesd changes, which is absolutely necessary to bind the party or parties affected.

Third. Section 12 provides that after the approval of the report of the engineer as provided for in the preceding section (Section 11) the county commissioners court shall order an election to be held, etc.

There is no provision for any election to be held if the commissioners court should not approve the report of the engineer, and if said court should modify or change the same according to their discretion and judgment, then in such case there is no authority for the commissioners court under this act to order an election.

Fourth. Section 13 provides that notice of such election shall be given, stating the time and place of holding same, but no length

of time is fixed for the giving of such notice. While Section 14 says the manner of conducting said election shall be governed by the election laws of the State of Texas, except as herein otherwise provided, yet it will be noted that the language is the *manner of conducting said election;* that is, the officers holding the election, the hours for the election, manner of receiving ballots and counting the same, etc., all bear upon the manner of *conducting* the election and do not relate to the notices to be given of an election thereafter to be had.

This act being of great importance to your and other sections of the State, I have attempted to give my views fully as to the defects in the present act in order that this act may be amended by the present Legislature in the particulars mentioned.

Yours very respectfully,

R. V. DAVIDSON,
Attorney General.

CONSTRUCTION OF LAWS—DRAINAGE DISTRICT LAW.

Bonds upon which the Attorney General has heretofore issued his certificate of approval are valid, except, etc., notwithstanding an irregularity in the law under which they were issued.

Matagorda County Drainage District No. 1 Improvement Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 16, 1909.

Hon. John M. Corbett, Bay City, Texas.

DEAR SIR: I am requested to advise your county officers as to the validity of this issue of bonds in view of an opinion rendered by this Department on the 14th inst. to the effect that no more drainage district bonds will be approved under the present law, and I am writing you as attorney for this district upon this subject.

This Department did not hold the drainage law invalid, and did not hold bonds heretofore issued by districts invalid. The Department only held that by reason of the insufficient provisions in said Act to make clear the manner in which the commissioners court should exercise the authority therein granted, no more bonds would be approved until the confusion contained in the act was cleared by amendments thereto.

It is clear to our mind that the amendment to Article 3, Section 52, of the Constitution of the State, adopted in 1904, authorizes the creation of drainage districts and the issuance of bonds; and it is also clear that Chapter 40 of the Acts of the Thirtieth Legislature authorizes the commissioners court to establish such districts and to issue bonds therefor.

It seems that each bond issued by your district contains substantially the following provision:

"It is hereby certified and recited that all acts, conditions and things required to be done and performed pursuant to and in the issuance of these bonds have been properly done and performed and

have happened in due and regular time, form and manner as required by law, and that the amount of this issue of bonds does not exceed any constitutional or statutory limitation."

This provision in the face of the bonds has been held to constitute an estoppel against a municipality or public corporation to plead any irregularity as a defense to a suit for their collection.

Humboldt Township vs. Long, 92 U. S., 642.
Marcy vs. Township of Oswego, 92 U. S., 638.
Town of Elmwood vs. Marcy, 92 U. S., 289.
Anderson County Commisisoners vs. Beal, 113 U. S., 227.
Lincoln vs. Cambria Iron Co., 103 U. S., 412.
American Life Ins. Co. vs. Bruce, 105 U. S., 328.
German Savings Bank vs. Franklin Co., 128 U. S., 526.

Aside from this question of estoppel we find that Section 24 of the drainage act, reads in part, as follows:

"It shall be the duty of the Attorney General to carefully examine said bonds in connection with the facts and the Constitution and laws on the subject of the execution of such bonds, and if, as the result of such examination, the Attorney General shall find that such bonds were issued in conformity with the Constitution and laws, and that they are valid and binding obligations upon such drainage district by which they are issued, he shall so officially certify * * * and in every action brought to enforce collection of said bonds the certificate of the Attoney General or duly certified copy thereof shall be admitted and received in evidence of the validity of such bonds, with the coupons thereto attached; provided, that the only defense that can be offered against the validity of the bonds shall be forgery or fraud."

This is substantially copied from Sayle's Civil Statutes, 918f.

The Supreme Court in construing the effect of this certificate in the City of Tyler vs. Tyler Building & Loan Association, 86 S. W. Rep., 750, and in construing the effect of the recitals contained in the ordinance authorizing an issuance of bonds by said city, and the recitation of the bonds themselves, held that refunding bonds issued by said city which were called in question were valid and binding obligations upon the city, notwithstanding the fact that they had been issued to refund a bond issue which was clearly invalid and void.

It is therefore my opinion that by recitations in the bonds issued herein referred to and the effect of the certificate of this Department approving the same, your bonds are binding and valid obligations upon your district, notwithstanding the refuasl of this Department to further approve drainage bonds under the present act by reason of the confusion that exists in many provisions thereof.

It is not the policy of this Department to approve bonds even though the certificate of approval might render valid bonds so irregularly issued as to otherwise be invalid. In other words, the Department has pursued a policy of approving bonds only where the proceedings were entirely regular, and in this instance we do not intend to depart from such a policy, but simply to call your attention to our opinion as to the effect of the recitals in the bonds, and

the effect of the certificate issued by the Department with reference to this issue of bonds, by reason of the fact that the decision of the Department not to approve any more bonds of drainage districts until the law authorizing such issuance was amended in several particulars, might be construed as the opinion of the Department that bonds heretofore issued by drainage districts and approved by this Department are invalid.

Yours very truly,

J. T. SLUDER,
Assistant Attorney General.

TAX COMMISSIONER.

Bond of continues in force until expiration of term for which he was originally appointed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 15, 1909.

Hon. L. T. Dashiell, Tax Commissioner, Capitol.

SIR: I am in receipt of your letter, which is as follows

"Hon. W. R. Davie was appointed Tax Commissioner of the State of Texas by Governor S. W. T. Lanham on January 2, 1906, and he qualified on same date. This appointment was made under the act of the Twenty-ninth Legislature, creating the State Tax Board, etc., Chapter XVII, Acts of the First Called Session of the Thirtieth Legislature, creating the State Intangible Tax Board, provided in Section 1 that 'The present Tax Commissioner, heretofore appointed, shall hold his office until the expiration of the time for which he was originally appointed, and until his successor shall have been appointed and qualified.' The Act of 1905 provided for the appointment of a Tax Commissioner whose term of office should be two years. In January, 1908, I was appointed Tax Commissioner, etc., made bond and otherwise qualified as required by law. The Legislature was not in sesison when my appointment was made but upon the convening of the Thirty-first Legislature my appointment was sent to the Senate and confirmed. I am of the opinion that the bond which I made upon my appointment in January, 1908, and the commission that was then issued to me continues in force until the term for which I was originally appointed expires. I respectfully ask your written opinion upon this point to the end that the Comptroller may be advised as to the proper course to pursue in the matter of issuing my salary warrant for the month of February, 1909."

In reply I beg to say that I agree with you in your conclusion that the bond which you made upon your appointment as Tax Commissioner and the commission which was then issued to you continue in force until the expiration of the term for which you were originally appointed.

Respectfully,

R. V. DAVIDSON,
Attorney General.

BONDS—EXCESS INTEREST AND SINKING FUND AFTER REDEMPTION.

Where a city voted bonds in 1889 for school building purposes, providing for interest and sinking fund, and subsequently city assumed control of its schools, thereby becoming an independent school district, redeeming bonds previously issued, leaving excess fund collected as interest and sinking fund for said bond issue, board of trustees and not the city is entitled to the use of said fund, the same to be expended for like purposes as original issue.

City of McKinney School Building Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 27, 1909.

Hon. J. R. Gough, McKinney, Texas.

DEAR SIR: I am in receipt of your letter of the 22nd inst, addressed to the State Superintendent of Public Instruction and by him referred to this department for reply. In your letter you state that this series of bonds has been fully paid and all interest thereon, and that you have left on hand $1216.43, and you desire to know what disposition should be made of this fund, and whether or not this is a city fund or a fund belonging to the board of trustees of your city, to be used by them for school purposes.

In reply, I wish to advise that this question presents one of serious difficulty and I have had some difficulty in arriving at a proper conclusion. I had a letter of the 4th instant, from the Mayor of your city, asking what should be done with the funds and whether or not it could be transferred to other city funds and appropriated to other purposes. In his letter he stated the bonds were issued in 1889 and were redeemed in 1907, and there was nothing in his letter relative to the city of McKinney having assumed control of its public schools, thereby becoming an independent school district, and I answered his letter with the question as he presented it before me to the effect that the fund, as it appeared being a city fund, could be transferred to the general fund of the city or any other fund and appropriated to such other purpose as might be decided by the city council.

Since answering his letter, however, I have been advised both by your letter and the records of the State Superintendent's office that for many years McKinney has been operating as an independent school district, having assumed control of its public schools within a short time after the issuance of this series of bonds.

I wish to call your attention to Section 133, *et seq.*, Chapter 124, Acts of the Twenty-ninth Legislature, and especially to Section 136 of that Act, which reads as follows:

"In all cities and towns in this State which have assumed or may hereafter assume exclusive control and management of public free schools within their limits, and which have determined or may hereafter determine that such exclusive control and management of the public free schools within their limits shall be in a board of trustees, * * * the title to all houses, lands and other property owned, held,

set apart or in any way dedicated to the use and benefit of the public free schools of such city or town, including property heretofore acquired, as well as that which may hereafter be acquired, shall be vested in the board of trustees and their successors in office, in trust, for the use and benefit of such public free schools of such city or town, and such board of trustees shall have and exercise and exclusive control and management of such school property, and shall have and exercise the exclusive possession thereof for the purpose aforesaid * * *.

"And such board of trustees shall constitute a body corporate and shall have full power to protect the title, possession and use of all such property within the limits of such city or town, and may bring and maintain such suit or suits of law or equity, in any court of competent jurisdiction, when necessary to recover the title or possession of any such property that may be adversely held or seized, or to prevent any trespassing upon, in or to such property * * *."

This, it occurs to me, covers the question of your inquiry and determines the title to this excess of $1216.43, which is evidently included within the term property in the provisions of the Act above referred to.

Aside from this Act, there is a general principle of law that no tax fund shall ever be used for any other purpose than that for which it was levied and collected.

This tax fund having been levied and collected for the paying off of a bonded indebtedness incurred by the city for school purposes would require the expenditure of such fund for that purpose and no other; but as that obligation of the city has been discharged and this surplus of such fund left on hand, it would, nevertheless, if properly expended, be expended for the construction of additional buildings or the purchase of ground for additional buildings or the repair of existing school buildings.

It being a tax collected to redeem bonds issued for school building purposes and those obligations being discharged, it should, nevertheless, properly be expended only for school improvement purposes.

With that general rule of law well recognized and the provisions of the statute referred to, it seems that this fund is a school fund and is subject to the control of and disbursement by the board of school trustees of your city, who should have had the custody and control of the fund since its accumulation, and that my letter to Mayor Doggett was an error in holding that it was a city fund.

Yours truly,

J. T. SLUDER,
Office Assistant Attorney General.

CONSTRUCTION OF LAWS—DRAINAGE DISTRICT LAW.

Where petition to commissioners court fails to contain necessary allegations prescribed in said law to fix jurisdiction upon said court to act, all subsequent proceedings are void.

Hidalgo County Drainage District No. 1 Improvement Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, March 30, 1909.

Hon. D. B. Chapin, Chapin, Texas.

DEAR SIR: In compliance with your request relative to this proposed bond issue, I wish to call your attention to the provisions of the petition to the commissioners court to create this district, which reads as follows:

"We the undersigned resident citizen tax payers of Hidalgo County, Texas, constituting a majority of the freehold resident city tax payers whose lands shall be affected by the hereinafter proposed drainage district, would respectfully show to your honorable court:

"1. That there exists a great necessity for the construction and maintenance of canals and drains for the purpose of drainage within the drainage district hereinafter proposed; that by the establishment of a drainage system with such latterals, spurs, drains, inlets and outlets as may be found necessary, many thousands of acres of land along the proposed route can be utilized for farming, truck-growing, etc., and portions of the richest land in the county utilized which are now subject to overflows and can not be utilized on account of lack of drainage facilities.

"2. Your petitioners would, therefore, respectfully propose the construction and maintenance of a drainage district to be known as Drainage District No. 1, Hidalgo County, Texas, and the said district to be within the following proposed boundaries, to wit."

You will bear in mind that:

1. This petition does not recite that the signers thereof reside in the proposed drainage district.

2. It does not show that the lands of such petitioners are incorporated within the boundaries of the proposed district.

3. It does not show that as many as twenty-five of such petitioners are freehold resident property tax payers of such district, nor that a third of such freehold resident property tax payers of such district signed such petition.

You will observe from the provisions of Chapter 40, Acts of the Regular Session of the 30th Legislature, Section 2, under which these proceedings were instituted, reads as follows:

"Upon the presentation to the county commissioners court of any county in this State of a petition * * * signed by twenty-five of the freehold resident citizen tax payers, or in the event there are less than seventy-five freehold resident citizen tax payers in the proposed district, then by one-third of such freehold resident citizen tax payers of any proposed drainage district, whose lands may be affected thereby, praying for the establishing of a drainage district and setting forth the necessity, public utility and feasibility and proposed boundaries thereof, and designating a name for such drainage district, which name shall include the name of the county. The said commissioners court shall at the same session when said petition is

presented set same down for hearing at some regular or special session of said court called for the purpose * * * ."

You will observe that all of the statutory requirements are not embodied in your petition—the essentials of which, it occurs to me necessary to confer jurisdiction upon the court are lacking, in that the petition fails to show that the petitioners are either freehold resident citizen tax payers of the district, or that they constitute one-third of such taxpayers of the district, or that twenty-five of such signers are freehold resident citizen tax payers of the district. This is a jurisdictional question and it occurs to me without these essentials embodied in the petition the court acquired no jurisdiction to hear and determine the facts alleged in the petition.

County of North Dakota vs. Cheney, 22 Neb., 437.

Dodge County vs. Acom, 61 Neb., 376.

C. K. & W. R. R. Co. vs. County Commissioners of Chase County, 43 Kansas, 760.

County Commissioners of Chase County, 43 Kansas, 760.

Rich vs. Mentz Township, 134 U. S., 632.

Andes vs. Ely, 158 U. S., 312.

1st Abbott on Municipal Corporations, 427.

2nd Parham on Water and Water Rights, pp. 1003-1013.

It seems it is wholly immaterial what the facts are relative to the qualifications of the signers to such petition as it appears from the authorities cited and the provisions of the Act referred to that it is the allegation in the petition which confers the jurisdiction upon the court, and under the authorities cited all subsequent proceedings are absolutely void where the petition fails to contain the necessary allegations to fix jurisdiction upon the court to act in the premises.

We are, therefore, compelled to reject your record as the same can not be approved.

Yours very truly,

J. T. SLUDER,

Office Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—STATE RAILROAD—BONDS—PENITENTIARY SYSTEM, MAINTENANCE OF—PERMANENT SCHOOL FUND, INVESTMENT OF.

Legislature has authority to pass act authorizing Penitentiary Board to issue bonds, the proceeds from the sale of which are to be used to complete State railroad three miles to Palestine; State Board of Education authorized to invest permanent school fund in bonds so authorized, said bonds being "State bonds" and within the classification of bonds in which the Constiution authorize sinvestment of permanent school fund.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, May 3, 1909.

Hon. A. B. Davidson, Lieutenant Governor, Austin, Texas.

DEAR SIR: I beg to acknowledge receipt of yours of the 24th in which you request to be advised by this department whether in

our opinion the bill which passed the House relating to the completion of the Penitentiary railroad and the issuance of certain bonds violates the Constitution of this State.

In as much as the bill, as it passed the House, only authorized the completion of the road to Palestine, a distance of about three miles from its present western terminus, and the issuance of bonds amounting to only fifty thousand dollars in excess of those already issued under and by virtue of an Act of the Thirtieth Legislature, I will confine myself to the question submitted by you in so far as they relate to the bill as passed.

It can not be questioned that the State has the power to maintain a penitentiary system. While the Constitution is silent upon that subject, it is beyond a question a necessary function of government, and the Constitution contains no limitation upon the power of the Legislature to establish a penitentiary system for the safe keeping of convicts, or to establish industrial enterprises for their employment. The maintenance of such industries as would only in a slight degree compete with free labor has been the settled policy of this State for many years, and from time to time the Legislature has made provisions for their establishment, notably, the iron industry, the wagon and furniture factory and the provisions for the establishment of a cotton twine and bagging factory by the Penitentiary Board at the regular session of the present Legislature. The Thirtieth Legislature in which you had the honor to preside over the Senate, passed a similar bill to the one under consideration. (Chapter LXXIV of the Acts of the Thirtieth Legislature, page 151). The Legislature clearly expressed the purpose and necessity for the extension of the road as well as the legislative intent in the enactment of the bill, by the language used in the emergency clause which is in part as follows:

"The fact that there now exists no law *providing for means* for the extension of said State railroad, and the fact that the operation of said State railroad, and the fact that the operation of the Rusk Penitentiary *will be materially facilitated and cheapened* by such extensions and operation of said State railroad, as in this Act provided, and the fact that such extension *is necesasry to protect the timber and minearl resources of said Penitentiary,* creates an emergency, etc."

The Legislature has therein declared the imperative necessity of such an extension. The extension into the timber and ore lands, and the connection with another trunk line only a few miles distant from which it could receive its fuel for blasting and limestone for fluxing the ore, and also the additional outlet afforded for shipping the products of the penitentiary, are undoubted necessities. The Legislature is the one department of government to pass upon such a necessity, and having done so, it is clear that in the absence of constitutional limitation, it has the undoubted power to make the extension to the point where the necessities of the Penitentary, as expressed in the law, requires.

It has been repeatedly held that the presumption is that every State statute, the object and provision of which is among the ac-

knowledged powers of legislation, is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated.

Sedgwick on Construction Constitutional Law, p. 409.

Fletcher vs. Peck, 6 Cranch, 87.

Ex Parte McCollom, 1 Cowen, 564.

The necessity as declared by the Legislature for the extension through the ore and timber lands to a connection with another line or railroad is undisputed, and has been so affirmatively declared by the Legislature, and there being no constitutional inhibition aganst it in my opinon the Legislature clearly has the power to authoirze its construction to the extent authorized in the bill as it finally passed the House.

The next question is whether the Legislature has the power to borrow from the permanent school fund $200,000 to take up the former loan of $150.000 and to complete the three miles of line to its destination at Palestine, and to auuthorize the Penitentiary Board to issue bonds to that amount carrying a lien upon the line as security for the money.

There are three constitutional provisions which may appear to have some bearing upon this question. If neither of them prohibits the Legislature from enacting a valid law, then so far as my investigations have extended no constitutional objection can be found that questions the power of the State to provide the necessary funds in the manner prescribed in the bill.

The first constitutional provision I will consder is Section 49 of Article III which reads as follows:

"No debt shall be created by or on behalf of the State except tc supply casual deficiencies of revenue, repel invasions, suppress insurrection, defend the State in war or pay existing debts; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time $200,000."

The question is, does the bill attempt to create a debt by or on behalf of the *State*. The well settled rules of construction do not give to the laguage of the Constitution or of statutes any strained or technical meaning, but they are given the meaning in which the language or words are ordinarily understood. The word "State" as used in the Constitution has two meanings, and is used in both senses in different parts of the Constitution. In one sense it signifies the territory inhabited by the people; in the other it means the body politic inhabiting the territory. It is in the second sense that it is used in the above provision of the Constitution. Our Supreme Court and the Supreme Court of the United States in the case of Texas vs. White, have held that a State in the ordinary sense of the Consti tution is:

"A political community of free citizens occupying a territory of defined boundaries and organized under a government, sanctioned and limited by a written Constitution and established by the consent of the governed."

Texas vs. White, 74 U. S., 700.

State vs. White, 25 Texas, 465, 595.

Again the courts of this State say:

"A State is a political community organized under a district government, recognized and conformed to by the people as supreme; a commonwealth, a nation."

O'Connor vs. State, 71 S. W. Rep., 409.

An attribute of a State is sovereignty. Its laws, as a general rule, are supreme within its territory. It is a political corporate body, can act only through agents, and can only command by laws. It is, in the language of Vattel, "a moral person, having an understanding and a will, *capable of possession and acquiring rights* and of *directing and fulfilling obligations.*"

Republic of Mexico vs. De Arangoiz, 12 N. Y. Super. Ct., 634.

The State is vested with full power over all matters within the function of government not expressly inhibited by the Constitution. In such a capacity it owns its penitentiary system, its ore and timber lands to supply the raw material for the industries established to furnish employment for the convicts under its charge. It owns the general revenue raised for the support of the government. It owns the permanent funds created for the endowment of her schools and has clothed the Legislature with the power to invest said funds in the bonds of the United States, the State of Texas, or counties of 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.

Constitution, Section 4, Article VII.

Owning as it does the property of the penitentiary, including the ore and timber lands adjacent thereto, also the railroad penetrating them, and owning the revenue arising from its operation; owning, as sovereign, the general revenues of the State and the permanent school fund which it uses for investment only, can it be said that the action of using temporarily a small sum, properly secured, of one of its own funds, will have the effect of creating a debt against the State, or itself, within the meaning of Section 49, Article III of the Constitution. Would not the transaction be in the nature of an individual who kept his funds in separate accounts, his funds for groceries in one account, for dry goods, for medicine, for house rent in other accounts, and should he draw upon his grocery fund to relieve another necessity temporarily and placed the due bill of the dry goods account as security in the grocery fund, would he thereby be creating a debt against himself, especially when he owned it all. The word "debt" according to Webster "is that which is due from one person to another, whether money, goods or service. That which one person is bound to pay to another person, (not that which a person owes to himself, or that which he is bound to pay to himself.)"

Cook vs. Bartholomew, 13 L. R. A., 452.

A debt is that which one is bound to pay to another.

Lovejoy vs. Inhabitants of Foxcroft, 91 Me., 367.

A debt is a certain sum that is owing from one person to another.

Little vs. Dryer, 138 Ill., 272.

Anthony vs. Savage, 3 Pac., 546.

Appeal Tax Court vs. Rice, 50 Md., 302.

A debt is *created* when one person binds himself to pay money to another.

Scott vs. City of Davenport, 34 Iowa, 208.

A debt as defined by the Century Dictionary, is that which is due from one person to another, whether money, goods or services.

State vs. Georgia Co., 19 L. R. A., 485.

A debt is defined to be in its general sense a specific sum of money which is due or owing from *one person to another,* and denotes not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment.

Campbell vs. City of Indianapolis, 155 Ind., 186.

Neither the Penitentiary Board nor the State Board of Education which has charge of the investment of the school funds, are separate corporate bodies with powers or functions, inherently their own, but both are agencies of one and the same entity or person, namely, of the State, and when the State in the administration of its own property causes one agency to transfer temporarily to another of its own agencies, it is not creating a debt against itself within the meaning of that word as defined by the courts and standard dictionaries. It owes no obligation to any other person, no other person can sue on the obligation because in its true sense the State has merely used its own and promises itself that it will return to a certain fund owned by itself the funds it desires to use temporarily. Such a transaction is in no sense creating a debt by or on behalf of the State, for no other person is involved in the transaction but itself. The State would have no authority to issue or sell bonds to any other person, except in such cases as authorized by Section 49, Article III, of the Constitution.

If the bonds authorized by the bill were sold to an individual, bank, or any other person or association, it would then become a debt against the State, a claim or obligation due from the State to another person; but until such was accomplished it would not create a debt against the State. The exact point was passed upon by the Court of Civil Appeals of this State in the case of City of Austin vs. Valle, 71 S. W. Rep., 414, in which case the Supreme Court refused a writ of error.

The court used the following language:

"When is a 'debt created, and when are bonds issued' within the meaning of these provisions? If the debt is created when the people by an election consent that the council may issue the bonds, or if it is created, when the council by ordinance provides for the issue of the bonds, or even when the bonds have been prepared, signed and sealed, but not sold or delivered, then the appellant is right in its contention, and the issue was excessive. But we do not believe that the Constitution or the charter admits of such a construction. Neither the election or the ordinance providing for the issue of the bonds, nor the preparation, signing and sealing of the bonds, created any obligation against the city. All this might have been done and yet, if the *bonds had not been sold or delivered to a purchaser,* the city would have owed nothing. Certainly no debt would have been

created; neither do we think that the bonds could be said to have been issued until they passed into the hands of some one who claimed them as a debt against the city."

So long as the bonds are in the hands of the State they can not become a debt against the State. Moreover, to say that the State can not under proper restriction use funds of its own to carry on its own enterprises through its own instrumentalities, is to deny its sovereignty and its power to provide for its own necessities, admittedly within its own functions of sovereignty.

The next question is whether the permanent school fund can be invested in the bonds which the State issues to itself. No one who has seriously examined the subject will question the power of the Legislature to appropriate such a sum out of the general revenue of the State, especially after the necessity of the project has been declared by the Legislature and in view of the fact that the appropriation is for a propr object of governmental administration in a matter clearly within the functions of government.

The Constitution, Section 4, Article VII, provides * * * "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."

In the first place, the bonds authorized by the bill seem to be "State Bonds." They are bonds authorized by the State, through its Legislature to be issued by one of the agencies of the State to secure funds for a project owned and entirely controlled by the State. They will, therefore, come within the definition of that class of bonds which the Constitution expressly authorizes the funds to be invested in. In fact, it is my understanding that the permanent school fund owns at this time many bonds issued by the State, and that the public debt of the State, evidenced by bonds, are owned by the same fund. But if any doubt should exist whether the bonds provided in this bill are the kind of State bonds alluded to in the Constitution, then another provision in the same section vests in the Legislature the power and discretion to designate *such other securities,* and when the Legislature does so, as it provides in this bill, the bonds so issued will become a legal security in which the funds may be invested.

The Constitution lodges the power and discretion in the Legislature to designate *such other securities,* and legislative action will be binidng in all cases except in gross abuse of the power and discretion vested. I understand the facts to be that the railroad property which is pledged as a lien to secure the bonds is worth many thousands of dollars more than the money advanced in this bill, and that it affords ample security to the school fund for the amount required. Therefore, it can not be said as a matter of law that the securities are insufficient and that the requirement that they be accepted by the School Board would constitute an abuse of legislative power or discretion. The wisdom and policy of constructing said road and the use of said funds for such purpoes is not for this De-

partment to determine, but belongs to the Legislature, but as to your legal powers to construct such a road to meet the necessities of a State institution, I think there is no question.

The remaining section of the Constitution to be considered is Section 7 of Article VIII, which provides as follows:

"The Legislature shall not have the power to borrow, or in any manner divert from its purpose any *special fund* that may, or ought to, come into the treasury; * * * "

This provision uses the words "special fund," which means a fund distinguished from the general fund, or a permanent fund such as the school fund. It has reference to funds raised by taxation or otherwise for a specific function of government or to pay the current obligations arising thereunder. It cannot have reference to a permanent fund like the school fund, which the Constitution in express language authorizes to be invested, and to be invested in bonds of the State, and such other securities as the Legislature may prescribe. If the constitutional provision above quoted included the permanent school fund, then it would be in direct conflict. They must, therefore, be construed in *pari materia,* and, therefore, the last mentioned section is not a limitation upon the power of the Legislature to pass the bill you have under consideration.

The necessity for the extension of the road and the policy of doing so, in order to penetrate the ore and timber lands of the State, and to furnish an outlet for the products of the penitentiary and to furnish additional facilities for securing necessary supplies, is a matter clearly within the powers of the State, and is within the functions of the government, against which I find no constitutional inhibition.

Your powers are coextensive with the State's necessities arising in the proper administration of the State's institutions, but go no further. When the necessity ends, your powers fail.

The declaration by the Legislature that the railroad is necessary for the discharge of its governmental functions in maintaining its penitentiaries is not, however, conclusive upon the courts, and the facts as to such necessity is subject to judicial inquiry, but the Legislature is presumed to have acted within its constitutional powers in passing the act in question, and before said act would be held constitutional, it must be made to appear that the Legislature has clearly and unreasonably exceeded its legislative power.

In response to your inquiry as to whether the said act contains more than one subject and is in contravention of Article III, Section 35 of the Constitution, I beg to say that in my opinion the act, as passed by the House, is substantially an act to authorize the completion of the road to Palestine, and providing ways and means for the purpose, and that the provision as to ways and means is merely auxiliary to and a necessary part of the object of the bill.

Breen vs. Texas & Pacific Ry., Texas, 305.

Hayes vs. Porter, 20 Texas, 793.

Albrecht vs. State, 8 Crim. App., 216.

Very respectfully,

R. V. DAVIDSON,
Attorney General.

COMMON SCHOOL DISTRICT—ISSUANCE OF BONDS BY, ETC.

Commissioners court has authority to issue bonds on the faith and credit of common school districts to pay accounts legally contracted prior to date of bond issue.

Ward County Common School District, No. 3, School House Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 20, 1909.

Hon. R. B. Cousins, State Superintendent, Capitol.

DEAR SIR: I am in receipt of your letter of the 15th inst., enclosing a correspondence between your Department and Hon. J. E. Starley, county judge of Ward County, relative to a bond issue of this district.

It seems from the correspondence that this district desires the county commissioners court to issue bonds on the faith and credit of the district, as provided by law, the proceeds arising from the sale of such bonds to be used "in payment of accounts legally contracted in buying, building, equipping and repairing a school house for said district", or, as stated in the petition of the property taxpayers of said district, the funds to be used "for the purpose of paying the existing debt and completing the purchase and further repairing the school building now in said district."

I notice from your letter of the 1st inst., to Judge Starley that you advise that under Sections 53 and 127 of the school laws of 1907, that the commissioners court is without authority to issue bonds on the faith and credit of this district for the purpose mentioned, and I also observe that you advise that the title to the school property in question passed absolutely to the school district at the time the building now existing was constructed, notwithstanding the fact that the building was jointly constructed by a school fund and some lodge, the upper floor of the building having been designated as the lodge interest in the building and the lower floor as the school interest, to be used by each respectively.

Section 53 of the school laws of 1907 reads as follows:

"No mechanic, contractor, material man, or other person can contract for in any other manner have or acquire any lien upon the house so erected or the land upon which the same is situated, and all contracts of such parties shall expressly stipulate for a waiver of such lien."

Just how this provision of the law has any application to the conditions of that district, I am unable to understand. It is not sought by any one to foreclose any lien, and I find nothing in the correspondence indicating that any one has ever contracted for or made an effort to create any kind of a lien upon the school property of said district. It is, therefore, clear to my mind that this provision of the law has no application to the question.

Section 127 of the school laws of 1907, reads as follows:

"School trustees shall determine how many schools shall be maintained in their respective school districts and at what points they shall be located; they shall determine when the schools shall be opened and when closed; they shall contract with teachers to manage and supervise the schools, subject to the rules and regulations of the county and State superintendent; they shall approve all teachers' vouchers and all other claims against the school fund of their district; provided, that trustees of districts in making contracts with teachers shall not create a deficiency debt against the district."

This provision of the law deals exclusively with the available school fund of the county and the maintenance tax fund, and I do not understand by the correspondence submitted that the people of this district desire the commissioners court to issue bonds to pay any deficiency created by any expenditure of the available school fund or the maintenance school tax of the district in the employment of teachers or otherwise.

The decisions under this section of the school laws, Stephenson vs. Union Seating Company, 62 S. W. Rep., 128; Collier vs. Peacock, 93 Texas, 255; Andrews vs. Curtis, 2 Civ. App., 678, each treat of the expenditure of the available school fund of the district and none of them contain a discussion of the power of the commissioners court to issue bonds for the payment of debts created for building purposes of common school districts.

The Stephenson case was a caes where seats had been sold to the trustees of a common school district to furnish the school building, and under the authority of the law, as it then existed, 25 per cent of the school fund was set aside for two or three years for the purpose of paying this obligation, but before the obligation was discharged, the fund which had been set aside was diverted and appropriated to some other purpose. After it had been so appropriated it was sought by a writ of mandamus to compel the board of trustees to pay the debt long past due out of the available school fund of the district, none of which at that time contained a provision for setting aside of any part thereof for the payment of said debt. The court refused the writ of mandamus and held the debt could not be paid in such way. In other words, it held that the debt should have been paid out of the fund set aside for that purpose, but when not so paid it could not be paid out of any other fund.

The Collier case was a case where it was sought to enforce a contract made for the employment of a teacher when the contract called for more than the available scohol fund for a year, and it was held by the Supreme Court that such a contract was invalid when sought to be made a charge against the funds of the succeeding year.

The Andrews case was decided principally upon the Collier case. None of these cases anywhere discuss the power of the commissioners court to issue bonds for common school districts in the payment of accounts legally contracted for the construction, purchase, building, repairing or furnishing of school buildings, and I have been unable to find any decision of the higher courts of this State construing the statute upon this question.

The constitutional authority for issuing bonds on the faith and credit of common school districts is found in Article 7, Section 3, as amended at the general election in November, 1908, which reads in part as follows:

"* * * and may authorize an additional ad valorem tax to be levied and collected within such school district for the further maintenance of public free schools and the erection and equipment of school buildings therein; provided, that a majority of the qualified taxpaying voters of the district voting at an election to be held for that purpose shall vote for such tax, not to exceed in any one year 50 cents on the $1.00 valuation of property subject to taxation in such district * * *."

You will observe that there is no inhibition in this constitutional provision against the commissioners court or any other agency created by the Legislature to issue bonds on the faith and credit of common school districts to pay accounts created before or after the issuance of bonds, and there is absolutely no restriction upon the power of the Legislature in this provision of the Constitution upon this question.

Doubtless you had in mind the provision of Article II, Section 5, of the Constitution of the State, which provides, in part, as follows:

"No debt shall be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon."

And also Section 7 of the same article, which reads, in part, as follows:

"But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the same time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent of the sinking fund."

These provisions are the only constitutional restrictions upon the power to create a debt without providing at the time of its creation the necessary interest and sinking fund. You will observe that these provisions of the Constitution apply especially to city and county debt and as has been held by the appellate court of this State do not even apply to the current expense debts of such municipality.

Section 77, Chapter 124, Acts of the Twenty-ninth Legislature, as amended by the Thirty-first Legislature, reads, in part, as follows:

"The said bonds shall be examined by the Attorney General of the State of Texas and registered by the Comptroller of Public Accounts of the State of Texas. They shall be sold to the highest bidder and the purchase money shall be placed in the county treasury to the credit of said school district, and the money shall be disbursed upon warrants issued by the trustees of said district and approved by the county superintendent in payment of accounts legally contracted in the buying, building, equipping or repairing of school house or school houses of such district, or in the purchase of sites therefor."

To hold that this provision of the law has application only to accounts created after the issuance of bonds by the commissioners court on the faith and credit of such district would be to destroy the effect of the plain provisions of the act. If the district must first have its bonds issued before it contracts the debts, there would arise no necessity for any debts against the district for such purposes, as they would have the funds with which to pay cash instead of contracting the debts, and, therefore, the provision of the law would mean absolutely nothing.

You are, therefore, respectfully advised that it is the opinion of this Department that the commissioners court, on proper petition, is obligated to order the necessary election, at which the people of the district may vote a bond issue for the purpose mentioned in this act, whether said debts were created before, or are to be created after the issuance of such bonds. Of course the obligations must be legal and binding against the district before the county superintendent would be authorized to approve the same; but that question could not come up before the bonds were issued and would be a question to be passed upon by the county superintendent when the accounts were presented to him for approval, when he could determine their validity against the district. Besides, such bonds can not be issued by the commissioners court on the faith and credit of common school districts or otherwise without being first submitted to this Department for approval, and the question of the sufficiency of the petition and the sufficiency of all other proceedings leading up to the bond issue, and the issuance of the bonds themselves are questions to be passed upon by this Department and would not be approved by this Department if they did not show the bonds to be for a legal and proper purpose.

There is nothing in the law to prevent the trustees of this district from paying the lodge for the interest the lodge may have in the building, as the building does not belong to the district until paid for by it. This Department has repeatedly advised that trustees have no legal authority to make such contracts, but that would not deprive the lodge to demand of the trustees a payment to them of any expenditure by them made jointly in the construction of a building the interest in which the lodge has never been paid for, by the board of trustees of such district, and it is entirely legal and proper for the board of trustees of this district to complete the purchases of said building by paying the lodge for its interest in said building. Good faith in the transaction would demand that the district do this and pay all other binding, valid and subsisting obligations against the district and the same can and should be paid by the district out of the funds arising from the bond issue.

Yours truly,

J. T. SLUDER,
Assistant Attorney General.

BONDS—TAX RATE—INDEPENDENT SCHOOL DISTRICTS —COMMON SCHOOL DISTRICTS—CONSTITUTIONAL CONSTRUCTION.

Not necessary for the adoption of a constitutional amendment that it receive a majority of all the votes cast at an election, but a majority of votes cast on that question.

Tax rate must be specified in common school district tax election; not so in case of independent school districts.

Princeton Independent School District School House Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, October 20, 1909.

Mr. Wallace C. Wilson, Secretary School Board, Princeton, Texas.

DEAR SIR: I am in receipt of your letter of the 28th ult., enclosing a copy of an opinion of Judge F. Wm. Kraft of Chicago, disapproving this bond issue, and you desire my construction of the law under which the bonds were rejected. Judge Kraft refuses to approve the bond issue for two reasons:

The first, as given by him in his letter, reads as follows:

"The validity of this bond is entirely dependent upon the fact that Section 3 of Article 7 of the Constitution was amended at the election in November, 1908, when there was submitted to the voters for approval an amendment to said section increasing the limit of taxation in school districts from 20 cents on the $100 valuation to 50 cents on the $100 valuation. Recent litigation ensued in which the question was contested whether such amendment had in fact passed in accordance with the requirements of the Constitution. Judge Wear of the Twenty-third Judicial District held that such amendment had not been adopted by the voters for the reason that said amendment did not receive the favorable vote of a majority of the voters voting at the said election, although it did receive a majority of the votes cast upon the question. The right to issue these bonds being dependent upon said amendment, it consequently results, as above stated, that these bonds can not be legally issued while said decision stands unreversed."

The second reads as follows:

"The dificulty above noted is of itself sufficient to make it imperatively necessary to disapprove this bond issue. I call attention, however, to an additional objection that will have to be made which lies in the fact that the election at which these bonds were voted upon the specific amount of tax was not voted upon. The provision of Article 7, Section 3, of the Constitution, both as it originally stood and as it is claimed, to have been amended, requires that the qualified property taxpaying voters of the district shall vote such tax not to exceed in any one year 50 cents on the $100 valuation of property subject to taxation."

Answering his questions as they are given, I am of the opinion that neither of them is well founded.

1. It is true that there is a litigation pending in the courts of the State calling in question the adoption of the amendment to Article 7, Section 3 of the Constitution of the State voted upon at the November election, 1908. It is also true that Judge Wear, district judge of the Twenty-third Judicial District of the State, held that the constitutional amendment was not adopted because it did not receive a majority of all the votes shown to have been cast in said election, and that case is now pending on appeal in the Court of Civil Appeals at Dallas, Fifth Supreme Judicial District, and is set for the 30th of this month.

That Judge Wear is wrong in his decision, I respectfully refer you to the following authorities:

Allie vs. Denman, 8 Texas, 297.
Cass County vs. Johnston, 95 U. S., 360.
Douglas vs. Pike County, 101 U. S., 677.
Board vs. Smith, 111 U. S., 556.
Knox County vs. National Bank, 147 U. S., 99.
Gillespie vs. Palmer, 20 Wis., 544.
Dayton vs. City of St. Paul, 22 Minn., 400.
Green vs. Board (Idaho), 47 Pac., 259.
State vs. Barnes, 3 N. D., 319; 55 N. W., 883.
Bott vs. Secretary of State (New Jersey), 40 Atlantic, 740; 45 L. R. A., 251.
Smith vs. Proctor, 130 N. Y., 319; 14 L. R. A., 403.
May vs. Bermel, 20 N. Y. App. Div., 53; 46 N. Y. Supp., 622.
Sanford vs. Prentice, 28 Wis., 358.
Howland vs. Board, 109 Cal., 152; 41 Pac., 864.
Fiscal Court vs. Tremble (Ky), 47 S. W. Rep., 773; 42 L. R. A., 738.
State vs. Langlei, 5 N. D., 294; 32 L. R. A., 723.
State vs. Winkley, 29 Kan., 36.
State vs. Echols, 41 Kan., 1; 20 Pac., 523.
Taylor vs. Taylor, 10 Minn., 107.
Citizens, etc., vs. Williams, 49 La. Ann., 437; 37 L. R. A.,768.
Taylor vs. McFaden, 84 Iowa, 269; 50 N. W., 1070.
People vs. Town Clerk of Harp, 67 Ill., 62.
Dunovan vs. Green, 57 Ill., 67.
State vs. Padgitt, 19 Fla., 339.
Louisville & N. R. Co., vs. Davidson County Court, 1 Sneed, 637; 62 Amer. Dec., 452.
Madison County vs. Priestly, 42 Fed., 817.
Oldknow vs. Wainwright, 2 Burrows, 1017.
Gosling vs. Vealy, Adol. & E. (N. S.) 406, 7 Q. B.
Rushville Gas Co. vs. City of Rushville, 121 Ind., 206; 6 L. R. A., 315.
State vs. Dillon, 125 Ind., 65; 25 N. E., 136.
Mobile Savings Bank vs. Board of Supervisors of Okdibbeha County, D. C., 22 Fed., 580.
State vs. Mayor of the City of St Joseph, 37 Mo., 272.
State vs. Binder, 38 Mo., 455.

Metcalfe vs. City of Seattle, 1 Wash. St., 297.
Yesler vs. Same, 1 Wash. St., 308; 25 Pac., 1014.
Lamb vs. Cain, 129 Ind., 338; 15 L. R. A., 832.
State vs. Vanosdal, 131 Ind., 338; 15 L. R. A., 832.
City of South Bend vs. Lewis, 137 Ind., 512; 37 N. E., 986.
Railway Company vs. Hardin, 137 Ind., 386; 37 N. E., 324.
Schlichter vs. Keiter, 156 Penn. St., 119; 22 L. R. A., 161.
Kuns vs. Robertson, 154 Ill., 394; 40 N. E., 354.

If the above authorities are not sufficient to convince any one of the error in Judge Wear's decision, I am unable to determine how to convince such person. Besides, if that amendment to the Constitution were not legally adopted, practically all the constitutional amendments which have been voted upon at a general election since the adoption of the Constitution in 1876 are invalid also, as almost all of them have been adopted by the same character of vote: even the constitutional amendment creating the courts of civil appeals was adopted in the same way, receiving a majority of the votes cast upon that subject, but not a majority of the votes shown to have been cast in the election. There can be no reasonable doubt of the error in Judge Wear's decision and that the constitutional amendment will be sustained.

2. There is objection made to the manner of submitting the proposition to issue bonds by this district, to the effect that the election order and election notice should specify the particular tax rate to be voted upon to provide the necessary interest and sinking fund for the bond issue and the case of Parks vs. West, 108 S. W. Rep., 470, is quoted as authority for the conclusion. It is true that the Court of Civil Appeals in that case decided that the question when submitted should state the specifis tax rate necessary to provide the interest and sinking fund for the bond issue and that it based its decision upon the case of Lowrance vs. Schwab, 101 S. W. Rep., 840; but it is not true that the Supreme Court has in any way given its sanction to this particular part of that decision of the Court of Civil Appeals in the Parks case. While the Court of Civil Appeals did so decide this question, the case was reversed upon other questions involved in the suit and no reference made by the Supreme Court to that particular question and a decision upon that question was not necessary to a decision of the case by the Supreme Court. The fallacy of this decision (Parks vs. West) by the Court of Civil Appeals will readily appear when the decision in the Lowrance case, upon which they base their conclusion in this case, is analyzed. In the Lowrance case there was an attack made upon an election to authorize a bond issue in a common school district, which districts are created by order of the commissioners court and elections for bond purposes as well as for any other purpose are ordered and held under the direction and supervision of the commissioners courts. That election was governed by the provisions of Chapter 124, Acts of Twenty-ninth Legislature, directing the manner of holding bond elections in common school districts. Subdivision C of Section 58 of that act, as amended by the Thirtieth Legislature, in specifying the particular objects to be passed upon by the commissioners court

in ordering such election, provided that the commissioners' court shall state "the amount of tax to be voted on." Section 59 of the same act provided the form of ballot to be "for school tax," "against school tax."

These provisions cover an election held to vote either a maintenance tax or a bond tax. After voting such tax, either for maintenance purposes or for bond purposes, the same should not be abrogated, increased or diminished without another election held for that purpose, as provided in Sections 63 and 64 of that act. Just how the Court of Civil Appeals of the Fifth Supreme Judicial District, in the case of Parks vs. West, supra, could hold that the Lowrance case was authority for their decision in the Parks case, I do not understand.

Article 7, Section 3 of the Constitution does not provide that any specific tax rate shall be levied for either common or independent school districts, but the Legislature having provided the tax rate must be specified in a common school district tax election, it was proper for the same to have been specified, and fatal to the election if that provision of the law were not complied with.

There is no such provision in the law authorizing the issuance of independent school district bonds. Section 154, Chapter 124, Acts of the Twenty-ninth Legislature, as it then existed, on this particular question reads as follows:

"Provided further, that no such tax shall be levied and no such bonds issued until an election shall have been held for the purpose of determining said question, whereat two-thirds of the taxpayers voting at said election shall vote in favor of the levying of said tax or the issuance of said bonds, or both, as the case may be."

And the act of the Thirty-first Legislature, amending this provision, adds the further proviso, as follows:

"Provided, that the specific rate of tax need not be determined in the election."

It is wholly immaterial that this proviso added by the Thirty-first Legislature may be in conflict with some other provision of Chapter 124, of the Acts of the Twenty-ninth Legislature, as there can be no question but that if there is such conflict the act of the Thirty-first Legislature must prevail.

I also wish to refer you to the law which places the tax rate for bond issues in independent school districts absolutely under the control of the board of trustees after the qualified taxpaying voters of the district have authorized a bond issue.

A part of Revised Statutes, Article 912, reads as follows:

"Whenever any bonds shall be issued, the county commissioners court, or council of such city or town, shall levy upon the last assessment of the property for such city or town, as the case may be, a tax sufficient to pay the interest and sinking fund of not less than 2 per cent upon such bonds. The tax so levied shall remain as the levy for that purpose until a new levy may be made for that purpose; provided, that such commissioners court, or council, may from time to time increase or diminish such tax so as to adjust the same to the taxable values of the property of the county, or city or town,

and the amount to be collected; provided further, that the amount shall not at any time be reduced so that it will not raise an amount sufficient to pay the annual interest and sinking fund on all the bonds sold or exchanged under the provisions hereof."

If any question should be raised as to the bonds included within the meaning of the above article, I further call your attention to Revised Statutes, Article 917, which reads as follows:

"The county commissioners' court of any county, or the mayor and board of aldermen or city council of any city or town that have heretofore issued bonds to aid in the construction of railroads or other works of internal improvements, are heerby authorized and empowered to reduce the rate of taxation heretofore levied for the purpose of paying the interest and sinking fund on such bonds so as to raise the amount necessary to pay the said interest and sinking fund which may become due annually according to the terms of said bonds; and any county, city or town, by its said commissioners or city council, or mayor and aldermen, may from time to time hereafter increase or diminish its rate of taxation according to the valuation of its taxable property so as to raise the amount necessary for the payment of said interest and sinking fund annually; provided, that the taxes shall never be reduced below the rate that will raise the amount that is annually due upon such bonds."

Of course, these two provisions above quoted apply to counties, cities and towns, and authorize the commissioners courts of the counties, and the city councils of cities and towns to adjust the tax rate according to the necessities to meet interest and sinking fund for outstanding bonds, and the tax rate, therefore, is absolutely under the control of the county commissioners court and city council of cities and towns, limited, of course, in their power in the reduction of the tax rate to an amount sufficient to pay the interest and provide the necessary sinking fund.

Section 161, Chapter 124, Acts of the Twenty-ninth Legislature on the subject of independent school districts, reads as follows:

"The trustees elected in accordance with the preceding section shall be vested with the full management and control of the free schools of such incorporated town or village, and shall in general be vested with all the powers, rights and duties in regard to the establishment and maintaining of free schools, including the *powers and manner of taxation for free school purposes* that are now conferred by the laws of this State upon the council or board of aldermen of incorporated cities and towns."

Therefore, as it clearly appears, a tax rate for a bond issue, after the bonds have been authorized by a vote of the qualified taxpaying voters of an independent school district, is under the control of the board of trustees of such district, and they can increase or diminish the tax rate as their taxable values increase or diminish so as to levy a sufficient rate to provide the necessary interest and sinking fund. What could possibly be the reason for requiring a specific tax rate to be voted upon at the time the question is submitted when

immediately upon issuance of the bonds the board of trustees are authorized by law to reduce such tax rate if the same should appear excessive?

It is, therefore, inconceivable how any one can come to the conclusion that a specific tax rate must be voted upon or be contained in the election proceedings for independent school district bond elections, the Constitution making no such requirement and the statute expressly providing that such rate need not be specific.

The Court of Civil Appeals of the Fifth Supreme Judicial District, in deciding the Parks case, evidently got the provisions of the statute applicable to common school districts confused with those applicable to independent school districts and applied the statute of common school districts to that of independent school districts, which were entirely dissimilar in this particular. I, therefore, contend that the decision of the Court of Civil Appeals in the Parks case is not authority. The opinion has not been approved by the Supreme Court and was based upon an opinion of the Court of Civil Appeals of the First Supreme Judicial District which was rendered on an entirely different character of school districts.

I also wish to call your attention to a question of facts that may not appear to those who are investigating independent school district bonds, which are being approved by this Department. The Mertens Independent School District case (Parks vs. West) was not a suit attacking the validity of the bond issue. It was simply a suit attacking an election and seeking to set aside an election for irregularities and enjoin the bond issue which was proposed by the board of trustees. No bonds were ever issued by the district. The Baird Independent School District case, (Snyder vs. Baird Independent School District, 111 S. W. Rep., 723), was also a suit to set aside an election and was not a suit attacking the validity of any bond issue. I mean by this that neither of the above suits involved the same question that is involved in determining the validity of a bond issue already properly executed ready for delivery. Under our law a suit can be filed to set aside an election within thirty days after the election. This is termed a direct attack upon the election proceedings. If this time elapses and no suit is instituted for the purpoes, the election can not be attacked collaterally for any irregularity therein contained, and especially so after the bonds have been issued.

I call your attention to the Revised Statute Article 1789, which reads, in part, as follows:

"Any person intending to contest the election of anyone holding a certificate of election as a member of the Legislature, or for any office mentioned in this law, shall within thirty days after the return day of election, give notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest."

Sayles' Statutes, 1897, Art. 1804t, reads as follows:

"If the contest be for the validity of an election held for any other purpose than the election of an officer, or officers, in any county or part of the county or precinct of the county, or any in-

corporated city, town or village, any resident of such county, precinct, city, town or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as applicable, as are prescribed in this chapter for contesting the validity of an eletcion for county officer."

The latest election law is known as the Terrell Election Law, and was enacted in 1905. Section 92 of the Terrell Election Law reads as follows:

"All election contests except for nomination in primary elections shall be tried as required by the Act of April 6, A. D., 1895, unless otherwise provided for by law," the act referred to being the article of Sayles' Statutes above quoted.

Therefore, if it should be finally determined that there is an irregularity, or has been an irregularity in the manner of submitting this question to the qualified voters of an independent school district, the question can only be raised by a proceeding attacking that election, instituted for that purpose, and within thirty days after election. If no stituted for that purpose, and within thirty days after such election. If no such proceeding is instituted the question can not be raised against the validity of the bonds issued. We do not admit, however, that the manner of the submission is improper or in any way an irregularity, but contend that it is the only proper way to submit the question under the law.

There are practically no independent school district bonds issued within thirty days after the election held for that purpose.

There is another question that I wish to call your attention to and that is the provision on the face of each bond, which reads as follows:

"That all acts, conditions and things required to be done and performed and to happen precedent to and in issuance of this series of bonds and of this bond have been properly done and performed and have happened in regular and due time in form and manner as required by law."

This occurs to me is a complete estoppel against the district and would prevent the district from raising any question as to the validity of the bonds after the bonds had been sold and the proceeds received by such district. I think there can be no question as to the soundness of this proposition.

Simonton on Municipal Bonds, Secs. 193 and 248.

Modern Law of Municipal Corporations, Hainer, Sec. 372, and numerous authorities therein cited.

Besides Acts of the Twenty-ninth Legislature, Chapter 124, Section 5, was amended by the Thirty-first Legislature, Chapter 110, which reads as follows:

"In all cases where the proceeds of the sales of any bonds have been received by the proper officers of the county or incorporated city (independent) or common school district, road precinct, drainage, irrigation, navigation and levee district, or by the party acting for it in negotiating the sale thereof, such county or incorporated city (independent) or common school district, road precinct, drain-

age, irrigation, navigation and levee districts, shall thereafter be estopped from denying the validity of such bonds so issued and the same shall be held to be valid and binding obligations upon the county or incorporated city (independent) or common school district, road precinct, drainage, irrigation, navigation and levee districts for the amount of bonds sued on and interest thereon at the rate mentioned therein deducting such amounts, if any, as having been previously paid thereon."

So it therefore appears that the objections to the independent school district bond issues in Texas and especially those objections referred to in this letter are absolutely frivolous, and all bonds originally issued by these districts are valid and binding obligations upon the same.

Yours truly,

J. T. SLUDER,
Assistant Attorney General.

BONDS—MUNICIPAL CORPORATIONS.

Bonds, in order to be legal, must state a statutory purpose. City can not enter partnership with private corporation (water company) for the purpose of extending its water mains.

City of Tyler Water Works Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 16, 1909.

Hon. C. O. Griggs, City Attorney, Tyler, Texas.

DEAR SIR: I am in receipt of your letter of the 8th inst., relative to this issue of bonds and advising that it is the wish of your city council that I give my views in full, by a written opinion, why this bond issue can not be approved.

It is a fundamental principle of law that a bond issue must state in the election order, election notice and bond ordinance a statutory purpose; without such purpose being so stated a valid issue can not be had. It is very clear to my mind that the purposes of this bond issue are not statutory purposes. It is true that Section 26 of your city charter, stating the purpose for which bonds may issue, reads in part, as follows:

"* * * the purchase and improvement of public works, the construction and repairs of storm sewers and acquisition, erection and maintenance of waterworks and electric lights and gas works and plants * * *".

This is all the authority granted by your city charter to issue waterworks bonds. This, in my judgment, contemplates that the bonds issued for waterworks purposes shall be bonds for the construction of a waterworks plant to be operated by city officials in the exercise of their official duties for the benefit of the public. It

does not, in my opinion, authorize the issuance of bonds for the construction of any part of a waterworks system. It is true that if the city owned this waterworks and desired to extend or add to the system, it would be clearly within the power of the city to do so under the authority granted in the charter. These bond proceedings do not state a statutory purpose. They could not truthfully state a statutory purpose as defined above, as it is made to appear that this bond issue is not sought for the purpose of installing a waterworks system, but for the purpose of extending the waterworks system of a private corporation owning the present waterworks of your city. It is proposed by this bond issue to construct and lay water mains in North Tyler, connecting with the mains of the Tyler Water Company, a private corporation. When the same are so constructed and connected with the mains of the present water company they are to be leased or turned over to the water company to be operated by it for the benefit of the water company and for which consideration the company proposes to pay the city 6 per cent on the expense of constructing and extending the said water mains. As I once before advised, this partakes of many of the elements of a partnership between the municipality of the City of Tyler and the water company, a private corporation owning the waterworks of your city. I must admit that it is a very peculiar character of partnership proposed, but it possesses the elements of partnership just the same. The city is to furnish the capital to extend these improvemnts and receive for such extension 6 per cent, not on the profits of the water company, but upon the capital so invested. It is usual, of course, for partners, when they form a co-partnership, for each partner to furnish a certain part of the capital stock and then share proportionately the profits of the partnership. As stated above, this proposed partnership is peculiar, in that the city is to furnish the capital and the water company is to operate the mains constructed by such capital and appropriate the profits to its own use without dividing the profits with the city, except to the extent of 6 per cent of the capital invested by the city. It would be just as legal for the city to issue $11,000 in bonds, the amount proposed, and turn the bonds over to the water company, with which the water company would extent its improvements to North Tyler; or it would be just as legal for the city to issue the $11,000 in bonds, sell them for $11,000 and turn the $11,000 over to the water company by which the water company would extend its improvements to North Tyler, the water company, of course, agreeing in each instance to pay the city 6 per cent on the $11,000 per annum and taxing the water consumers of North Tyler and pocketing the proceeds of such tax. This, in my judgment, is essentially a bond issue for a private purpose. It is a bond issue for the purpose of aiding a private corporation to extend its water mains to North Tyler. It is a partnership, in that Tyler Water Company proposed to pay the city out of its profits 6 per cent of the bond issue annually, and operate the mains itself for its own use. That this can not be done is very clear from the following authorities:

Williams vs. Davidson, 43 Texas, 34.

City of Brenham vs. Water Co., 67 Texas, 542.

Nalle vs. City of Austin, 21 S. W. Rep., 375.

If the Legislature in enacting a special act granting your city a charter, had added to the provision of the charter herein referred to the authority for the city "to construct a waterworks system in whole or in part and operate the same itself as a municipal corporation or lease such waterworks system or any part thereof to any private individual or corporation to operate such water company and charge the public for water rents and appropriate such charges to its own use," then so far as the Legislature would be empowered to do so, your city would have the authority to issue the proposed bonds.

If the above provision were contained in your charter, the bonds could then not be approved because such provision in your charter would be unconstitutional and void as being in conflict with Article 11, Section 3 of the Constitution which reads, in part, as follows:

"No county, city or other municipal corporation shall hereafter become a subscriber to the capital stock of any private corporation or association or make any *appropriation* or *donation* to the same or in any wise *loan* its *credit.*"

If the purpose of this bond issue does not embody the elements of partnership, which I do not concede, but which is earnestly claimed by your city officials, it would be a donation to a private corporation, or a loaning of the credit of the city to advance the interests of a private corporation, which is not permissible under the above provision of the Constitution, and which has been very well discussed and decided in the case of Cleburne vs. G., C. & S. F. Ry. Co., 66 Texas, 457. Such attempted legislative authority would also be in direct conflict, in my judgment, with Article 8, Section 3 of the Constitution of the State, which reads as follows:

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

It can not be denied that in addition to the elements of partnership of this proposed bond issue, that the taxes to be levied and collected from the people of your entire city are to pay for a bond issue issued solely to extend the water mains of a private corporation and to enable the people of North Tyler to be benefited by having the privilege of paying water rent and obtaining thereby water supply from a private corporation, and this would be true, to say nothing of taxing the people of your entire city for the benefit of those few living in North Tyler, if they were receiving thereby municipal assistance instead of assistance through a private corporation. In other words, there would still be a question if this water supply were going to be furnished North Tyler through the municipal officers, there would still be a question of the right of the city to tax its entire property and inhabitants for the benefit of only one addition to the city.

This question is very well discussed in the case of Ottawa vs. Carey, 108 U. S., 110. That case was very similar to the proposition involved in this bond issue, the United States Supreme Court holding that municipal corporations being created only to aid the State government in the legislation and administration of local affairs, possesses only such powers as are expressly granted or as

may be implied, because essential to carry into effect those which are expressly granted, and also further holding that bonds issued by a municipal corporation, but not under either a general authority to borrow for corporate purposes or a special legislative authority to borrow for purposes within the power of the Legislature to confer, are void. In this case it was sought to issue bonds, the proceeds of which were to be expended in developing the natural advantages of the city for manufacturing purposes and the bonds were issued and turned over to a private corporation for the purposes mentioned. The bonds were held void in the hands of purchasers.

You will, therefore, understand:

1. This bond issue can not be approved because the Legislature has not authorized the city to issue the bonds for the purpose for which this bond issue is sought.

2. Bonds can not be issued for the purpose herein specified, it being a private purpose, even if authorized by the Legislature, as such legislation would be unconstitutional.

3. They can not be issued to aid a private corporation as it is proposed to do in this instance for constitutional reasons.

4. The proposed issue embodies the element of a partnership between the city and a private corporation.

Yours very truly,

J. T. SLUDER,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY WARRANTS—BONDS—DEBTS—CONSTITUTIONAL CONSTRUCTION—TAX RATE—COURTHOUSE AND JAIL.

Commissioners court may issue bonds or interest-bearing warrants, subject to limitation herein, for purpose of constructing courthouse and jail.

Chambers County Courthouse Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 1, 1910.

Hon. W. B. Gordon, County Tax Assessor, Anahuac, Texas.

DEAR SIR: In reply to your letter of the 24th ult., in which you desire to know if the county commissioners court is authorized "to issue interest-bearing warrants to build a courthouse and jail, or must an election be held and bonds issued for the construction of such building."

In reply thereto, I wish to advise that prior to 1893 the commissioners courts were authorized by proper orders to issue interest-bearing or non-interest-bearing county warrants for the purpose of borrowing money to construct courthouses and jails.

Revised Statutes, Articles 797, 819 and 1548.

Cresswell Ranch & Cattle Co. vs. Roberts Co., 27 S. W. Rep., 737.

Ashe vs. Harris Co., 55 Texas, 52.

San Patricio Co. vs. McClure, 58 Texas, 243.
Davis vs. Burney, 58 Texas, 364.
Lumber Co. vs. County, 88 S. W. Rep., 412.

In 1893 the Legislature passed an act authorizing "the county commissioners court of any county in this State to issue bonds of said county for the following purposes:

"1. For the erection of a county court house and jail, or either.

"2. For purchasing or constructing bridges for public purposes within the county or across a stream that constitutes the boundary line of the county." (Rev. Stats., Art., 877).

This act was amended in 1903 adding authority to issue road and bridge bonds, but the amendemnt does not affect the question here under consideration.

This article of the Revised Statutes, enacted in 1893, is clearly cumulative of the provisions of the statute theretofore enacted and above referred to, which authorized the issuance of county warrants for the construction of courthouses and jails, and when this last act was enacted there were two separate and distinct means by which the county commissioners court could borrow money for the construction of such buildings and two different and distinct evidences of debt authorized to be issued by them to borrow money for the construction of such buildings: First, by the issuance of county warrants, and, second, by the issuance of bonds.

In 1899 the Legislature enacted a law, the first section of which reads, in part, as follows:

"Section 1. Hereafter it shall be unlawful for the commissioners court of any county or the city council of any incorporated town or city in this State to issue the bonds of said county or town or city for any purpose authorized by law, unless the proposition for the issuance of such bonds shall have been first submitted to a vote of the qualified voters who are property taxpayers of said county, town or city, and unless a majority of the said qualified property taxpayers voting at said election is in favor of the proposition for the issuance of bonds, then the bonds shall not be issued. If the proposition for the issuance of bonds is sustained by a majority of the said property taxpayers voting at said election, then the said bonds shall be authorized and shall be issued by the said commissioners court or said town or city council". (Chap. 149, Acts 26th Leg. Sec. 1.)

This act of the Legislature does not in any way require an election to be held to authorize the commissioners court to issue interest-bearing or non-interest-bearing warrants for the construction of such buildings, and it does not provide that the indebtedness for such purpose must be created by the authority of such an election. It simply provides that when *bonds* are issued for the incurring of such indebtedness that an election shall be held as therein provided.

We are not to be understood by virtue of the conclusions reached in this opinion as holding that the commissioners court can issue county warrants without restriction and create such indebtedness without limit.

The Constitution provides "no debt for any purpose shall ever be

incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent as a sinking fund". (Art. 11, Sec. 7, Constitution of the State).

This provision of the Constitution has been held to apply to all debts contracted by counties and cities, except such debts as were at the creation of the same reasonably within the contemplation of the parties to be satisfied out of the current revenues of the county or city.

McNeal vs. City of Waco, 89 Texas, 83.

Corpus Christi vs. Woesner, 58 Texas, 465.

Terrell vs. Dessaint, 71 Texas, 770.

When the commissioners court creates any other kind of debts, such as debts for the construction of a courthouse and jail, this constitutional provision must be complied with or the indebtedness is invalid.

San Patricio Co. vs. City National Bank, 44 S. W. Rep., 1069.

Mitchell Co. vs. Bank, 91 Texas, 370.

In other words, when such interest-bearing warrants are ordered to be issued by the commissioners court, the court must provide for the payment of the interest and create the necessary sinking fund to discharge the obligations at maturity the same as if it were a bond issue.

There is also another constitutional provision to govern the commissioners court in the creation of this character of indebtedness. No county is authorized to create an indebtedness in excess of an amount which can be supported by a tax rate of not exceeding 25 cent on the $100 valuation of property. That is, the tax rate necessary to pay the annual interest and create a sinking fund sufficient to redeem the indebtedness at maturity, whether bonds or warrants, must not exceed in any one year, together with the tax for all other indebtedness of this character which may be outstanding at the time, 25 cents on the $100 valuation of property.

Constitution of State, Art. 8, Sec. 9.

Mitchell Co. vs. Bank, 91 Texas. 361.

Bank vs. Terrell, 78 Texas, 450.

Nolan Co. vs. State, 83 Texas, 182.

Dean vs. Lufkin, 54 Texas, 265.

Jefferson Iron Co. vs. Hart, 44 S. W. Rep., 321.

Robinson vs. Breedlove, 61 Texas, 361.

Loonie vs. Houston, 54 Texas, 517.

You are, therefore, respectfully advised that it is our opinion that subject to and in accordance with the constitutional provisions herein discussed, the county commissioners court has the power to create an indebtedness for the construction of a courthouse and jail and issue as an evidence of such inedbtedness interest-bearing warrants for such purpose, notwithstanding the fact that the law also authorizes them to issue bonds for the purpose of borrowing money to construct such buildings, the Act of the Twenty-sixth Legislature, Chapter 149, referred to herein, requiring such election to be held

only in case there is to be a bond issue for the construction of such buildings.

Yours very truly,

J. T. SLUDER,
Assistant Attorney General.

BONDS—COMMON SCHOOL DISTRICTS—VALIDATION OF, ETC.

Atascosa County Common School District No. 1, School House Bonds.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 17, 1910.

Hon. W. M. Abernethy, County Judge, Pleasanton, Texas.

DEAR SIR: After a thorough conference with the members of the department upon the subject of the validity of this school district and its authority to issue bonds, we have reached the conclusion that the same is a valid district and that legal and valid obligations may be created in the issuance of bonds upon said district.

We are of the opinion that the boundaries of the district are sufficient to identify the territory sought to be included in the district. Being of that opinion, we have reached the conclusion that if there wire any question of its validity originally, such question has been eliminated by the adoption of the constitutional amendment on August 3, 1909, and by the validating provision of Section 50, Chapter 124, Acts of the Twenty-ninth Legislature, as amended by the Thirty-first Legislature, Chapter 12.

The constitutional amendment referred to, which was adopted in August, 1909, reads in part as follows:

"Section 3a. Every school district heretofore formed, whether formed under the general law or by special act and whether the territory embraced within its boundaries lies wholly within a single county or partly in two or more counties is hereby declared to be and from its formation to have been a valid and lawful district."

You will observe that this language covers both common and independent school districts and includes every district in the State, whether it is a county line district or a district wholly within any particular county and clearly makes valid the district under consideration. Before the adoption of this constitutional amendment, however, the latter part of Section 50, Chapter 12, Acts of the Regular Session of the Thirty-first Legislature, read in part as follows:

"The commissioners' court shall designate such school districts by numbers; provided, that all school districts in the State heretofore laid out and attempted to be established by the proper officers of any county and heretofore recognized by said county authorities as school districts of said county, are hereby validated in all respects as though they had been duly and legally established in the first instance."

This language as you will see expressly, when read in connection

with the balance of the act, applies to common school districts and is evidently intended to reach just such questions as are involved in this district.

We are of the opinion that either the Act of the Thirty-first Legislature or the adoption of the constitutional amendment referred to is sufficient to make valid the district under consideration.

We are also of the opinion that it is the duty of the commissioners' court to proceed to the issuance of the bonds authorized by vote of the people at an election held for that purpose in this district, and you are respectfully so advised.

Yours very truly,

J. T. SLUDER.
Assistant Attorney General.

OPINIONS CONSTRUING DEPOSITORY LAW.

STATE DEPOSITORY—UNION BANK & TRUST CO., DALLAS —NATIONAL BANK—STATE BANK.

State bank, which is a State depository, may convert itself into national bank, without affecting the obligation of contract with State as State depository.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 15, 1908.

Hon. Sam Sparks, State Treasurer, Capitol.

SIR: I have your letter of the 11th instant, in which you say:

"I have been advised by the Union Bank & Trust Co. of Dallas that it is the intention of that institution to convert itself into a national bank.

"The said bank is a State depository.

"Please advise me if the contract made with the Union Bank & Trust Co. by the State will in any manner be affected should the said bank be converted into a national bank."

In reply I beg to say that while your question appears not to have been decided by our State courts, I am of the opinion that it should be answered in the negative.

Rev. Stats. U. S., Sec. 5154; Fed. St. An., Vol. 5, p. 110, and note.
Metropolitan Bank vs. Claggett, 141 U. S., 520.
Michigan Insurance Bank vs. Eldred, 143 U. S., 293.
City Natl. Bank of Poughkeepsie vs. Phelps, 97 N. Y., 44.
National Bank vs. Clark, 44 Barb., 26.
Coffey vs. National Bank, 46 Mo., 140.
Ean's Admr. vs. Exchange Bank, 79 Mo., 182.
Thorp vs. Wedgeforth, 56 Pa. St., 82.
Kelsey vs. National Bank, 69 Pa. Sta., 426.
Atlantic National Bank vs. Harris, 118 Mass., 147.
Bank vs. McIntire, 40 Ohio St., 536.
Savings Bank vs. Sachtleben, 67 Tex., 422.
Austin vs. Tecumseh National Bank, 49 Neb., 412; 59 Amer. St., 543, and note.

Truly yours,
WM. E. HAWKINS,
Acting Attorney General.

SCHOOL LANDS, PURCHASER OF—FORFEITURE FOR NON-PAYMENT, PAYMENT THROUGH MISTAKE, BEING APPLIED TO OTHER LANDS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 21, 1908.

Hon. Sam Sparks, State Treasurer, Capitol.

SIR: We are in receipt of your letter of the 19th instant which is as follows:

"On July 27th, 1908, this Department received a remittance of $360.29 from A. L. Green of Stanton, Texas, with a letter instructing that it be applied as interest on the following school land accounts in Andrews County, Texas:

"On sections 8, 9, 10 and 11, block A-51, account W. A. Rasberry, from March 17, 1906, to November 1, 1907 .....$180.96

"On section 24, block A-51, and sections 3, 4, and 5, block A-52, account W. J. Rasberry, from March 17, 1906, to November 1, 1907, ... 179.33

"Total $360.29

"The sum of $179.33 was credited to the four sections last mentioned above as requested, but the sum of $180.96 which he requested to be applied on Sections 8, 9, 10, and 11, Block A-51, could not be credited to the accounts for the reason that the interest due November 1, 1907, on those Sections had been paid previous to this remittance. Sections 8, 9, 10, and 11, Block A-51, Andrews County, stand on the records of the Treasury Department in the name of J. F. Vincent. For that reason the sum of $180.96 was returned to A. L. Green at Stanton, Texas, on August 29, 1908. This money was again placed in the Treasury Department by said A. L. Green on September 18, 1908.

"On September 18, 1908, said A. L. Green made affidavit and presented to the Treasury Department stating that the payment of the sum of $180.96 made to the Treasury Department by him on July 27, 1908, was not intended by him as a payment of interest on Sections 8, 9, 10 and 11, Block A-51, Andrews County, but was intended as a payment of interest due November 1, 1907, on Sections 1, 2, 8, and 9, Block A-52, Andrews County, standing in the name of W. A. Rasberry. A copy of said affidavit is attached hereto.

"The accounts for Sections 1, 2, 8, and 9, Block A-52, Public School, Andrews County, in the name of W. A. Rasberry, have been declared forfeited by the Commissioner of the General Land Office for non-payment of interest due November 1, 1907, said forfeiture having been declared since July 27, 1908.

"Will you give me your opinion on the two questions following:

"1. Was the payment of $180.96 made by A. L. Green, referred to above, a payment on July 27, 1908, of interest due November 1, 1907, on Sections 1, 2, 8, and 9, in Block A-52, Andrews County, which stood on the books of the Treasury Department in the name of W. A. Rasberry?

"2. Was said payment on July 27, 1908, sufficient for this Department on this date to notify the Commissioner of the General Land Office that money was in this Department on July 27, 1908, to pay the interest due November 1, 1907, on said Sections 1, 2, 8 and 9, Block A-52, Andrews County, in the name of W. A. Rasberry, and to request that he reinstate the accounts?"

Said affidavit referred to in the above letter is as follows:

"The State of Texas,

"County of Travis.

"Before me, the undersigned authority, on this day personally ap-

peared A. L. Green of Stanton, Texas, known to me, who being first duly sworn, deposes as follows:

"That he, the said A. L. Green was the remitter of the sum of three hundred sixty and 29-100 ($360.29) dollars referred to in the foregoing certificate from Hon. Sam Sparks, State Treasurer. That the remitting of the sum of one hundred eighty and 96-100 ($180.96) dollars as interest to November 1, 1907, on Sections 8, 9, 10 and 11, Block A-51, Andrews County, for the account of W. A. Rasberry, was a clerical eror. That the said W. A. Rasberry does not own and never did own said sections of land. That said W. A. Rasberry did own Sections 1, 2, 8 and 9, Block A-52, public school land in Andrews County, and that said W. A. Rasberry paid to him, the said A. L. Green, the aforesaid sum of one hundred eighty and 96-100 ($180.96) dollars, to be remitted to Hon. Sam Sparks, State Treasurer, as interest on said Sections 1, 2, 8 and 9, Block A-52, referred to above. And that the remittance of one hundred eighty and 96-100 ($180.96) dollars, to Hon. Sam Sparks, referred to in the foregoing certificate, was for the purpose of paying all interest due to November 1, 1907, on said Sections 1, 2, 8 and 9, Block A-52 for account of W. A. Rasberry.

(Signed) "A. L. GREEN.

"Sworn to and subscribed before me on this 18th day of September, A. D., 1908.

"(Seal) (Signed) "H. L. HAYNES,
"Notary Public, Travis County, Texas."

Answering your questions in their order, I beg to say:

1. Revised Statutes, Article 4218p, contains the following provisions:

"All purchase money due upon lands, as well as accrued interest, and all other moneys arising from the sales or leases of said lands shall be paid by the purchaser or lessee direct to the Treasurer of the State, who shall cause *an accurate account to be kept with each purchaser,* and who shall execute duplicate receipts for all sums of money paid to him under the provisions of this chapter, one of which receipts shall be delivered to the purchaser or his agent, and the other transmitted to the Commissioner of the General Land Office."

It will be noted that in Revised Statutes, Article 4218p, both purchasers and lessees are included.

Revised Statutes, Article 4218u, is as follows:

"All lessees shall pay the annual rents due for leased lands directly to the Treaurer of the State, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and the other transmitted to the Commissioner of the General Land Office. The Treasurer shall cause to be kept an accurate account with each lessee, and the Commissioner of the General Land Office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office."

It will be observed that Article 4218u, applies to lessees only, purchasers not being mentioned.

In the case of Anderson vs. Terrell, 8 Texas Ct. Rep., 312, our Supreme Court held that the foregoing provisions of Revised Statutes, Article 4218u, require the State Treasurer to keep the accounts therein mentioned with the *lessee* rather than with the land.

It seems to me that said decision will apply as well, under Article 4218p, to accounts with *purchasers from the State* of public school lands.

Revised Statutes, Article 4218k, contains the following provisions:

"Purchasers may also sell their lands, or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is affected under this chapter, and in such cases the vendee or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years' residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or cancelled or properly credited, as the case may be, *and the vendee shall become the purchaser direct from the State*, and be subject to all the obligations and penalties prescribed by this chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon."

Without here expressing a definite opinion upon that feature, it will perhaps be sufficient for present purposes to say that these statutory provisions appear to treat a substitute purchaser as *a purchaser from the State*, and that the courts would probably hold that whenever the State Treasurer received notice from the Commissioner of the General Land Office of the filing in that office of a conveyance of public school lands and substitute applications and obligations therefor, it is the duty of the State Treasurer to thenceforth carry, *in the name of said substitute purchaser*, the account which has theretofore stood on the books of the State Treasurer in the name of the original purchaser from the State, and so on, for each successive transfer of the land.

It will be noted that in said case of Anderson vs. Terrell the statement of facts shows that the direction given to the State Treasurer for the application by him of the payment was that it should be credited to *lessees' account*, no land being described or mentioned; while in the case submitted by you the directions accompanying the remittance which reached you on July 27, 1908, specified that a certain part of such remittance was to be credited on certain sections of land, (describing them), in the name of Rasberry, although your books do not show that land in his name, but do show that land in the name of J. F. Vincent, and that interest thereon due November 1, 1907, had already been paid.

I am inclined to believe that because of this difference between the facts of the two cases the decision in the Anderson case will hardly apply to the case presented by you, and that it is to be gravely doubted whether or not any portion of said remittance of July 17, 1908, should be treated by you or by the Commissioner of the General Land Office, or that it would be regarded by the Supreme Court, as a payment made as of that date upon Sections 1, 2, 8 and 9, in Block A-52, which, it appears, in fact stood at that date upon your books in the name of Rasberry, but which were not mentioned in the letter of remittance from Rasberry's agent, Green. The gravity of the matter is apparent in view of the fact that intervening rights to said Section 1, 2, 8 and 9, in said Block A-52, or part thereof, may have set up since said forfeitures occurred.

Upon the whole, I am of the opinion that until the Supreme Court shall hold otherwise, you should decline and refuse to recognize or treat any portion of said remittance as a payment of interest on July 27, 1908, upon said Sections 1, 2, 8 and 9, in said Block A-52. If this conclusion is erroneous, Mr. Rasberry has his remedy, and the decision of the Supreme Court upon the question involved will be of value to your Department and to the General Land Office.

2. I am of the opinion that you are not authorized to now certify to the Commissioner of the General Land Office that any portion of said remittance was a payment of interest as of date July 27, 1908, upon said Sections 1, 2, 8 and 9, in said Block A-52. The affiant's declaration at this time as to what were his intentions in making said remittance can not change the legal effect of such remittance, your duty in the premises.

I can not conceive any theory upon which you are authorized to consider for any purpose, or to base any official action whatever upon, the aforesaid affidavit.

Respectfully,
WM. E HAWKINS,
Assistant Attorney General.

COUNTY DEPOSITORY.

County depository which has heretofore been the depository of county, but at a subsequent selection of depository a different banking institution is selected, old depository has sixty days within which to turn over funds of county.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 30, 1909.

Mr. Jos. Sheridan, Cashier the Buchel National Bank, Cuero, Texas.

SIR: We have your letter of recent date from which it appears that your bank is a county depository, and that you desire from this Department a construction of Section 24 of Chapter 164 of the General Laws of the Twenty-ninth Legislature of Texas (1905), providing a system of State, county and city depositories.

The preceding Sections 20, 21, 22 and 23 provide for county depositories and for the selection thereof by the county commissioners

of the respective counties, and for the execution of a bond by such county depository, etc. Then follows said Section 24, as follows:

"Section 24. As soon as said bond be given and approved by the commissioners court, an order shall be made and entered upon the minutes of said court designating such banking corporation, association or individual banker as a depository of the funds of said county until sixty days after the time fixed for the next selection of a depository; and thereupon it shall be the duty of the county treasurer of said county, immediately upon the making of such order to transfer to said depository all the funds belonging to said county, and immediately upon the receipt of any money thereafter to deposit the same with said depository to the credit of said county; and for each and every failure to make such deposit the county treasurer shall be liable to said depository for 10 per cent upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county."

With reference to said Section 24 you say:

"You will note this is conflicting; one gives us the right to retain the funds for sixty days longer in the event we should lose out in bidding; on the other hand, it gives the county treasurer the right to check it all out and transfer it immediately after five days, etc."

The question upon which you desire our opinion is this: In the event your bank should not be the successful bidder as county depository for the next term prescribed by law, will it have the right to retain the county deposits until sixty days after the time fixed for the next selection of a depository, or will it be required by law to turn over the county deposits to its successor as such county depository immediately after the commissioners court shall have approved the bond of such successor and shall have made and entered in the minutes of the court an order designating such successor as the county depository, it being made by said Section 23 the duty of the successful bidder to file its bond within five days after its selection as such county depository.

In reply to your inquiry, I beg to say that I am of the opinion that the view first above presented should prevail, and that your bank, as the existing county depository, will be entitled to retain the county deposits until sixty days after the time fixed by law for the next selection of a county depository. I am of the opinion that the provision in Section 24, requiring that immediately upon the making by the commissioners court of the order designating a depository of the funds of the county, it shall be the duty of the county treasurer to transfer to said depository all the funds belonging to said county, was intended by the Legislature to be applicable to only the inauguration of the system in a given county and is not thereafter applicable in that county.

You will note that the provision for an immediate transfer to the county depository of all the funds belonging to such county is, by the terms of the law, made operative upon the *county treasurer only* and that it does not apply to county depositories.

In other words, as I understand this statute, its purpose was to promptly put the system of county depositories into operation

throughout the State, and to require the county treasurer of a given county to turn over the county funds to the county depository of his county immediately after it became entitled under the law to receive such deposits, and immediately upon the receipt of any money thereafter to deposit the same with said depository to the credit of said county and to provide that after the system shall have been inaugurated in such county, the county depository selected and designated by the commissioners court and authorized under the law to act, shall be entitled to continue to so act and to retain the county deposits in its hands until sixty days after the time fixed by law for the next selection of the county depository for that county.

Respectfully,
WM. E. HAWKINS,
Acting Attorney General.

BONDS, PROCEEDS OF, ETC.—COUNTY DEPOSITORY—COMMISSIONERS COURT.

Commissioners court can not legally accept bid for county's funds, waiving interest on proceeds of sale of bonds kept on hand by such depository until expended by said court for the purposes of their issuance.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 23, 1909.

Judge John L. Young, County Judge of Dallas County, Dallas, Texas.

SIR: We are today in receipt of your letter of yesterday, in which you say:

"I attach hereto a copy of a bid submitted to the commissioners court of Dallas County today by the City National Bank of Dallas, for three series of bonds, aggregating $875,000 issued by said county, as indicated by said bid. We desire to be officially advised in writing by your department as to whether or not the court can legally comply with the second condition of said bid thereby waiving the interest on the money received for said bonds until it is lawfully and regularly expended for the purposes for which the bonds were issued."

Said copy of said bid shows that the bid embodied three express conditions, the second of which is therein set out as follows:

"By proper action of the commissioners court the proceeds of the sale of these are to be deposited with the City National Bank of Dallas, without interest, and to so remain on deposit until lawfully and regularly expended for the purposes for which the bonds were issued."

The issues involved in this matter must be controlled by what is known as the County Depository Law, which was enacted by the Twenty-ninth Legislature of Texas (Acts 1905, page 392-5), which was designed to at once secure the several counties in the safe keeping of county funds and provide a revenue to such counties, respectively, in the form of interest upon such funds while held on deposit to the credit of the county in such county depository. Con-

sequently, back of the question formulated by you lies the inquiry as to whether this bidder is or is not the legally constituted county depository of Dallas County.

Your letter does not state whether such bidder is or is not such county depository. However, I am today informed orally by your personal representative, J. Lawson Goggans, Esq., that the Trinity National Bank was the County Depository of Dallas County down to the date of its recent merger with this bidder, the City National Bank of Dallas, and that the latter is now, or that prior to the acceptance of its bid for said bonds and the deposit of proceeds of sale of such bonds to the credit of Dallas County, such bidder will become and be the duly constituted county depository of Dallas County.

I will, therefore, undertake to answer your question upon that assumption.

Looking, then, to the provisions of said County Depository Law, we find among them the following:

The county commissioners of each county are required to receive every two years from banking incorporations, associations or individual bankers in the county bids to become "the depository of the funds of such county." (Sec. 20, as originally enacted and as amended by the Thirtieth Legislature, Chapter CVIII, page 208.)

Such bidder is required to submit to the county judge "a sealed proposal, stating the rate of interest that said banking corporation, association or individual banker offers to pay *on the funds of the county* for the term between the date of such bid and the next regular time for the election of a depository." (Sec. 21.)

Such commissioners court is required "to publicly open said bids and cause each bid to be entered upon the minutes of the court and *to select as the depository of all the funds of the county* the banking corporation, association, or individual banker offering to pay the *largest rate of interest per annum for said fund;* provided the commissioners court may reject any and all bids." (Sec. 22.)

It will be noted that the depository is to thus acquire the right to become the actual depository of "all the funds of the county" and that the successful bidder is to be the one which offers to pay therefor "the largest rate of interest per annum."

It is true that the commissioners court is authorized to reject any and all bids, but that is merely a precautionary provision for the protection of the county in the selection of a county depository and does not affect the relative rights and duties of the depository and of the commissioners court after the selection of the depository has been made and after it has given bond as such depository in accordance with the law.

Said Section 22 then proceeds thus: "The interest upon such county funds shall be computed upon the daily balances of (to) the credit of such county with such depository and shall be payable to the county treasurer monthly and shall be placed to the credit of the jury fund or to such funds as the commissioners court may direct."

Section 23 requires that *within five days* after the selection of such depository the successful bidder shall execute and file with the

county clerk a bond in an amount not less than the total amount of revenue of such county for the entire two years for which the same is made "conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository," etc.

This statute further provides that *"as soon as said bond be given and approved* by the commissioners court" the successful bidder shall be designated as the "depository of the funds of said county" and that "thereupon it shall be the duty of the county treasurer of said county, immediately upon the making of such order of transfer to said depository of *the funds belonging to said county,* and immediately *upon the receipt of any money thereafter* to deposit the same with said depository to the credit of said county." (Sec. 24.)

It is, therefore, evident that it was the legislative intent and purpose to require:

1. That each county in the State shall designate a county depository.

2. That such depository shall be entitled to have and receive and that it is the duty of the county to place in such depository to the credit of the county all the funds of the county, no matter from what source same may have been derived or for what purpose they are to be applied.

3. That such depository is to pay and that the county is to receive interest upon all such deposits and that such interest shall be computed upon the daily balances to the credit of such county in the hands of such depository.

4. That no time must be lost unnecessarily in the selection and qualification of such county depositories and in getting the county's funds of every nature and character whatsoever into such depository to the credit of the county, in order that the county may receive interest upon such deposits calculated upon daily balances to the credit of the county in such depository.

It is true that, under the provisions of Section 25, in the event no qualified bidder submits a proposal to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined, the commissioners court is given the power and it is made their duty to deposit the funds of the county with any one or more banking corporations, associations or individual bankers in the county or any adjoining counties in such sums and amounts and for such periods of time as may be deemed advisable by the court: but this statute requires in Section 25 that all such deposits shall be "for such periods of time as may be deemed advisable by the court and *at such rate of interest* not less than one and one-half per cent per annum, as may be agreed upon by the commissioners court and the banker or banking concern receiving the deposit, interest to be *computed upon daily balances due the county treasurer"* and these alternative provisions of the statute themselves emphasize the unquestionable purpose of the Legislature to require that all the funds of the county shall, as far as possible, produce interest for the county, which shall be placed to the credit of the jury fund or of such funds as the commissioners court may direct.

I am, therefore, of the opinion that the above mentioned bid for

said bonds can not legally be accepted by the commissioners court of Dallas County, because of the second condition therein expressed, for the reason that the law requires that all the funds of the county on deposit to its credit in the county depository of the county shall bear interest at the rate specified in the accepted proposal under which such bank became the county depository of Dallas County. In other words, the law contemplates that all the funds of the county shall be kept in the county depository and shall bear interest calculated on daily balances to the credit of the county.

I beg to add that the views herein expressed are strictly in harmony with several opinions heretofore given by me, on different occasions, relative to the proper construction and meaning of said statute.

Respectfully,
WM. E. HAWKINS.
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY DEPOSITORY—INTEREST—DEPOSITORY LAW—CONTRACT.

County depository can not transfer its contract to another bank, and commissioners court has power to revoke order granting original contract. Bonds, proceeds of sale of, must be placed with county depository, and draw interest the same as other county funds. Commissioners court can not sell bonds at a price less than par and accrued interest.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 29, 1910.

Hon. John L. Young, County Judge, Dallas, Texas.

DEAR SIR: Your favor of the 27th instant was duly received. Your said letter is as follows:

"On December 23d, 1909, Hon. William E. Hawkins, then office assistant to the Attorney General, rendered a decision on a tentative contract proposed to be made between the City National Bank of Dallas and the County of Dallas, concerning the sale of $875,000 or road, bridge and viaduct bonds issued by the county. A reference to the records of your office will doubtless disclose a copy of this opinion and data upon which it was based, so I shall only refer to them herein instead of setting them out in full.

"In this opinion, Mr. Hawkins assumed that the City National Bank of Dallas was then, or would immediately become, the designated depository of county funds of Dallas County and upon that assumption proceeded to consider the question submitted. This assumption may have been unwarrantable, and the commissioners court of Dallas County therefore desires to ask your Department for a substitute opinion upon the following statement of facts:

"In January or February, 1909, the county judge of Dallas County advertised for bids for depository of its county funds, as provided by law. The Trinity National Bank of Dallas, being the highest bidder, was awarded the contract as depository of Dallas

County for a term of approximately two years from that date and filed bond for $800,000, being the total current revenues of Dallas County for the two years prior to that date, as required by law, which bond was duly accepted and approved by the county commissioners court. This arrangement continued unchanged until December 11th, 1909, when the directors of the Trinity National Bank of Dallas made a tentative transfer of its assets, including the depository contract with Dallas County, with the City National Bank of Dallas, it being contemplated that this action should be ratified at a meeting of the stockholders of Trinity National Bank of Dallas called and convened the following month pursuant to law, at which contemtemplated meeting the arrangement, if ratified, would stand, and, if disapproved, would fail. On December 22d, 1909, the City National Bank of Dallas, not being at that time the technical depository of the county funds, made offer to purchase the issue of bonds hereinabove mentioned, proposing to pay the principal and accrued interest to date of purchase, upon the conditions set forth in the bid, and the commissioners court of Dallas conditionally accepted the proposal. Following this agreement between the bank and the county, the matter was submitted to your Department, as already mentioned herein, and upon the rendition of the opinion disapproving the contract, the matter has since remained in statu quo.

"On January 11th, 1910, the stockholders of the Trinity National Bank of Dallas, at regular annual meeting voted to effect the transfer of all of the assets of said bank to the City National Bank of Dallas and to go into voluntary liquidation.

"Herewith, you will find a copy of the bid of Trinity National Bank for depository of Dallas County funds; the order of the court accepting the bid; the bond filed by the bank; the order of the court approving the bond, and the order putting Trinity National Bank of Dallas into liquidation, all of which instruments speak for themselves. The commissioners court has not taken any formal action with regard to the matter of the transfer of this depository contract from one of these national banks to the other. The City National Bank is prepared, as principal, to furnish us a satisfactory bond as our depository, provided we will ratify and approve the transfer of the depository contract hereinabove mentioned.

"The questions, which the court desire answered, are:

"(1) Under the circumstances shown, has the commissioners court of Dallas County the legal authority to approve or ratify the transfer or assignment of its depository contract, for the unexpired term thereof, from the Trinity National Bank to City National Bank of Dallas and accept a satisfactory new bond from the latter bank, or is it necessary for the court to proceed to the selection of another depository for such unexpired term, in the manner provided for the selection of a depository at the regular time for such selection?

"(2) In advertising for and accepting proposals for a county depository, can the court legally advertise for and accept a proposal on what we may term a 'graduated' basis, i. e., could such proposal be to pay different rates of interest on different funds, 4 per cent on general revenue funds and 3 per cent on funds derived from the sale of county bonds, to be calculated on the daily balances to the credit

of each particular funds? Could such proposal legally be upon a graduated basis according to the total amount held by the depository to the credit of the county, thereby paying different rates of interest on the amount of the total daily balances to the credit of the county. irrespective of the particular funds to which the moneys belong? To illustrate the point, could the proposal legally be to pay 4 per cent on all amounts to the credit of the county up to $100,000; 3 per cent on all amounts to its credit in excess of $100,000 and less than $200,000, and 2 per cent on all amounts in excess of $200,000 and less than $300,000?

"(3) Whether the proceeds of the sales of issues of county bonds for special purposes must necessarily be treated as depository funds under all circumstances, or whether such special funds may not be handled outside of the provisions of the depository law, especially where the funds come to the county during an interim while there is no legally constituted depository in existence, or the existing depository makes no objection? In other words, must the money derived from the sale of these bonds necessarily be placed in the depository and draw interest under a depository contract, when there is such a depository in existence under contract to pay such interest?

"(4) Whether funds produced by a sale of bonds on a desirable basis to a bank, which requires that the funds be left in its possession until lawfully disbursed for the purposes for which the funds are created, ever come into the hands of the county in such an unqualified sense as to make them subject to the terms of the depository law?

"(5) Whether, under the facts as above stated, the county may lawfully make the contract proposed with the City National Bank of Dallas, thereby selling to it the issues of bonds hereinabove mentioned?

"(6) Can Dallas County sell the above mentioned bonds at par on credit, the deferred payments to be made as the county needs the money during the progress of the work, for which the bonds are to be issued, and to be secured by a satisfactory bond of the purchaser, bonds to be delivered at this time and title thereto to pass to the buyer immediately?"

Before answering your specific questions in the order named, we wish to say that the assumption made by Mr. Hawkins in his opinion of December 23, 1909, namely, that the City National Bank of Dallas would become the county depository of Dallas County before the proceeds of the bonds were realized, is immaterial to your inquiry. If such bank was not the depository, still the depositories act of the Twenty-ninth Legislature clearly contemplated that the proceeds of such bonds should be placed in the county depository and in the event said bank should not be the depository, said law would require immediate transfer of those funds to the duly selected and qualified county depository.

In reply to your questions we hold:

1. Under the facts stated by you, it is our opinion that the Trinity National Bank, by voluntarily going into liquidation and merging its identity with the City National Bank, and transferring all its assets and property to the last named bank, has rendered itself

incapable of and incompetent to perform the duties and functions of a county depository. By its voluntary action it has made impossible the performance of its contract with the county of Dallas, and therefore, the said contract is terminated. In legal contemplation, the situation provided for in Section 27 of the depositories act now exists and the commissioners court would have authority to revoke tevoke the order creating the Trinity National Bank as depository. By its said voluntary action, the Trinity National Bank has also, in our opinion, made impossible the performance of the conditions prescribed in Section 31 of said depositories act, in event the commissioners court should decide to act thereunder.

We are further of the opinion that it is beyond the power of the commissioners court to ratify the transfer of the depositories contract made by the Trinity National Bank to the City National Bank in that no such authority is conferred expressly or by implication by the depositories law or by any other statute. The commissioners court have only such powers as are expressly granted by statute or by necessary implication therefrom, and we fail to find any authority for the commissioners court of Dallas county to confirm, ratify or consent to the agreement made between said two banks so as to effect the creation of the City National Bank as a county depository. The commissioners court should take action without delay to revoke the order creating the Trinity National Bank as depository. and to proceed under the provision of Section 30 of the depositories law to select a new depository in that the legal effect of the actions of said Trinity National Bank is the same as if no selection of a depository had been made at the time provided by law.

2. By a literal construction of the provisions of the depositories act, it might be that there is no legal objection to the commissioners courts accepting a proposal for a county depository where the bids are made upon a "graduated" basis, such as you illustrate, but it is our opinion that both the letter and spirit of said law seems to contemplate that the bids should be for interest upon all county funds without reference to the different classes of funds and regardless of the amount of such funds as may come into the depository during the term of the contract, and that such bids should be for a specified rate of interest upon the entire funds. The statute does not seem to contemplate a bid upon daily balances different in rate of interest as to certain classes of funds or different in rate of interest between certain portions of the total county funds, arbitrarily classified by contract. This question is one of some difficulty, but we think the commissioners court should require a specified rate of interest in the bids upon all county funds without reference to the class of same and without reference to graduated amounts.

3. As is well pointed out by Mr. Hawkins in his opinion above referred to, the county depositories act requires all county funds to be placed in the custody of the depository selected, without unnecessary delay. If the proceeds of these county bonds should be received at a time when there is no legal depository to receive the same, yet it is the duty of the commissioners court to select a depository at once and when same is selected and legally designated, the said funds must be transferred to and placed in the hands of the depos-

itory. We think the circumstance that such funds might come into the possession of the county during an interim in which there is no legally constituted depository, makes no difference, nor do we think that if there was a duly constituted depository in existence its consent or failure to make objection to the handling of such special funds outside of the provisions of the depository law could in any manner control the operation of said law.

4. We think your fourth question should be answered in the affirmative, because if the sale of bonds to the bank passes the title to the said bonds, but does not entitle the county immediately to the proceeds thereof this would, in legal effect, be a credit sale, which the commissioners court would have no power or authority to make, as shown by the authorities hereinafter cited. If the sale should be such as to pass title to the bonds and make the proceeds the immediate property of the county, then, notwithstanding the provision of the contract that the funds should remain in the hands of the bank, it would be legally sold and the funds would belong to the county and remain in the hands of the bank as the agent of the county. In such event, the provisions of the depositories law requiries the immediately transfer of said funds to the legally selected depository and in case such bank should be the depository, the said funds would draw interest the same as other county funds.

5. We do not think under the facts stated by you that the county commissioners court has any lawful authority to make the contract proposed by the City National Bank of Dallas, not only because the depositories law would be itself circumvented, but for the additional reason that a sale of the bonds in acordance with the proposal of said bank would be subject to two objections rendering said contract illegal:

(a) Because said arrangement would be in effect a sale at less than par with accrued interest; and,

(b) Because such sale would be in reality a credit sale.

It would be beyond the power of the commissioners court to make a sale of either character. Article 918b, Sayles Civil Statutes, provides that such bonds "shall not be sold at less than its par value, and accumulated interest, exclusive of commissions." The Act of the Thirty-first Legislature authorizing the issuance of bridge and viaduct bonds, under which the greater number of these bonds were issued, contains a similar provision. As we understand the proposed purchase of these bonds, the value of same is to be determined at the date of the sale and the bonds continue to draw the prescribed rate of interest, but the money is to be paid only when necessary for the purposes for which the bonds were issued, said deposit to be without interest. This seems to clearly be a sale at less than par. (See Delafield vs. Illinois, 2 Hill, 159; 26 Wendel's, 192; 8 Paige, 527.)

6. We are of the opinion that the county commissioners court could not make a credit sale of these bonds, as such courts are of limited authority and in the sale of public bonds they are the special agents of the county. The rule is well established that when a power

is conferred under these circumstances to sell bonds, they must be sold for cash or its equivalent. See Delafield vs. Illinois, 2 Hill, 159.)

We think that the fact that the bank offers to tender and provide a satisfactory bond would not be material, because when the title to the bonds pass, the county is entitled to the proceeds thereof in money or its equivalent. Doubtless it would be legal for the commissioners court to make a contract of sale of these bonds to be delivered and paid for at some future date, provided the bonds are to remain in the possession of the county until the purchase price is paid at par with accrued interest, exclusive of commissions, which time may be only when the money is actually needed for the purpose for which the issue was made. Further than this, we think the commissioners court would have no legal authority to go.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

OPINIONS CONSTRUING ELECTION LAW.

ELECTION LAW—SPECIAL ELECTION FOR STATE SENATOR.

Notice of special election must be given, though it be held on same day of general election, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, October 23, 1908.

Hon. J. F. Onion, San Antonio, Texas.

DEAR SIR: In your letter of the 21st instant you state that "it has developed that the proclamation of the Governor for the General Election does not include the election of the senator for the 24th Senatorial District to fill out the unexpired term of R. B. Green, deceased."

You desire to know what course should be pursued in order to make the election of the senator for that district legal and have such election held on the same date that the General Election is held, on November 3rd.

Under Section 30 of the Terrell Election Law the Governor of the State is required to give notice of all elections for State and district officers, electors for President and Vice-President of the United States, members of Congress, members of the Legislature and all officers who are elective every two years, and such notice shall be given by proclamation by the Governor ordering the election at least thirty days before the election, which proclamation shall be mailed to the several county judges of the State.

Section 35 of said law reads as follows:

"In all cases of vacancy in a civil office in the State, caused by death or resignation or otherwise, the vacancy of which is to be filled by election, the officer or officers authorized by this act to order election shall immediately make such order, fixing the day, not exceeding thirty days after the first public notice of such order to fill the unexpired term."

As the election of senator for this district is a special election and there is no law authorizing that such election to fill such vacancy shall be held at the next General Election, after such vacancy occurs I am of the opinion that without some notice of this election, the same would be illegal and void.

15 Cyc. 322, and authorities there cited.

I am of the further opinion, however, that if the local notices of the General Election published by proper authorities of your senatorial district have included in said notices the election of the senator, that the election so held will be a valid election.

State vs. Thayer, 31 Neb., 82.

If the local notices of the General Election do not include notice of the senatorial election, in my opinion such election would be void unless the voters of the district were otherwise notified of such election. In other words, it has been held where the voters of the district are not notified by proclamation of the Governor nor by any

other method pointed out by statute, if the voters of such district have actual notice that an election is to be held for a certain purpose and the voters attend such an election and such election is fairly held, the same would be upheld as a legal and valid election.

10 Amer. & Eng. Ency. of Law, 629, and authorities there cited
Adsit vs. Osmun, 84 Mich., 420.
State vs. Lansing, 46 Neb., 514.
Norman vs. Thompson, 30 Texas Civ. App., 537.
Sneed vs. State, 40 Cr. App., 264.
Voss vs. Terrell, 40 S. W., 170.

If there has been no notice of any kind given of a senatorial election to be held on the same date with the General Election, I am of the opinion that such notice should yet be given. The law requiring a thirty day notice to be given prior to an election is held to be directory and not mandatory.

10 Amer. & Eng. Ency. of Law, 630 and authorities there cited.

You are, therefore, respectfully advised that if the Governor's proclamation of a regular election to be held on the 3rd of November did not contain notice of the special election of a senator to fill the vacancy caused by the death of Senator Green, and that there has been no notice given in the senatorial district by the local authorities of the counties of said district of such an election, that such notice at least by the local authorities authorized by law to give such notice in each county of your district should yet be given in the manner provided by law. If there has been such notice given by the local authorities in the counties of the senatorial district, I am of the opinion that the same is sufficient and that the election will be valid, and especially if the voters of the district have actual notice of a special election held for the election of a snator on the same date that the General Election is held, in any way such actual notice may be given, as through the press, from the stump, or having the names of the candidates for the senate printed upon the ballots voted at the General Election.

Yours truly,
J. T. SLUDER,
Assistant Attorney General.

ELECTION LAW—CITY EXECUTIVE COMMITTEE, DISQUALIFICATION OF MEMBERS OF.

City executive committeemen shall serve until successors are elected. Announcement as candidate for public office does not disqualify party from acting as chairman of city executive committee; police officer not disqualified to act as member of city executive committee.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 30, 1908.

Hon. John C. C. Corder, Dallas, Texas.

DEAR SIR: Your two letters, one of date of the 18th inst., and the

other the 21st inst., both received. Upon the facts stated in your two letters you ask the opinion of this Department:

1. Whether or not there is a legally existing Democratic Executive Committee in and for the city of Dallas; and

2. If there be such a committee, whether or not two named members of the committee have not by their acts disqualified themselves from further serving upon said committee.

The facts pertinent to the inquiry as to whether there is a legally existing Democratic Executive Committee, I take to be as folows:

Subsequent to the enactment of Section 128a of the Terrell Election Law in the year 1905 the chairman of the county Democratic executive committee of Dallas County appointed a Democratic executive committee for the city of Dallas to serve until the next election, as is provided in said Section 128a; that said committee called a meeting of the members of the Democratic party of the city of Dallas for the 20th day of April, 1907, which was thirty days prior to the first election held under the present charter of the city of Dallas, which was provided in said charter, Section 6, Article 14, to be held on the sixth Tuesday after the going into effect of said charter, which was the 21st day of May, 1907; that after said meeting was called, there was selected a committee composed of a chairman and four members; that on the .... day of April, 1908, the same being the first Tuesday in the month, there was held in the city of Dallas a regular election, as provided in Section 1, Article 5, of the charter of the city of Dallas, to elect a board of education composed of the president and six members; that said committee selected as aforesaid in April, 1907, failed to order a primary election to nominate party candidates at said election of a board of education and failed to call a mass meeting of the members of the Democratic party thirty days prior to the date of said election for the purpose of selecting a new committee.

Section 128a of the Terrell election law is as follows:

"Each and every incorporated town and city in the State of Texas, whether incorporated under general or special laws, may make nominations for office in the following manner: In each of said cities and towns there shall be an executive committee for each political party, consisting of a city chairman and one member for each ward in said city or town, and in case said city or town is not divided into wards, then there shall be selected four members of said committee in addition to the city chairman. In all cities and towns which now have a duly selected executive committee the same shall serve until the next city election, and in cities and towns having no executive committee the county chairman of the political party desiring to make nominations in such cities and towns shall appoint an executive committee to serve until the next city election shall be held, and in each city and town in this State in which a political party may desire to make nominations there shall be held, at least thirty days prior to the regular election, an election at which there may be nominatedd by each political party, officers to be selected at the next city election, and at which said election there shall be selected the executive committee for said city or town herein provided for, and in all such city primary elections the provisions of the law

relating to primary elections and general elections shall be observed. The executive committee herein provided for may decide whether or not nominations shall be made by such political party in such city or town, and in case it is decided that no nomination shall be made such executive committee shall call a meeting of the members of such political party at least thirty days prior to a regular election, at which a new executive committee shall be selected to serve during the ensuing term; provided, that this act shall not be construed to prevent independent candidates for city offices from having their names upon the official ballot, as provided for in Section 99 of this act."

The question is: For what length of time was the committee selected to serve, which was selected at the mass meeting, as above stated, on the 20th day of April, 1907,—whether for one or for two years.

Section 128a, above quoted, after declaring that in incorporated cities and towns there shall be an executive committee for each political party, provides:

1. The character of the committee; that is, that there shall be a city chairman and one member for each ward, if the city is divided into wards. If not, then a chairman and four members.

2. It provides that in cities and towns having a duly selected committee, that such committee shall serve until the next city election; that in cities and towns having no executive committee, that the county chairman appoint such committee to serve as in case of the existing committee until the next city election.

3. Said section then provides for primary elections for the purpose of electing party candidates for city offices and that at such primaries the executive committee shall be selected. These primary elections shall be at least thirty days prior to the regular election.

4. That the executive committee may determine whether or not nomination shall be made by the political party they represent.

5. In case the committee decides not to have nominations, it is provided that they call a meeting of the members of such political party at least thirty days prior to a regular election, at which a new executive committee shall be selected to serve during the ensuing term.

The term for which the committees provided for immediately after the going into effect of the act, that is the duly selected committees at the time the act took effect and therein constituted to be Democratic executive committees in their respective cities, and the committees selected by the chairman of the county executive committee should serve was provided to be until the next city election. I construe this, however, to mean until the next city election at which city officers should be elected, for the reason that it was provided that their successors should be chosen at primaries for the nomination of party candidates to be held at least thirty days prior to a regular election, or that in case no nomination should be made, at a meeting of the members of such political party at least thirty days prior to a regular election. It is plain that the committee provided for to come into existence upon the going into effect of the law should serve until thirty days prior to the next regular city election *at which officers of the city should be chosen*, at which time whether

it was determined there should be primaries to nominate said officers or not, a new committee would be selected, and the committee so elected or selected should serve during the ensuing term.

In construing a statute it is always proper to take into consideration the purposes for which the law was intended.

The function of an executive committee is to act for the political party to which it belongs in connection with the conduct of primary elections held to nominate party candidates. The only duty expressly prescribed by Section 128a is that the executive committee therein provided for is to determine prior to city elections whether or not nominations shall be made by the political party to which such executive committee belongs. Other duties are imposed by the provision that in all such city primary elections the provisions of the law relating to primary elections and general elections shall be observed. Their duties are relatively the same in respect to city elections as county executive committees are in respect to general elections.

In the case of county executive committees, they are elected for the same term as county officers, that is, two years, their term of service being the time intervening between general elections. Their duties are mainly in connection with the primaries preceding the general elections and just before their term of office expires.

The charter of the city of Dallas in Article 3, Section 2, provides for the election every two years of a mayor and four commissioners. Practically all the political and judicial powers of the city of Dallas are vested in said mayor and four commissioners and the officers appointed by them. However, Article 5, Section 1, provides for the election of a board of education composed of the president and six members, the term of office of said board being two years. The elections of the board of education are held on the first Tuesday of April of the years ending in even numbers and the elections of the board of commissioners on the first Tuesday of April in the years ending in odd numbers. So that there is a regular election provided for on the first Tuesday of April every year.

Section 48 of Article 14 of said charter reads:

"All elections for the approval or rejection of bond issues, the granting of franchises and the levying of special taxes, wherein such matters shall be submitted to a vote of the taxpayers of the city, shall be held at a general election in said city of Dallas, and the elections held to elect members of the board of commissioners and the board of education shall be the only elections in said city which shall be denominated general elections."

The question then is, whether the executive committee selected on the 20th day of April, 1907, was to serve until the election of the board of education in April, 1908, or until the next election of the mayor and commissioners in April, 1909.

I am of the opinion that the committee under a proper construction of said Article 128a should serve until their successors are elected at a primary election held at least thirty days prior to the first Tuesday in April, 1909, or until their successors are selected at a mass meeting held at such time.

There is no provision in the Dallas city charter in any way modifying any of the provisions contained in said Section 128a of the Terrell election law.

It is customary in most cities to have one election for the election of all elective officers and the city of Dallas is an exception to the general rule of cities in Texas, and I think throughout the United States, in providing an election for school officers upon off years when there are no elections for other elective officers. I think probably the intention of the Legislature in providing that the members of the board of education be elected in two years other than those when the mayor and commissioners are elected was to remove these offices as much as possible from politics; otherwise I can see no reason why such provision would have been made, because it certainly would have been less expensive to the city to hold one election for the purpose of electing all its officers than it is to hold two.

The duties prescribed in the city charter for the Board of Education are generally to contract for, lease and purchase lots and to construct buildings for school purposes and to make all needed repairs and alterations in same; to furnish said school buildings with all appropriate furniture, fixtures and apparatus; to sell or dispose of school property when the same is necessary or advisable; to lay off the city into such school districts as, in the judgment of the said board, shall be proper; to increase or diminish said districts and to change the boundaries thereof at pleasure; to employ superintenents, teachers and such other persons as may be necesasry, and to fix their compensation and prescribe their duties and to establish all such regulations and rules deemed necessary by the board; to provide and maintain an efficient system of public schools in the city of Dallas.

Section 4 of the same article provides:

"Whenever the amount involved in any purchase or sale of property proposed to be made by the Board of Education shall equal or exceed the sum of one thousand dollars it shall be the duty of said board to certify its action with respect to said matter to the Board of Commissioners and said board shall have the power to veto and nullify said action within five days after being notified thereof." * * * It is provided that the members of the Board of Education shall serve without salary.

It will be seen that the duties of said board are non-political. The political tenets or affiliations of a candidate for a position on the board could have no possible bearing upon his qualifications to perform the duties of his office. I think that the framers of the Terrell election law had in view that school officers were not political officers.

Section 51 reads:

"At the election of school district officers or school officers for a city, town or village, at which no other officer is to be elected, or election of officers of fire departments, any ballot may be used prescribed by local authorities."

Section 3, of Article 3, of the Dallas City Charter, provides that "in case a primary election is held pursuant to the call or under the direction of any political party, or of any association of individuals

for the nomination of candidates for the offices of mayor and commissioners, the candidates or persons voted for in said primary election shall be voted for at large by all of the legally qualified voters in said city and upon the same plan and under the same system as is provided for in the preceding section, it being the purpose of this act to nominate and elect at large in said city the mayor and commissioners, without restricting the nomination of candidates for either position to any smaller designated territory within the limits of said city." There is no provision for or reference to any primary election to be held for nominating the Board of Education.

Considering then the office to be performed by city executive committees, that their principal function is to determine whether or not there shall be party primaries and assist in and about such primaries, and considering that these duties are to be performed for the election succeeding the election at which they are chosen, and considering the character of the office of members of the Board of Education in the city of Dallas, I am of the opinion that the election of the Board of Education should not be taken into account in determining the time of service for which the city executive committee of the city of Dallas is chosen.

You state that the chairman of the present city committee announced as candidate for representative to the Legislature of Dallas county in the early part of the present year, 1908, and later withdrew on acount of sickness, and ask whether or not this announcement as a candidate for a public office disqualified him from acting as a chairman of the city committee under Section 60 of the Terrell election law.

I am of the opinion that it does not. Said Section 60 reads:

"No one who holds an office of profit or trust under the United States or this State, or any city or town in this State, except a notary public, or who is a candidate for office or who has not paid his poll tax, shall act as judge, clerk or supervisor of any election; nor shall any one act as chairman or as a member of an executive committee either for the State or any district or county, who has not paid his poll tax, or who is a candidate for office, or holds any office of profit or trust under either the United States or this State, or in any city or town in this State, except a notary public."

The disqualifications stated in said Section 60 apply only to members of executive committees, either for the State or any district or county. Section 128a was enacted subsequently to Section 60, and if it had been intended to adopt the disqualifications contained in Section 60 it would have been so provided. The provision in said section 128a "that in all such city primary elections the provisions of the law relating to primary elections and general elections shall be observed" does require that the officers holding a city primary be not disqualified under said Section 60. But to construe said section as applicable to city executive committees would be to add a term to its provisions.

I am likewise of the opinion that the member mentioned as holding the commission of police officer of the city of Dallas would not thereby be disqualified from acting as a member of said committee.

Yours truly,

R. E. CRAWFORD,
Assistant Attorney General.

ELECTION LAW—SPECIAL ELECTION IN SENATORIAL DISTRICT—NOTICE OF ELECTION.

Provision of law that twenty days' notice be given not mandatory, provided voters have actual notice of such election.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 24, 1909.

Hon. Tom W. Perkins, Acting Chairman Committee on Privileges and Elections, Senate Chamber, Capitol:

DEAR SIR: I have your letter of the 22nd inst., in which you ask my advice as to whether or not, under the facts as stated by you, a valid election may be held to elect a Senator to fill a vacancy in the Second Senatorial District under a writ of election issued by the Governor on the 13th day of March, 1909, an election on the 3rd day of April, 1909, only twenty days intervening between the date of the writ and the date named for the election, exclusive of the day of the issuance of the writ and the date when the election is to be held.

Section 33 of the Terrell election law is as follows:

"The county judge, or if he fails to act, then two county commissioners, shall cause notice of a general election or any special election to be published by posting notice of the election at each precinct thirty days before the election, which notice shall state the time of holding the election, the office to be filled or the question to be voted on, as the case may be, provided that in local option, stock law and road tax elections, the notices of elections or any other special electional specially provided for by the laws of this State shall be given in compliance with the requirements of laws heretofore or hereafter enacted governing said elections, respectively, and provided also that if a vacancy occurs in the State Senate or House of Representatives during the session of the Legislature or within ten days before it convenes, then twenty days' notice of a special election to fill such vacancy shall be sufficient. Posting of notice of an election shall be made by the sheriff or a constable, who shall make returns on a copy of the writ how and when he executed the same."

You will note that the above section provides that in case of a vacancy in the State Senate or House of Representatives occurring during a session of the Legislature or within ten days before it convenes, then twenty days' notice of the special election to fill such vacancy shall be sufficient. The question is whether the notices as provided in Section 33, having not been posted for the full period of twenty days prior to the election, will such election be void? In other words, is the provision contained in said Section 33 providing for the posting of notices in the case of an election held to fill a vacancy occurring in the State Senate or House of Representatives during the session of the Legislature for twenty days, mandatory or only directory?

The question is not free from doubt. In Texas the Court of Criminal Appeals has held in a number of cases that the statutes providing notices of election to be posted for a given number of days prior to a local option election are mandatory, and that a failure to post

such notices for the length of time required by the statutes, render such election void. Ex parte Connally, 75 S. W., p. 1; Stallworth vs. State, 18 Ct. App., 378; Ex parte Kramer, 19 Ct. App., 123; Donaldson vs. State, 15 Texas App., p. 25.

The grounds, however, upon which the courts have based their decisions in local option cases are peculiar to that class of cases.

The following language is held, in the case of Donaldson vs. State, above cited:

"If the law invoked was a general law passed by the Legislature for the State at large, then indeed the conclusions announced might be maintainable. But with regard to local option, the settled law is, that the action of the commissioners court in ordering an election, the election and all its inciednts must conform strictly to the requirements of the statute or the election will be void. (Boone vs. State, 10 Texas Ct. App., 418.) Such a law even though promulgated upon the proper authority is void and is neither binding upon nor notice to any one. It is a quasi local or special law, and depends for its validity upon its adoption in conformity with the laws permitting its adoption."

These decisions are therefore not conclusive, if authority at all, upon the question for decision. A similar question has not been decided in Texas, so far as I have been able to ascertain, and, as before stated, the authorities in other jurisdictions are in conflict and no solution of the question can be arrived at which will be entirely free from doubt. However, I am of the opinion that the weight of authority and the best reason does sustain the proposition that a special election held to fill a vacancy is not invalid, because the law in reference to posting notices has not been literally complied with. If, however, the failure to post the notices for the required length of time should result in a lack of actual notice on the part of the voters entitled to participate in the election, then such failure to post the notices would be sufficient to avoid the election. The only purpose of the law requiring the posting of notice is, that actual notice of election shall be communicated to the electors entitled to participate in the election. Black on Interpretation of Laws, page 358, states the following rules of construction as to laws regulating elections:

"Statutory provisions regulating the conduct of elections, if not made mandatory by the express terms of the law, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about, when the departure from the prescribed method was not so great as to throw a substantial doubt on the result, and where it is not shown that there was any obstacle to a fair and free expression of the will of the electors."

The American and English Encyclopedia of Law, Vol. 10, page 606, states the rule to be:

"In the case of special election, however, when the law does not fix the time and place of same, but they are to be fixed by some authority, failure to give such notice or issue a proclamation of the election, will render it a nullity, unless the people have actual knowledge and attend the result is not affected. If it appears that the

people generally had knowledge of the special election so that the result would not have been different if proper notice had been given, failure to give such notice does not vitiate the election."

In the case of Foster vs. Scarf, 15 Ohio St., 532, legal notice was not given and the election was held void, but the court says:

"In deciding this case, however, we do not intend to go beyond the case before us as presented by its own peculiar facts. We do not intend to hold, nor are we of the opinion that the notice by proclamation as prescribed by law is per se in all such cases necessary to the validity of an election; if such was the law, it would be in the power of a ministerial officer by a misfeasance always to prevent legislation. We have no doubt that when an election is held in other respects as prescribed by law and notice of the fact of the election is brought home to electors though derived through other means than the proclamation which the law prescribes, such election would be valid."

In the case of the State ex rel. Little vs. Langley, 32 L. R. A., 723, it was contended that notice as required by statute was not given. The court held that even if the notice had been sufficient the election was not void, as the voters were not mesled by the defects in it.

In the case in re Rowley, 70 N. Y. Supp. 208, an election was ordered and it was the duty of the town clerk to post notices of the election. This he wholly failed to do, but the voters had actual notice. It was held that the election was valid. The following is quoted from the language of the court:

"As I have said before, it was the duty of the town clerk to give notice of election, * * * The statute in respect to his duty is directory only. In case of the failure of the town clerk to post and publish the notice when the electors were not given other notice, the vote cast would be void, and the will of the people thwarted by the wilful failure of that officer to perform his duties. But that is not the case here. The end sought to be obtained by the statutes, to wit: the giving of the notice of the question to be voted for at the town meeting was accomplished in this case as already clearly appears."

In the case of Wheat vs. Smith, 7 S. W. 161, it was doubtful from the evidence whether the notice required by law had been given, but it was shown that the voters had notice in fact, and that the result was not affected by the failure to give the statutory notice. In discussing the question the court says:

"When a special election to fill a vacancy is ordered, there is no presumption that the voters know the date fixed by the writ of election, and they must be informed of it, but the established rule is that the particular form and manner pointed out by the statutes of giving notice is not required. Actual notice to the great body of electors is sufficient. The question in such case is whether the want of statutory notice has deprived sufficient of the electors of the opportunity to exercise their right to change the result of the election. When the election is legally ordered and the electors are actually apprised of the time of holding it, the misfeasance or nonfeasance of

the officer upon whom the statute devolves the duty of giving the election notice can not deprive the electors of the power to express their will through the ballots."

Section 13 of Article 3 of the State Constitution provides:

"When vacancies occur in either House, the Governor or the person exercising the power of the Governor shall issue writs of election to fill such vacancies, and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened shall be authorized to order an election for that purpose."

I have been able to find nowhere in the books a definition of a writ of election. The Terrell election law, in Article 31, in providing that the county judge or county commissioners shall issue a writ of election, provides that there shall be stated in such writ:

"The office or offices to be filled by the election or the question to be voted on, or both, as the case may be, and the date of election."

The American and English Encyclopedia of Law, Vol. 30, defines a writ to be a judicial instrument by which the court commands some act to be done by the person to whom it is addressed. It is issued either at the commencement of an action or during its progress, directed to the sheriff or other ministerial officer, or to the party intended to be bound by it, and commanding some act that is mentioned to be done at some certain time specified.

In the case of Moore vs. Fedawa, 15 Neb. 379, it is said:

"A writ may be defined to be a mandatory direction to the officer to whom it is addressed requiring him to perform a particular act, as to summon the defendant or to sell property under the decree of the court. In every case the writ itself contains the directions as to what is required to be done."

I take it that writ of election as used in the section of the Constitution as above quoted means a written direction by the Governor to the proper officers authorizing and directing them to hold an election upon the date named in the writ.

Without discussing the question as to whether or not, since the Constitution having vested in the Governor the power in cases of vacancies occurring in the Legislature, to issue writs of election and to name the time at which such elections shall be held, the Legislature would have authority to enact a law requiring notices to be given for a certain number of days before that election could be held. I am of the opinion that an act of the Legislature should not be construed to take away from the Governor the authority given him under the section of the Constitution above mentioned of designating the time at which the election shall be held unless such a construction is absolutely necessary from the language of the statute in question. It will be noted that the language in the first part of Section 33 is:

"That the county judge * * * *shall* cause notice to be published by posting notices of election at each precinct 30 days before the election."

The language which we are construing occurring in the latter part of the section is:

"And provided also that if a vacancy in the State Senate or House

of Representatives during a session of the Legislature or within 10 days before it convenes, then 20 days' notice of a special election to fill such vacancy shall be sufficient."

The language is not that the notices *must* be posted for the full 20 days, or that the failure to post the notices for 20 days would not be sufficient. I am of the opinion that if the Legislature intended by this provision to interfere with the will of the Governor to designate the time at which the election should be held to the extent of requiring that he call it for a sufficient length of time after his call to give the election officers time to post the required notices for the full 20 days prior to the election, they would have used language more direct than that which they have used in the section quoted. I am for the reasons stated of the opinion that the election, if held on the 3rd day of April, 1909, will not necessarily be invalid for the reason that notices as required by Section 33 of the Terrell election law have not been posted for the full 20 days in the several voting precincts of the Senatorial district.

With respect, I am yours truly,

R. V. DAVIDSON,
Attorney Gneral.

COUNTY EXECUTIVE COMMITTEE—OFFICE OF REPRESENTATIVE.

Whether the district be composed of one county or a greater number of counties, the office of representative is a district office and not a county office. It is beyond the power of the county executive committee to determine that candidates for such office shall be elected otherwise than by plurality vote. Such candidates may be assessed a greater sum than $1 for election expenses, etc.

AUSTIN, TEXAS, May 18, 1910.

Hon. A. G. Anderson, Democratic County Chairman, Fairfield, Texas.

DEAR SIR: We are in receipt from Hon. A. B. Storey, State chairman, of a copy of your letter to him under date of April 21, 1910, in which you ask a ruling upon two questions:

1. Whether the office of member of the Legislature from a district composed of one county alone is in legal contemplation a district office or merely a county office, and whether or not it is within the power of the county executive committee to determine that a nomination of a candidate for such office shall be made by a majority vote and not by a mere plurality.

2. Whether or not in the event such office is to be considered a district office the committee is limited to the sum of one dollar in assessing candidates for such office for the purpose of defraying the expenses of the primary.

We beg to advise you that the sections of the Terrell election law of 1905 that bear upon the question of the power of a county executive committee to provide for majority nominations are the following:

"Section 105. * * * A any political party may hold a second primary election on the second Saturday in August to nominate can-

didates for a county or precinct office where a majority vote is required to make a nomination; but at such second primary only the two candidates who received the two highest votes at the first primary for the same office shall be voted for * * * ."

"Section 111. * * * On the third Monday in June preceding such general primary the county committee of each county shall meet at the county seat and determine by lot the order in which the names of all candidates for each nomination or position requested (to) be printed on the official ballot shall be printed thereon, and decide whether the nomination of county officers shall be by majority or plurality vote, and if by majority vote the committee shall call as many such elections as may be necessary to make such nomination, and in case the committee fails to so decide, then the nomination of all such officers shall be by plurality vote cast at such election."

"Section 117. * * * Provided that the county executive committee may determine whether the nomination of county officers shall be by a majority or plurality vote in such county, and if by a majority vote, then the committee may call as many such elections as may be necessary to make such nomination."

It follows from the foregoing that if the office of member of the Legislature from a district composed of one county alone is to be regarded as a mere county office, then it is within the power of the county committee to require the nomination for such office to be by a majority vote and to cause such number of primary elections to be held as may be necessary in order to secure a majority nomination. It also follows that the power of the committee to provide for majority nominations is restricted to purely county offices and does not extend to this office if it is in legal contemplation a district office and not a county office. Furthermore, we think it clear from the provisions of the Constitution of Texas and the statutes of this State that the office of member of the Legislature, even where the district is composed of only one county, is not a county office in any proper sense, but is a district office.

Section 26 of Article 3 of the Constitution provides for the devision of the State into representative districts and provides among other things that "whenever a single county has sufficient population to be entitled to a representative, such county shall be formed into a *separate representative district*, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other."

Also Section 111 of the Terrell election law refers to and plainly recognizes the fact that there may be districts composed of one county only, and that this will not cause them to lose their character as districts.

Therefore, as above indicated, our conclusion is that a candidate for member of the Legislature who receives a plurality of the votes cast for that office on primary election day is thereby nominated for the office, and it is beyond the power of the county executive committee to determine otherwise.

In answer to your second question, we beg to call your attention to the language of Section 111 of the Terrell election law, which spe-

cifically gives to the county committee the power to assess a candidate for a district office for a sum greater than one dollar in the event the district is composed of one county only. The language referred to is the following:

"No candidate for a State or district office, unless such district is composed of one county only, shall be required to pay any portion of such cost, unless the executive committee of the county shall so direct, but in no event shall more than one dollar apiece be assessed against any such candidate for a State or district office unless such district is composed of one county only."

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CENSUS—SHERIFF AND TAX COLLECTOR—COUNTY AND DISTRICT CLERK—ELECTION LAW.

Counties having a population of 10,000 or more according to census report properly obtained entitled to elect tax collector separate from sheriff. Counties having population of 8000 entitled to district clerk separate from the office of county clerk.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 11, 1910.

Hon. James P. Stinson, County Judge, Anson, Texas.

DEAR SIR: We have your letter of recent date, which is as follows:

"Referring to conversation had with you recently in the matter of the separation of the sheriff's and tax collector's office in those counties where an official count under the present census will show the population to be such as to authorize same, I herewith enclose the published letter of Dana Durand, director, relative to the question.

"Please give me your opinion in the light of the statements made by Mr. Durand as to whether or not the count proposed to be given out by him July 1st, should it be obtained for Jones county, and the same should show the population to authorize separation of the above offices, would it be such an official count as would separate them, and authorize the executive committee to place the names of candidates for the office of tax collector on the ticket to be voted upon July 23rd for said office?

"The ballot to be voted upon July 23rd will not be made up, as you know, by the county executive committee until July 11th.

"I intend to make application, on behalf of the county court of Jones County, prior to July 1, for the official count of said county."

The question involved in your letter as to the availability of the United States census of 1910 as a test of the population of counties in determining whether or not they may lawfully during this year separate certain offices that are now combined was submitted by others to this Department some time ago. Before expressing any opinion on the matter this Department wrote the United States

Census Director at Washington and received from him an answer which was in substance and effect that "the census act provides that the reports on the inquiries it provides for shall be published by July 1, 1912. * * * At the twelfth census the population of the United States, by States and Territories, was announced on November 27, 1900," which was after the general election of that year. There was nothing to indicate that the population of counties would be given out earlier this year, and assuming, therefore, that the population of counties according to the thirtieth census would not be *officially* made known before the first Tuesday in November of this year, this office thereupon informed its inquirers accordingly.

Section 32 of the act of Congress of July 2, 1909, providing for the taking of the thirteenth census, contains the following language:

"That the director of the census is hereby authorized, at his discretion, upon the written request of the Governor of any State or Territory, or of a court of record, to furnish such Governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies, and one dollar additional for certification."

When we obtained the information above referred to from the census director we concluded that he had decided to exercise the discretion given him by said Section 32 by declining to certify officially the population of any county in advance of the regular publication of the report showing the population of all States, counties and cities.

However, we are now advised that he has declared his willingness and ability to furnish, on or about July 1, 1910, an official certificate of the population of any county if application therefor is made in the manner pointed out in said Section 32. In the published letter from Mr. Durand, which you enclosed to us, he says:

"As already stated the enumeration of population must be completed within 30 days from April 15, and the schedules returned by the enumerators to the supervisors of the respective districts. These schedules, as soon as they have been examined by the supervisors of census and have been corrected, are returned to the Census Office at Washington and should be wholly in our possession on or before the first of July next. It would be easily possible, therefore, for this office to make the count of population for such counties in the State of Texas as are likely to be affected by the requirements of the State Constitution and certificate to that effect be given in each case where such action is necessary, provided this office receives a formal request, prior to July 1st, next, from the proper official to whom, under the State law, said certificate should be duly transmitted. This request should state specifically the date on or before which the certificate should be received".

In view of the above quoted announcement now made by the census director that he will on application furnish certificates of the population of counties by about July 1, 1910, the question arises as to what will be the legal effect if such certificates are furnished as stated. This is a question that did not arise under the state of

facts heretofore presented to this Department, and hence is a question upon which we have not heretofore had occasion to pass.

This question, now presented to us for the first time as aforesaid, is, we think, controlled by the decision of the Supreme Court of this State in the case of Nelson vs. Edwards, 55 Texas, 389. The Act of Congress providing for the taking of the tenth census required each enumerator as soon as he had made his list to file it in the office of the county clerk of his county. The bulletins from the census office at Washington and the final report would not be published until long afterward. The Supreme Court held that as soon as the enumerators' lists were filed in the county clerk's office the tenth census was in force in that county and furnished the test of whether or not a tax collector separate from the office of sheriff should be elected. The court in the course of the opinion said:

"So far, then, as we are advised, it would seem that, for the purposes of the question now before the court, the filing of the list in the office of the county clerk would be sufficient evidence of the census for that county, in the absence of any allegation and testimony that it was not correct."

The Act of Congress for the taking of the thirteenth census makes no provision for enumerators filing their lists with the county clerk, but it does provide in said Section 32 that the director of the census may furnish certified copies of the population on application therefor. When this is done we think it must be held to have the same effect that was given by the Supreme Court to the filing of the enumerators' lists under the act for the taking of the tenth census.

Section 16 of Article 8 of the Constitution of Texas not only permits but *requires* the election of a tax collector separate from the office of sheriff where the last preceding United States Census shows a population of 10,000 or more. Also Section 20 of Article 5 of the Constitution not only permits but *requires* the election of both a county clerk and a district clerk, separately, where the county has a population of 8,000 or more. You will note that said Section 20 does not expressly refer to the United States Census, but in Brooks vs. Dulaney, 100 Texas, 86, the Supreme Court concluded that the framers of the Constitution had in mind an *official* enumeration as the test of population and therefore said court held that the attempt made by the Legislature in Article 1096 of the Revised Statutes of 1895 to prescribe as a test five times the number of votes cast for Governor in the last election was void and that the last preceding United States Census would control.

Therefore, it results from said published statement of the census director and said decision of the Supreme Court that counties having a population of 10,000 or more according to the certificate of the census director, if such certificate shall be duly applied for by the proper authority and shall be duly furnished before the first Tuesday in next November, should on that day elect a tax collector separate from the sheriff; that counties having a population of 8,000 or more according to the same character of certificate furnished before the first Tuesday in November should on that day elect two clerks instead of one; and that in counties having the required population ac-

cording to the same character of certificate furnished before next July 23rd the political parties desiring to nominate a county ticket should on that day make separate nominations for the offices of sheriff and tax collector and for the offices of county clerk and district clerk.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

ELECTION LAW—OFFICE OF SHERIFF AND TAX COLLECTOR—GETTING NAME ON TICKET AS CANDIDATE FOR—SEPARATION OF OFFICES.

Pending knowledge of latest United States census, candidate may make request in the alternative.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 15, 1910.

Hon. A. J. Parker, County Judge, Karnes City, Texas.

DEAR SIR: We have your letter of the 13th inst., which is as follows:

"My attention has been called to your ruling in regard to the separation of the office of sheriff and tax collector in counties where the population shown by the United States Census for this year shows over 10,000 .

"While the census of this county has not been announced we are sure that it will exceed 10,000 in population.

"Our sheriff Mr. E. C. Seale goes to Austin to see you in person so that he might get some advice from you as to his case. He has announced as a candidate for the office of sheriff and tax collector of this county subject to the action of the Democratic primaries in July. He is required to file an application with the chairman of the executive committee of the Democratic party of this county for a place on the official ballot not later than next Saturday the 18th, and is required in said application to state for what office he desires to run. He is puzzled as to how he could apply. If he applies for a place on the official ballot in accordance with his announcement as above, that is for sheriff and tax collector, and his name goes on the ballot in that way, and in the primary election another party is voted for simply for the office of *tax collector*, and still another person is voted for for the office of *sheriff*, could not such other persons lawfully claim to be the nominees of the party in the event later on the census official at Washington should issue his certificate that the population of this county did exceed 10,000 for this year's census?

"Please advise him what officials or persons can lawfully demand the certificate as to population. In this connection advise him if any court of record outside of this county can demand such certificate.

"Advise him as to what would be the effect of my issuing my proclamation in the general election for the election of a sheriff and tax collector as heretofore, and not as to offices separated, even if the population did exceed 10,000, but no certificates to that effect had been presented to me from any census official."

In accordance with your request we have orally given your sheriff and tax collector, Mr. E. C. Seale, our advice on the points mentioned in your letter. In order that there may be no possibility of misunderstanding our ruling on this matter, we will now give you the opinion of this Department in writing.

In order to avoid any diffficulty and confusion growing out of the uncertainty at the present time as to whether or not the certificate of the United States Census Director when obtained will show a population of 10,000 in your county or not, we would suggest that the candidate who may be affected by such certificate as to the population of your county file their applications for a place on the official ballot for the July primary in the alternative; that is to say, that they express clearly in their applications their exact intentions with reference to their candidacy in the event the offices in question remain combined as they now are, and also in the event that a certificate from the census director showing a population of 10,000 arrives before the July primary making necessary separate nominations for said offices at the July primary. The applications for a place on the ballot must be filed not later than next Saturday the 18th of June. However, the official ballot for the primary will not be made out until the 11th of July. Before the 11th of July the certificate of the census director if applied for by the proper authority will likely be received, so that before the ballot for the primary election is made out it will be officially known what the population of your county is and whether separate nominations should be made for the offices in question. Therefore, when the official ballot is prepared on July 11th the names of the candidates for these offices can be printed thereon in accordance with their intentions as expressed in their applications. To illustrate this we will give you the following form of application which may be used by the candidates and varied to fit the exact nature of their candidacy.

.....A. D. 19....

To Hon. .....

Chairman of the Executive Committee of the Democratic Party:

I hereby request that my name be placed upon the official ballot for the primary election to be held on the 23rd day of July, 1910, as a candidate for the office of sheriff and tax collector.

My occupation is .....My postoffice is .....
(If in a city or town the following should be added; I live on .....street: the number of my residence is.....)
In the event the certificate from the United States Census Director is duly applied for and duly obtained before July 23, 1910, and shows a population of 10,000 in said county of.....and in the event that the Democratic party of said county acting upon said certificate shall make seperate nominations for the offices of

sheriff and tax collector, then in lieu of the foregoing request I hereby request that my name be placed upon the official ballot for the primary election to be held on the 23rd day of July, 1910, as a candidate for the office of tax collector and not for the combined office of sheriff and tax collector.

.....
(Signed by candidate.)

The State of Texas,
County of.....

Before me, the undersigned authority, on this day personally appeared ....., known to me to be the person whose name is subscribed to the foregoing instrument of writing and acknowledged to me that he executed the same for the purpose therein stated.

Given under my hand and official seal, this the..... day of June, 1910.

.....
(Signed by officer.)

This form may be used by candidates for the offices of sheriff and tax collector and candidates for the offices of district and county clerk, each candidate varying in form slightly so as to suit the exigencies of his candidacy and so as to leave no doubt as to his intention in the contingency of separate nominations being made and also in the contingency of the office remaining combined as it is now. We do not think that the Democratic party can on July 23rd properly make separate nominations for the offices in question, unless the official certificate of the census director showing the required population has arrived by that time. If such certificate has not been obtained before July 23rd, but should be obtained between that date and the time that the county judge shall under the provisions of Sections 31 and 33 of the Terrell Election Law make his order for the holding of the general election in November and issue his notices of such election then it would result that the Democratic party would have a nominee for the combined office of sheriff and tax collector, and a nominee for the combined office of district and county clerk and would not have separate nominees for such offices. However, inasmuch as the Constitution is mandatory and separates the offices of its own force as soon as the last preceding census shows the required population it would be obligatory on the county judge in the case just mentioned to make his order and issue his election notices for the election of a sheriff and a tax collector separately and a district and county clerk separately. A difficulty would thenarise in determining which of these offices that were one at the time of the July primary and are two at the time of the November election the nominee of the July primary is to be considered a candidate for. We think this question should be solved by allowing the nominee for the combined office to elect which branch of the nomination he will relinquish and which he will retain and make known his election in that matter to the county judge before he makes his order for the general election and issues his notices of such election Thereupon, if the nominee of the July primary elects to retain

the nomination for the office of tax collector and relinquish that branch of the nomination which realtes to the sheriff's office, so as to permit the election of some one else for the latter office, the Democratic party would, of course, be without a nominee for the office of sheriff at the time of the November election. In that situation we think the proper way for the names of candidates for the office of sheriff to go on the official ballot for the general election in November would be by a petition in favor of each candidate for such office, to be signed and sworn to by 5 per cent of the entire vote cast in the county at the last general election and to be filed with the county judge in accordance with the provisions of Section 98 of the Terrell Election Law. In that way the names of all persons desiring to run for the office of sheriff and who are able to have the necessary petitions filed in their behalf would be printed on the ballot for the November election and the voters at that election would choose a sheriff. In the absence of any such petitions the official ballot for the November election should contain the office of sheriff with a blank place left for the voters to write the name of the person who is their choice for such office. In that way the office would still be filled whether names of candidates were printed on the ballot before the election or not.

In answer to the second question contained in your letter, we have to advise you that while Section 32 of the Act of Congress of July 2, 1909, providing for the taking of the thirteenth census provides in general language "that the director of the census is hereby authorized at his discretion upon the written request of the Governor of any State or Territory or of a court of record to furnish such Governor or court of record with certified copies of so much of the population or agricultural returns as they may be requested upon the payment of the actual cost of making such copies and one dollar additional for certification", we think that the application for a certificate as to the population of a single county should be made either by the county court of that county or the district court of the judicial district that includes that county or by the Governor of the State.

In answer to your last question as to what would be the effect of your issuing your proclamation for the election in November of a single officer as sheriff and tax collector if no certificates from the census director had been presented to you before your issuance of such proclamation, but the facts would be and should afterwards be made officially known that the population of the county was 10,000 or more, we have to state that an interesting and perhaps difficult question would be presented if such certificate should be placed on file in your county between the issuance of your proclamation for the holding of the November election and the day that such election is to be held. However, we do not deem it necessary to rule on that question at this time, inasmuch as the certificate of the census director if procured at all can easily be procured and doubtless will be procured before the time you are required by the law to make your order and issue your notices for the November election. If this certificate is presented to you before you make such order

and issue the notice of election, then no difficulty will be presented and it will be your plain duty to make your order and issue the notices for the election of the officers in question separately in the event the certificate shows the required population.

Yuors very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ELECTION LAW.

District candidate (for State Senate) required to have application for name to be placed upon ticket in the hands of the district chairman, or the respective county chairmen, within the time prescribed by law; transmission by mail where request fails to reach chairman not sufficient compliance to get name upon ballot.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 18, 1910.

Hon. I. N. Fallis, County Chairman, Clifton, Texas.

DEAR SIR: We have your letter of the 19th inst., in which you state that Mr. S. P. York of Gatesville, mailed to you a registered letter containing his application to have his name printed on the official ballot for the primary election to be held on next July 23rd as a candidate for the office of State Senator for the Twenty-seventh Senatorial District, composed of more than one county.

You state that the envelope in which this letter was inclosed bears the postmark of the postoffice at Gatesville, dated June 7, 1910, at 7 a. m., and you further state that you received the letter by registered mail on June 7th at 5 p. m. You also state that said senatorial district is without a district chairman. Under these circumstances you ask the ruling of this Department as to whether or not said application was filed with you within the time required by law.

Your letter does not state when the letter of Mr. York was deposited in the post office at Gatesville, but we are reliably informed that this was done on the evening of June 6th.

As you are aware, Section 110 of the Terrell Election Law positively requires the application for a place on the ticket of candidates for district offices in districts composed of more than one county to be filed not later than the first Monday in June. The first Monday in this month being the 6th, therefore, any application for such an office filed after June 6th was too late.

Therefore, the question before us is, when is an application to be considered filed with the district or county chairman within the meaning of Section 110? Is it filed with the chairman the moment it is deposited in the post office? Or does the filing take place when its actual transmission begins from the post office in which it was deposited? Or is it filed only when it reaches the hands of the chairman to whom it was directed?

Section 108, which prescribes the procedure for a candidate for a *State* office in order to get his name printed on the official ballot for the primary, contains the following:

"All such requests shall be considered filed with the State chairman when they are sent from any point in this State by registered mail addressed to the State chairman at his post office address."

Section 110 applicable to district candidates in districts composed of more than one county, and Section 111 applicable to county and precinct candidates and district candidates where the district is composed of only one county, both require applications to be filed with the proper chairman not later than the respective days mentioned in said sections; but neither of them contains any provision similar to the one quoted above from Section 108.

If said provision had been omitted from Section 108, it is clear that even the applications of State candidates could not have been considered filed with the State chairman until they had reacehd his hands or at least his office.

In Gates vs. State, 128 N. Y., 221, 28 N. E., 373, the contention was made that a claim for damages was filed with the board of canal appraisers when it was duly mailed to them, but the Court of Appeals of New York overruled this contention and held that the claim was not to be considered filed until it was actually delivered to such board. On page 228 the court said:

"To require that 'claimants shall file their claims in the office of the canal appraisers,' has but one meaning and effect. There must have been a delivery by, or on behalf of, the party of his claim to the office itself to constitute, and to enable him to allege and to establish, the jurisdictional fact of a filing."

Therefore, unless the above quoted provision in Section 108 can be read into Section 110, it follows that our holding must be that Mr. York's application, which did not reach you until the afternoon of the 7th of the month, was not filed within the time required by law and can not be considered. An inspection of said provision will show that it can not be read into and made to apply to Section 110 or Section 111 without an alteration in its language. It uses the expression "such requests", thereby limiting its scope and application to the requests dealt with in the preceding part of that section. It lays down a rule as to when requests are to be considered filed with the "State chairman", but says nothing about district or county chairmen. It declares the effect to be given to the sending by registered mail of a request "addressed to the State chairman", but contains no intimation that the same effect is to be given to the sending by registered mail of the application of a district candidate addresesd to a district or county chairman.

If the Legislature had intended that the requirement of Section 110 should be satisfied by anything less than what its plain terms import, it would have been easy to express such intention and it is to be presumed the Legislature would have done so. In Red vs. Morris, 72 Texas, 554, loc. cit., 556, the Supreme Court of Texas said:

"When by the use of apt words a definite meaning could have

been clearly conveyed and more general terms are employed, * * *, it is to be presumed that such meaning was not intended."

See also the treatise on Statutory Construction, in 1 Fed. Stat. Ann., LXXV.

In view of the extent of the territory within the boundaries of this State and the delay and expense incident to making a trip from some portions thereof to the office of the State chairman and the length of time that might be required for a letter to reach the State chairman after it had been started, there are substantial reasons why the Legislature might well have intended to prescribe a different rule for filing requests as candidates for State offices from the one applicable to candidates for district, county or precinct offices.

The foregoing considerations and authorities have brought us to the conclusion that the provision quoted from Section 108 has no application here and that Mr. York's request was not filed with you in time, and we so rule.

If the provision aforesaid in Section 108 could be held to apply to requests made under Section 110, there would still remain a question as to whether or not an application registered and deposited in the post office on the evening of the 6th, but which did not begin to move on its journey until the morning of the 7th, could properly be said to have been "sent from any point in this State by registered mail" within the meaning of said provision. We think it very doubtful whether it could. In U. S. vs. Dauphin, 20 Fed Rep., 625, loc. cit. 628, the court said:

"It is to be observed that throughout the title 'The Postal Service', the verb 'send,' and its past participle, 'sent,' have an established meaning, and uniformly signify forwarded in the mail through the offices of the government. See Rev. St., pars. 3851, 3909, 3912, 3932, 3937, and 3993. Whereas, the intentional procurement of the conveying of a letter into the mail is described as causing to be deposited. See Sections 3887 and 3893."

However, we base our ruling principally upon the ground first stated.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

ELECTION LAW—REPRESENTATIVE—VACANCY.

Vacancy in office to be filled by election; vacancy in nomination to be filled by executive committee.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 21, 1910.

Mr. H. Miller, Democratic Chairman, Bellville, Texas.

DEAR SIR: We have your letter of the 16th inst., in which you state that there is vacancy in the office of a member of the Legislature from your representative district and you desire to know how a nomination may be made to fill this vacancy.

You refer to Article 50 of the Terrell Election Law, but I do not think it has any application here. Article 50 provides for the nomination of candidates by the county executive committee of a political party after a nomination has been made by the primary and a vacancy created by the death of the nominee, or his declination of the nomination. The primary election to be held on July 23rd is for the sole purpose of nominating State, district, county and precinct candidates to be elected in the general election next November. Section 50, you will observe, applies only to a vacancy in a nomination and not to a vacancy in an office. The provisions applicable to the case of a vacancy in the office of representative are to be found in Sections 30, 33, 35 and 105 of the Terrell Election Law. The Governor issues his proclamation calling an election to fill the vacancy and the county judge of the county causes the legal notices of the election to be properly posted. I understand that the Governor has already taken the necessary steps to have all vacancies in the Legislature filled on July 23rd, the day of the primary.

Said Section 105 contains the following language:

"Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have power to make such nominations; provided, that all precincts in the same county and all counties in the same district shall vote on the same day."

The above provisions quoted from Section 105 points out the way for the Democratic party to make a nomination of a candidate for the special election to be held on July 23rd, in the event it desires to do so. Assuming that the legislative district in question is composed of Austin County alone, your county executive committee may cause a special primary for the purpose above mentioned to be held, say on June 30th. Then on Saturday, July 2nd, the county executive committee may meet and declare the result and the chairman certify the name of the nominee to the county clerk, who may thereupon publish the name in a paper five days in accordance with Section 131 and post it in his office ten days in accordance with Section 132, and then order the name printed on the official ballot for the special election to be held on July 23rd.

I do not pass on the question of whether all the provisions of Sections 131 and 132 apply here, but it would be safe to comply with them.

The county judge, county clerk and sheriff are made a board to provide the supplies to hold the special election on July 23rd. Terrell Election Law, Section 36.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ELECTION LAWS—SPECIAL ELECTIONS—VACANCIES IN LEGISLATURE.

Same ballot boxes can not be used in Democratic primary election and for special election to fill vacancies in Legislature.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 25, 1910.

Hon. Adolf Stein, County Judge, New Braunfels, Texas.

DEAR SIR: In answer to your letter of the 20th inst., we have to advise you that in our opinion the same ballot boxes can not be legally used for the Democratic primary election to be held on July 23rd, and for the special election to be held on the same date to fill vacancies in the Legislature and the State Senate. In special elections to fill legislative vacancies the commissioners court appoints a presiding judge, an assistant judge and two clerks of election. (See Section 58 of the Terrell Election Law.) The first part of said section, having reference more directly to general elections, requires the two judges of election to be of different political parties where practicable and the clerks of election to be of different political parties where practicable. It is possible that the courts might hold that this requirement of giving representation to different political parties would not apply to special elections of the kind to be held on July 23rd, the officers to hold which are provided for in the last sentence in said Section 58.

If the special election officers provided for in the last sentence of said Section 58 are not within the operation of the requirement of the preceding portion of said section that representation shall be given to different political parties where practicable, then it would follow that a single set of officers may be used to hold both elections on July 23rd, provided the Democratic Executive Committee of the county names the same presiding judge that the commissioners court has named for the holding of the special election, and such presiding judge, when so appointed by the county committee, appoints the same persons as assistant judge and clerks of the primary election that have been appointed by the commissioners court as assistant judge and clerks of the special election. (See Section 123 of the Terrell Election Law).

In special elections of the character of that to be held on July 23rd, copies of the returns of the elections are to be delivered to the county judge and the county clerk and the ballot boxes are to be fastened securely and delivered, unopened, by the presiding judge to the county clerk. The ballot box containing the ballots voted must remain unopened for a year, and after the expiration of one year, in the event there is not a contest of the election, such box is to be opened and its contents destroyed. (See Section 36 and Section 80 of the Terrell Election Law, and Sayles Civil Statutes, Articles 1743, 1747 and 1748.)

In primary elections, the election returns must be made to the county chairman of the party and the ballot boxes used in said primary must be delivered to said county chairman. The county

chairman afterwards delivers them to the county clerk of the county, who keeps them unopened for sixty days, at the end of which time, in the event there is no contest, the law *requires* them to be opened and the contents destroyed without examining any of the ballots. (See Section 131, 136 and 143 Terrell Election Law).

In view of the foregoing provisions, we think it would be impossible for the same ballot boxes to be used for both such elections and the law be complied with.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

ELECTION LAW—DISTRICT CHAIRMAN—OFFICIAL BALLOT.

The filing of the name to be placed on ballot by candidate with party who held himself out and was recognized by the public as district chairman of the senatorial district, though he was not such chairman, nevertheless entitles such candidate to have his name placed upon the official ballot.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 2, 1910.

Mr. C. W. Barcus, Attorney, Hereford, Texas.

DEAR SIR: I have carefully considered your brief filed with me yesterday upon the controversy as to whether or not Mr. Gough of Hereford, is entitled to have his name printed on the official ballots in the various counties composing the Twenty-ninth Senatorial District as a candidate for Senator in said district.

I quote from said brief your statement of the facts in the case, which statement is as follows:

"1. Four years ago Dr. J. S. Wilkins of Paducah was elected district chairman by the District Convention. At that time he was not a county chairman.

"2. There has been no chairman elected for the district since four years ago.

"3. Mr. Nat Henderson was two years ago elected as senatorial committeeman for the Twenty-ninth Senatorial District on the State committee and he still holds that place.

"4. Mr. Henderson thought, so stated, and held himself out and acted as district chairman of the Twenty-ninth Senatorial District until June 2, 1910.

"5. Dr. J. S. Wilkins did not act as chairman and did not hold himself out as such until June 1, 1910.

"6. There are three candidates for State Senate in the Twenty-ninth District and to each of the candidates and their friends Mr. Henderson stated he was the district chairman.

"7. If the three candidates did before June 6th file their applications with Mr. Henderson as chairman as required by law and Mr. Henderson believing and holding himself out as chairman received and filed said applications.

"8. On June 1st Dr. Wilkins informed Mr. Slaton, one of the candidates, that he, Wilkins, was chairman and Slaton notified Henderson of that fact and Henderson notified Jackson, another candidate who had filed with him, and attempted to notify Gough but by a mistake failed to do so.

"9. Mr. Henderson kept Mr. Gough's application until June 12, 1910, when he returned same to Gough and Gough sent same then to Wilkins".

A few days ago the question of the right of Mr. Gough to have his name go on the official ballot was submitted to this Department and a ruling made thereon against Mr. Gough upon a state of facts materially different in one respect from the state of facts now made to appear. The person heretofore submitting the question to this Department were under the impression that Dr. J. S. Wilkins of Paducah, had been elected district chairman in the manner required by law, and was therefore a district chairman de jure and was legally filling the office and prepared at all times to discharge the duties thereof. That being their belief about the matter, the fact was so presented to us and the ruling that I made was expressly based upon the assumption that there is and has been all the time an absolutely legal incumbent of the office in the person of said Dr. J. S. Wilkins. If that were the fact then our former ruling on this matter would necessarily have to be adhered to, inasmuch as under the law there can be no officer de facto while the office in question is actually filled and the duties thereof discharged by an incumbent of the office whose election thereto was in all respects legal.

In the light of the facts you now present as to the manner in which Dr. Wilkins was elected, which facts you have substantiated by a telegram from Dr. Wilkins himself stating that he was not a county chairman at the time of his election as district chairman and a telegram from ex-Senator D. E. Decker, stating that the election of Dr. Wilkins as district chairman was made by the Senatorial District Convention four years ago, it becomes necessary for me to determine whether or not Dr. Wilkins is the legally elected and constituted chairman of the executive committee for the Twenty-ninth Senatorial District.

Section 121 of the Terrell Election Law is as follows:

"On primary election day, when candidates for State, district, county and precinct offices are nominated the voters of each organized political party shall vote for a chairman of the county executive committee and the result shall be reported to the county clerk, and the county chairman thus elected shall at once enter upon the discharge of the duties of such position; *the said county chairman shall be ex officio a member of the executive committee of all the districts of which his county is a part, and the district committee thus formed shall elect its own chairman;* and all chairmen and members of the different executive committees in existence when this law becomes effective shall remain in office until their successors are elected, as providd herein."

From the language above quoted, it is clear that the various

county chairmen of the senatorial district constitute the District Executive committee and that the chairman of such district committee is required to be elected by the committee itself.

That part of Section 114 of the Terrell Election Law that bears more or less directly upon the matter under consideration is as follows:

"On the fourth Saturday in August succeeding each general primary there shall be held in each district within the State in which any candidate or candidates for any district office are to be elected at the succeeding regular election a district convention which shall be composed of delegates from the county or counties composing such district, selected in the manner herein provided. Notice of the time and place of holding such convention shall be given by the executive committee of such district at least ten days prior to such meeting. *Before such convention assembles the executive committee of such district shall meet and elect one of its number chairman of such committee,* shall prepare a list of delegates from the various counties composing such district which have been certified to the district committee by the chairmen of the various county committees, shall tabulate the vote cast in the various counties for each candidate for district office, which has been certified to such committee as provided in this act, and shall also prepare a statement, showing the number of convention votes which each county in such district is entitled to cast in said convention upon the basis set forth in Section 120, of this act, and shall present such list of delegates, tabulated vote and convention vote to the convention when it assembles. The district convention shall then canvass the returns of the votes cast in all the counties of the district for each candidate as presented to them by the district committee, and shall declare the person found to have received the largest number of votes at the primary in the district for such office the nominee of the party for such office, and the chairman and secretary of the convention shall forthwith certify such nomination to the Secretary of State".

The language underscored in the above quotation requires the district committee to meet and elect a district chairman before the assembling of the district convention. It further provides that the district chairman shall be one of the members of such district committee. Therefoer, no one is eligible to the position of district chairman unless he is a county chairman and as such made ex officio a member of the district committee. It follows that inasmuch as Dr. Wilkins was not a county chairman and therefore not a member of the senatorial district committee he was ineligible to the office or position of chairman of such district committee. It is also apparent that he was elected not by the body that had power to elect such an officer but by a district convention composed of delegates from the various counties within the district and which was an entirely different organization and body from the district committee and which was given by the law no authority whatever to select a district chairman. Therefore the election of Dr. Wilkins as district chairman was without authority of the law for two rea-

sons: First, because he was ineligible to the office, and second, because he was not elected by the district committee, the only body which had any power under the law to fill that position. Dr. Wilkins not being the legal district chairman for your district, and not having published himself as district chairman or taken any action as such chairman from the time of his attempted election up to June 1st of this year, he certainly could not be considered as a de facto district chairman before he began to act as such.

You have further stated to me that even between June 1st and June 6th he made no attempt to notify the candidates or the public at large that he was district chairman or claimed to be filling that position and did nothing to indicate that he was filling the office, except to inform Mr. Slaton on June 1st that he was district chairman and to receive and file between that date and June 6th the application of Mr. Slaton and Mr. Jackson when sent to him. This brings us to the question of whether or not Mr. Henderson of Wichita Falls was under the circumstances existing in this case a district chairman de facto within the meaning of the law at the time that Mr. Gough and the other two candidates filed their applications with him. In view of the fact that Mr. Henderson honestly thought that by virtue of his being State committeeman from that senatorial district he was thereby clothed with the position of district chairman and in view of the fact that for a considerable time preceding June 6th he publicly claimed to be district chairman and such claim was generally acquiesced in by the public, including the candidates themselves, and in view of the fact that Mr. Gough, as well as the other candidates, was reasonably justified under the circumstances in believing that Mr. Henderson was district chairman both at the time the applications were filed and almost up to the time limit within which applications could be filed, I have reached the conclusion that while Mr. Henderson and the candidates and the public were mistaken in their belief that Henderson was the legal district chairman, he was in the eye of law a chairman de facto at the time the applications were filed with him and therefore that such filing was just as valid as if he had been legally elected to the position of district chairman. This proposition is supported by the following authorities:

29 Cyc., pages 1391-1393.
Bell vs. Faulkner, 84 Texas, 187.
Aulanier vs. Governor, 1 Texas, 653.
Dane vs. State, 36 Texas Appeals, 84.
Herd vs. Elliott, 92 S. W. Rep., 764.
Ex Parte Ward, 173 U. S., 452.

In 29 Cyc., cited above, the following language is used:

"One of the fundamental prerequisites to the existence of a de facto officer is the possession of the office and the performance of the duties attached to it, but such possession need not be physically continuous. Thus, where an office is in dispute and the one in actual possession steps out with no intention of abandoning the office and the other claimant, with full knowledge of the facts, steps in and proceeds to do business, the one who previously had possession of the office is considered to be the officer de facto. It follows

as a necessary consequence that there can not be a de facto officer if a de jure officer is discharging the functions of the office in question. There can not be two different officers de facto in possession of an office for which one incumbent only is provided by law.

"But the mere fact of the possession of the office is not sufficient to make the incumbent a de facto officer. There must be color of title or his possession must be acquiesced in by the public. The mere possessor of an office without these other conditions is an intruder whose acts have legally no effect. * * * It would seem also that persons in actual possession of an office whose possession is acquiesced in for a considerable time by the public are de facto officers, although they do not possess color of title".

In Bell vs. Faulkner, supra, the fourth paragraph of the syllabus is as follows:

"A minor acting as clerk of an election may be considered a de facto officer and the will of the majority of the voters will not be defeated by reason of such fact."

The minor was not legally eligible to the position, but inasmuch as he had filled it without protest or objection he was held to be a de facto officer and his acts as legal and valid as if they had been done by one who was legally clothed with the office.

In the above cited case of Aylanier vs. Governor, the Supreme Court of Texas said:

"The point growing out of the refusal of the court below to receive testimony to show that the collector of taxes for the county of Galveston had not been duly elected and had not given bond as required by law will not require much consideration. The facts show that he had been commissioned as collector and that he had acted as such from the 1st day of August preceding. Acting as an officer under color given by the commissioners made him such de facto until ejected in a proceeding having that object directly in view; and his authority would not be questioned under such circumstances in a collateral way. His official acts would be valid and he could legally collect the tax and give receipts for the same".

In the case of Dane vs. State, supra, a complaint in a criminal prosecution was attacked, on the ground that the deputy county attorney before whom the complaint was sworn to had not had his appointment approved by the commissioners court and recorded in the manner required by law. The Court of Criminal Appeals held that he was nevertheless a de facto officer and the complaint just as valid in law as if his appointment had been complete and legal. The court said:

"In our opinion although the commissioners court had not at the time consented to the appointement of the said deputy county attorney he was a de facto officer and as such entitled to administer the oath to the complainant in this case and his authority could not be attacked in a collateral proceeding."

In the above cited case of Hussey vs. Smith, a United States marshal had served certain process issuing from local tribunals in the Territory of Utah and certain proceedings were had depending for their validity on such acts of the marshal. It was afterwards held by the Supreme Court of the United States that a marshal

had no actual authority to serve such process and that his legal jurisdiction was confined to cases in which the United States was concerned. However, it was held by the Supreme court that while in the service of such process from the territorial court he was an officer de facto; that his acts as such could not be collaterally attacked and that the proceedings were as valid and binding as if the service had been made by an officer having legal authority to act in such a matter. The court said:

"During all this time the marshal's acts were valid as being those of an officer de facto. They were as much so as if they had been done by him de jure. These remarks apply with full force to his acts as a ministerial officer in the Bernhisel case. An officer de facto it is not a mere usurper, nor yet within the section of the law, but one who, *colore offici*, claims and assumes to exercise official authority is reputed to have it, and the community acquiesces accordingly."

In the above case of Herd vs. Elliott, the offices of entry taker and county surveyor had formerly been consolidated, but at the time of the acts in question were legally separated, the office of entry taker being at that time without any legal incumbent. The county surveyor misapprehending the law and thinking that the offices were combined and therefore that he was entry taker as well as surveyor kept posesssion of the books and papers of the entry taker's office for a considerable time and without protest or objection from the public discharged the duties appertaining to the office of entry taker as well as those that belonged to the office that he legally filled, namely, county surveyor. It was held by the Supreme Court of Tennessee under these circumstances that his acts as entry taker were valid and could not be collaterally attacked, he being entry taker de facto, though having no legal title to that office. The court after quoting the definition of an officer de facto as given in the case of State vs. Carroll, 38 Conn., 449; 9 Amer. Rep., 409, said:

"The special portion of the definition above quoted which is applicable to the present case is the first specification, that is, where one acts 'without a known appointment or election' but under such circumstances of reputation or acquiesence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be."

I think the foregoing language embodies an excellent definition of a de facto officer and that Mr. Henderson clearly comes within that definition.

Therefore, it is the opinion of this Department that under the facts as they are now presented and as hereinbefore set out Mr. Henderson of Wichita Falls was district chairman de facto for the Twenty-ninth Senatorial District; that the filing of the application with him was valid; that his action in receiving such applications and filing them can not be collaterally attacked and that the names of all candidates for State Senator who duly and regularly filed their applications with him not later than June 6th are now legally entitled to have their names printed on the official ballot in every county in the district.

This conclusion seems to me to be clearly in accordance with the law and it certainly can work no injustice or hardship against any one of the three candidates. Any other holding would result in confusion and possibly in injustice. It is certain that under the facts as they are now presented the filing of applications with Dr. Wilkins did not avail the candidates anything, as he was neither district chairman de jure or de facto. Unless therefore the filing with Mr. Henderson can be held valid the candidates would be remitted to the requirement in Section 110 of the Terrell Election Law that where there is no district chairman applications must be filed with the various county chairmen not later than the first Monday in June. My understanding is that not one of the three candidates filed his application by the 6th of June with the various county chairman in the district. That being so, a holding denying the validity of the filing with Henderson would result in making it illegal to print the name of either one of the candidates on the official ballot in any of the counties and would necessitate the making of a nomination by each voter writing the name of his candidate on the ballot on primary election day.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ELECTION LAWS—CANDIDATES, ASSESSMENTS AGAINST.

Where the county executive committee makes assessment against a candidate and requests that he have such assessment in their hands by the fourth Monday in June, and such candidate fails to meet this requirement of the committee, but does forward same prior to meeting of primary committee, is entitled to have his name placed upon the official ballot.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 5, 1910

Mr. W. R. McClellan, Coleman, Texas.

DEAR SIR: We have your letter of the 28th inst., in which you state that Mr. J. R. Brown made application in accordance with law to have his name placed on the official ballot for the primary election as a candidate for justice of the peace: that he was duly notified at the instance of the county executive committee that he had been assessed $5 as his proportionate part of the expense of the primary election: that such notice requested him to have the money in your hands on or before June 27th; that he mailed you a letter on June 27th inclosing $5, which letter did not reach you until June 28th. You ask the opinion of this Department as to whether or not, in view of the provisions of Section 111 of the Terrell Election Law, Mr. Brown is entitled to have his name printed on the official ballot for the primary election.

We find nothing in the law on this point except what is con-

tained in Section 111 above referred to. Said section, after requiring the committee to meet on the third Monday in June and to apportion the expenses according to the rule therein laid down, provides that the committee at such meeting shall:

"By resolution direct the chairman to immediately mail to each person whose name has been requested to be placed on the official ballot a statement of the amount of such expense so apportioned to him, with the request that he pay the same to the county chairman on or before the fourth Monday in June thereafter."

A subsequent portion of said section provides for a meeting of the sub-committee, known as the primary committee, on the second Monday in July for the purpose of preparing the official ballot. Then follows this proviso:

"Provided that the name of no person shall be placed thereon for a county or precint office who has not paid to the county executive committee the amount of the estimated expense of holding such primary *apportioned* to him by the county executive committee *as hereinbefore provided.*"

You will note that the committee is to cause the chairman to mail a written request to each candidate stating the amount assessed against him and requesting that he pay such amount on or before the fourth Monday in June. The sub-committee known as the "primary committee," meets on the second Monday in July for the purpose of making up the official ballot for the primary. Such sub-committee is, by one of the provisions above quoted, forbidden to print on the official ballot the name of any candidate who has not paid the amount assessed against him.

The question here is would this prohibition imposed upon the sub-committee apply in a case where the candidate had paid the amount assessed against him before the time that the sub-committee holds its meeting, but did not make such payment until after the fourth Monday in June.

While, of course, it is the safest plan for candidates to follow strictly the written request of the county executive committee and make the payments not later than the fourth Monday in June, still we are of the opinion that the prohibition directed against the sub-committee applies only in a case where at the time such sub-committee is called upon to act the candidate in question is still delinquent in the payment of the amount assessed against him. If he makes payment between the fourth Monday in June and the second Monday in July, we believe it would be lawful for the sub-committee to give his name a place on the ballot.

You will observe that the law does not *directly* say that candidates shall pay their assesments by the fourth Monday in June. It merely directs the committee to have its chairman mail them a *request* so to do. It may be conceded, however, inasmuch as the request of the committee is one made in obedience to the law, it is to be regarded as the request of the *law* as well as of the *committee*. Still, the fact that the law does not direct and in positive terms say to the candidates that they must make payment by the

fourth Monday in June is a circumstance that is entitled to some weight in determining whether this particular part of Section 111 is mandatory or merely directory.

The cardinal rules for determining whether statutes are mandatory or directory are clearly indicated by the following quotations from 2 Sutherland on Statutory Construction (Lewis' Ed.):

"Sec. 611. There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words, and there are no negative words, and it relates to the time or manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory. Generally it is so; but it is a question of intention. Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true, but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the Legislature intends what is reasonable, and especially that the act shall have effect: that its purpose shall not be thwarted by any trivial omission or a departure from it in some formal, incidental or comparatively unimportant particular."
* * *

"Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the Legislature intended compilance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. 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 the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute."

"Sec. 613. A statute required the township clerk to certify on or before the first Monday of October in each year to the supervisor of his township the amount of the town indebtedness growing out of the payment of bounties. Where such certificate was not made within that period, but was within a week afterwards, and seasonably to answer the intended purpose, it was held good, and the provision so far directory. The information was to enable the supervisor to include the amount certified in the tax levy."

"Sec. 633. Where an existing right or privilege is subjected to regulation by a statute in negative words, or those which import that it is only to be exercised in a prescribed manner, the mode so prescribed is imperative."

Tested by the foregoing rules of construction, we think the *implied request* made by the law upon the candidate that he pay his assessment on or before the fourth Monday in June must be con-

sidered directory merely, unless the above quoted proviso in said Section 111 operates upon said *implied request* in such a way as to make it mandatory and strict compliance therewith a condition precedent to printing the candidate's name on the ballot.

When we examine said proviso, we find that it is couched in negative terms and contains an express prohibition. Therefore, it must be held to be mandatory. But the question arises, does the language mean that a candidate's name shall not be printed on the ballot if he has not "*paid*" "as hereinbefore provided" the amount assessed against him? If so, there is room for the contention that payment at any time after the date "hereinbefore" named will not avail him. Or does this language mean only that the candidate's name can not go on the ballot unless he has, at the time the sub-committee meets and takes its action, "*paid*" the amount that was "*apportioned to him*" "*as hereinbefore provided.*" If the latter construction is correct, then it is obvious that the direction to pay by the fourth Monday in June is not rendered mandatory by anything contained in the proviso now under discussion and that the sub-committee has the legal authority to give every candidate a place on the ballot who has paid his assessment at any time before such sub-committee actually makes up the ballot. We believe the construction last set out is the correct one. We think the phrase, "as hereinbefore provided" has the word "apportioned" for its antecedent, and not the word "paid," and that the following rule laid down in 2 Lewis' Sutherland on Stat. Constr., Sec. 420, applies:

"Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refers solely to the last antecedent."

A good illustration of the features that distinguish a directory from a mandatory provision is to be found in a comparison between the *implied request* contained in Section 111, that candidates pay on or before the fourth Monday in June, and the direct and specific requirement in Sections 108, 110 and 111, that candidates shall file with the proper party officer their written applications "*not later*" than the respective dates mentioned in said sections. The one provision is expressed in *affirmative* language, not necessarily carrying with it a prohibition against the doing of the thing later; the other is expressed in *negative* language, strongly implying a prohibition against the doing of the thing at a date later than that fixed by the statute.

In view of the foregoing principles and authorities, we conclude that Mr. Brown's case does not fall within the prohibition against the sub-committee that is contained in the proviso to Section 111, and that he is legally entitled to have his name printed on the ballot. We have reached this conclusion from the language of the law itself, independently of any considerations as to the practical consequences of one holding or the other. But it is not out of place to say that under this holding the law operates justly and reasonably, whereas under a different one its operation in many cases would be harsh and unreasonable. We have before us now a case where a candidate offered to pay the county chairman at the time of filing his application the amount that would be required of him, but the chairman declined to receive it at that time, saying he did not know

just how much it would be and that written notice would be given when the committee met. The committee met on June 20th, but for some reason (perhaps because of the large number of notices to be written and mailed) the notice to the candidate in question was not mailed until June 23rd at 11 a. m. Before the notice reached him he was called away from town by the illness of his mother, but arranged with a friend to take the notice from the postoffice and pay the amount assessed. The result was that the friend did not get the money to the chairman until the morning of June 28th, and the latter declined to receive it because he was doubtful of his authority to do so after the fourth Monday in June (the 27th.) It is apparent that if the fourth Monday in June (just one week from the time fixed by law for the apportioning of the expenses by the committee) is to be made the dead line, cases similar to the one above outlined will inevitably occur with considerable frequency. We are not disposed to adopt a construction that will bring about such results unless we are driven to it by the plain terms of the statute. In this instance we conclude that such a construction is not required either by the spirit or the letter of the law.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

ELECTION LAW—SPECIAL ELECTION TO FILL VACANCY IN CONGRESS—DISTRICT COMMITTEE AUTHORIZED TO CALL SPECIAL ELECTION.

Should be called at such date as to give reasonable time to get proper returns and names of candidates certified to county clerks so that same may be printed upon official ballot for general primary.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 7, 1910.

Hon. R. T. Brown, District Chairman, Henderson, Texas.

DEAR SIR: In answer to your oral inquiry this day submitted, we have to advise you that Section 105 of the Terrell election law authorizes your committee to call a special primary election to be held on a day fixed by it in the various counties composing your Congressional district for the purpose of nominating a Democratic candidate for the unexpired term recently made vacant by the resignation of Congressman Gordon Russell, such vacancy to be filled by a special election that has been ordered by the Governor for the 23rd day of this month. That part of Section 105 which gives your committee this power is the following:

"Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations; provided, that all precincts in the same county and all counties in the same district shall vote on the same day."

We are of the opinion that you should fix the time for holding this special primary election at such a date as to give a reasonable time for all returns of the special primary to be made by the proper party officials, such returns to be canvassed and the result declared, and the name of the nominee to be certified to the various county clerks in the district time enough for such county clerks to cause the name of the nominee to be printed on the official ballot for the special election to be held on July 23rd. You should cause the county executive committees in the counties of your Congressional district to comply with the provisions of Sections 46 and 114a in the preparation of the official ballot for your special primary election. The Department rules that you have authority to receive the written applications of candidates in said special primary at any time before it is too late to cause their names to be printed on the official ballots for the special primary in all the different counties of the district. Applications filed with the district chairman so late that it will be impossible to have their names printed on the official ballots for the special primary in the different counties in the district will have to be rejected.

Section 124 of the Terrell election law forbids the placing on any primary ballot of any printed matter except that which is authorized by law and provides that on ballot cast in violation of that section shall be counted. We do not find in the law any definite and specific provision expressly authorizing the printing of candidates' names on the ballot for a special primary under the circumstances that exist in your case, but the Department is of opinion that the authority given by the above quoted provision of Section 105 carries with it the power to receive applications of candidates and to cause their names to be printed on the ballot for the special primary. We think the form of the applications of candidates in your special primary should comply with that prescribed in Section 110 for similar applications of candidates to be voted upon at a general primary.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

ELECTION LAW—PRIMARIES—CHALLENGERS — SUPERVISORS—CANDIDATES.

No provision for challengers in party primaries. One-fifth the number of candidates may choose two supervisors, etc.; any voter may challenge, when and how; loitering, what is, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 21, 1910.

Hon. A. B. Storey, Democratic State Chairman, San Antonio, Texas.

DEAR SIR: After a more thorough consideration of the matters discussed between you and the writer yesterday over the long distance telephone, this Department has reached the following conclusions:

1. That the law makes no provision for the appointment of regular challengers for a primary election. We do not find the word "challenger" used anywhere in the Terrell election law, except in Sections 40 and 75; and it is clear that the provision made in Section 40 for one challenger for each political party is of such a nature that it can not be applied to a party primary.

2. That under Section 123 and under Section 126, as amended by the acts of 1909, page 451, any *one-fifth* of all the candidates whose names will be printed on the official ballot may, by a written and signed agreement, made on the day before the primary or earlier, choose two supervisors in one or more or all of the election precincts in a county. These supervisors must be sworn by the presiding judge of the primary in each voting precinct where chosen and are then entitled to remain at the polling place and see that the election is conducted fairly and lawfully. When Sections 123 and 126 are read in the light of what is said about supervisors in Section 73, it is reasonably clear that a supervisor in a Democratic primary may object to a voter he thinks is not a Democrat or is not otherwise qualified to vote, and that thereupon it will be the duty of the presiding judge to swear the person offering to vote and ascertain whether he is qualified.

3. That no persons other than those mentioned in Section 76 of the Terrell election law should be allowed within the room where the primary election is being held. Said Section 76 contains the following:

"No person shall be admitted within the room where the election is being held except the judges, clerks, persons admitted by the presiding judge to preserve order, supervisors of election, and persons admitted for the purpose of voting; provided, that the officers of the election shall permit an interpreter to assist any voter who can not both speak and read the English language."

This provision is of such a nature that we think the Legislature intended it to apply to primary elections as well as general elections. This construction is strengthened by the language of Sections 134 and 135.

4. That probably any Democratic voter has the right to challenge in good faith any person offering to vote, provided he can make such challenge kown to the judges of election without entering the room where the polling place is. But he must not enter the room for the purpose of making a challenge, and he must not loiter or electioneer within one hundred feet of the entrance of the polling place. Loitering or electioneering within the distance named is made a penal offense. See Sections 159, 134 and 84.

It would seem that merely coming up to the door to make a bona fide challenge and retiring to a distance of one hundred feet as soon as the challenge is made would not be loitering.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

OPINIONS RELATING TO FEES OF OFFICERS—CONSTRUCTION OF THE FEE BILL.

FEE BILL—FEES OF OFFICE—TAX ASSESSOR—INDEPENDENT SCHOOL DISTRICT.

Fees not collected during fiscal year should be reported as delinquent.
Where independent school district designates county tax assessor and collector to assess and collect taxes of district, fees therefor should be treated as fees of office and accounted for under fee bill.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 18, 1908.

Mr. Jas. E. Bolton, Tax Assessor, Dallas, Texas.

DEAR SIR: We have your letter of the 10th inst., and as to the questions therein submitted beg to advise:

1. You say that in settlement of your commissions for assessing 1908 taxes the Comptroller forwarded you an order on your tax collector for the amount due you by the State, and that the collector made a partial payment of said amount on November 5th, but did not pay the remainder until December 5th. Upon this statement you ask the opinion of this Department as to whether or not you are required under the provisions of the fee bill to report the last amount paid as fees collected during the fiscal year beginning December 1st, 1907, and ending November 30th, 1908, or should you treat the same as delinquent fees in said report. I am of the opinion that such amount should be treated as delinquent fees. Section 11 of the fee bill provides:

"Each officer mentioned in the preceding section, and also the sheriff, shall at the close of each fiscal year make to the district clerk of the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected and by whom due."

Section 16 of the same act provides:

"It shall be the duty of those officers named in Section 10 of this act, and also the sheriffs, to keep a correct statement of the sums coming into their hands as fees and commissions in a book to be provided for that purpose, in which the officer at the time when any fees or moneys shall come into his hands shall enter the same, etc."

I have examined the other sections of this law to find if there was any other provision proper to be construed in connection with the language quoted of the sections above, and have found none, and can see no reason why the language in these sections should not be given its plain and literal meaning, which if done would only require the officer to report such fees as paid for the year as had been actually collected by him in cash during that year, and would require him only to enter fees collected in his book when, and not before, the same might be actually paid over to him.

2. You say further that tax assessors are allowed one per cent commission for assessing special taxes levied by school districts, and inquire if these commissions are required to

be included in the report of fees required by the fee bill. Section 165, Chapter 124, of the General Laws of the Twenty-ninth Legislature provides that:

"When a majority of the board of trustees of an independent school district prefer to have the taxes of their district assessed and collected by the tax assessor and collector, same shall be assessed and collected by said county officers * * *" And further provides "That when the county assessor and county collector are required to assess and collect the taxes of independent school districts, they shall respectively receive 1 per cent for collecting and assessing same."

These provisions of the law require the county assessor and collector whenever a majority of the board of trustees of an independent school district in their county may wish it, to act in assessing and collecting the school tax for such district. So that when requested by a majority of trustees of such district it becomes their official duty to perform the services required by said provision of the law. The compensation of the assessor and collector is fixed at 1 per cent, respectively, for assessing and collecting such taxes.

Art. 2495c provides:

"Hereafter the maximum amount of fees of all kinds that may be retained by any officer mentioned in this article as compensation for services shall be as follows: * * * ." Then follows the different county officers with the maximum amount allowed them per annum.

Art. 2495h excepts from the provisions of the law in respect to maximum fees, and the compensation allowed officers for ex officio services when allowed upon the order of the commissioners court, and the fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes, which it is declared shall be in addition to the maximum salaries fixed in the fee bill.

We think these different sections of the law quoted compel the construction that the fees collected by county assessors and collectors for the assessing and collecting school taxes for independent school districts under the provisions of Chapter 124 of the General Laws of the Twenty-ninth Legislature are fees of office, and should be so treated by the respective officers collecting the same.

The exceptions contained in Art. 2495h indicate that all other charges for services rendered by officers mentioned in Section 10 of the act under consideration, other than the exceptions contained in said section, are to be treated as fees of office.

It is true the services of the assessor and collector rendered to independent school districts in their county are not services rendered to the whole county, but they are services rendered by virtue of their holding their respective offices, and the fees paid them are provided by law and do not arise by virtue of any contract between them and the independent school district. You will also note from the provisions of Section 165 of Chapter 124 of the acts of 1905 that there is no option with the officers named as to whether or not they will serve said district in case the majority of the trustees prefer that they do. The law makes it their duty.

You suggest that the payment of three-fourths of said commission to the county treasurer by such assessor would in effect be a

transfer from the local school funds of the school district to the general fund of the county. I doubt if this contention is correct. The act which provides for the levying of the special taxes in these school districts provides that 1 per cent be paid to the assessor in case the county assessor does the assessing. It was intended by the Legislature that this 1 per cent should go to the assessor and not to the school fund. Certainly when taken out by the assessor as fees it changes its character of being a part of the school fund and becomes a part of the fees of office, in which both the county and assessor have an interest.

In the case of Ellis Co. vs. Thompson, 66 S. W., 50, the Supreme Court uses this language:

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

However, whether or not the payment by the assessor of three-fourths of the fees collected into the treasury, a part of which might be fees collected by him from independent school districts for the assessing by him of the school tax in said district, be a conversion of the school funds of such districts to the general fund of the county to the extent of the amounts of his commissions derived from his fees in serving said independent districts, this would not entitle the assessor to treat such commissions other than as fees of his office.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

WITNESSES, OUT-COUNTY—FEES AND MILEAGE.

Out-county witnesses not entitled to fees and mileage in felony case pending in county other than county of their residence, on change of veneue, unless they have been summoned to appear by court in which such case is pending.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 25, 1909.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: Answering the inquiry contained in the letter of Hon. C. C. Harris, district attorney, of date the 21st instant, addressed to you as to whether witnesses subpoenaed in felony cases in the county of their residence would be entitled to claim mileage and witness fees upon a change of venue in the case such witnesses attend the trial of the case in the county to which the venue was changed without having been served with any process from the county to which the venue was changed, I beg to advise that Section 5 of Chapter 19 of the First Special Session of the Twenty-fifth Legislature, 1897, as amended on page 375, General Laws of the Twenty-ninth Legislature, 1905, provides that:

"Witnesses shall receive from the State for attendance upon district courts and grand juries in counties other than that of their residence in obeyance to subpoenaes issued under the provisions of this act, their actual traveling expenses, etc."

The act in question provides only for the witnesses summoned outside of the county of the court issuing the process, so that a witness would not be entitled to the fee provided in said section unless he had been summoned to appear before a court in a county other than his residence.

Chapter 141 of the General Laws of 1903 provides that:

"Any witness who may have been recognized, subpoenaed or attached and given bond for his appearance before any court or before any grand jury out of the county of his residence to give testimony in a felony case and who shall appear in compliance with the obligations of such recognizance or bond shall be allowed his actual traveling expenses not exceeding 3 cents per mile, etc."

I am not quite clear as to whether the act above quoted is not superseded and repealed by the act of 1905; but whether it is or not, a witness, unless he had given bond for his appearance before the court in some other county than his residence, would not be entitled to the fees provided in the above act, so that in any event in order that witnesses may receive the compensation provided by law, they should be subpoenaed by the court in which the case is pending upon change of venue.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTRUCTION OF LAWS—COUNTY JUDGE, FEES OF—DEPENDENT AND DELINQUENT CHILDREN.

County judge not entitled to fee of $3 for each trial of dependent or delinquent children, as in criminal cases; purpose of statute to reform and not to punish.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 4, 1909.

Hon. C. W. McCollum, County Auditor, Waco, Texas.

DEAR SIR: We have your letter of the 26th ultimo, in which you ask the opinion of this Department as to whether or not the duties prescribed for the county judge in Chapters 64 and 65 of the Acts of the Thirtieth Legislature in reference to the proceedings therein provided for, dependent and delinquent children come within the meaning of Article 1109 C. C. P., with reference to the fees provided in said article for the county judge—that is, whether or not the county judge is entitled to a fee of $3.00 as provided in said Article 1109 when he performs the duties prescribed in said chapter.

Article 1109 C. C. P. provides that the county judge shall be entitled to a fee of $3.00 in each criminal action tried and finally disposed of before him, to be paid by the county.

As to the duties prescribed in Chapter 64 in respect to dependent children, I find no difficulty in coming to the conclusion that there is no provision for any proceeding in said chapter which could be denominated a criminal action. However, as to the provisions of Chapter 65 I have found some difficulty in coming to a conclusion, but am of the opinion that there is no proceeding therein provided for which would come within the denomination of a criminal action as that phrase is used in Article 1109 C. C. P. The Legislature in enacting Article 1109, Code of Criminal Procedure, evidently had in mind proceedings in accordance with the provisions of Code of Criminal Procedure instituted by complaint, information or indictment, and prosecuted in the courts having jurisdiction under the criminal laws of the State. The main idea of Chapter 65 is not the punishment of the child, but its reformation, and this is provided for not by punishment as in criminal cases, but in the mode therein specially provided.

Section 1 of the act provides what acts on the part of the child constitutes delinquency, and provides that any child committing any of said acts shall be deemed a delinquent child and shall be proceeded against as such in the manner provided. You will note that these acts are not declared crimes and some of them mentioned are not in themselves criminal. Further, there is no certain punishment fixed by the act to be assessed against a child found delinquent. I am, therefore, of the opinion that such proceedings as are provided in said chapter are not criminal actions, and that the county judge would not be entitled to be paid by the county the fees provided in Article 1109 C. C. P.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTRUCTION OF LAWS—DISTRICT ATTORNEY'S PER DIEM.

District attorney's fiscal year begins December 1st of each year. When district attorney serves only fractional part of fiscal year he shall be entitled to such proportionate part of maximum allowed as the time of his service bears to the entire year.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 12, 1909.

Hon. Gordon Boone, Navasota, Texas.

DEAR SIR: In answering your inquiry of the 4th inst. I desire, first, to construe Sayles' Civic Statutes. Art., 2495 which I think is not in anywise affected by the act of April 29th, 1907, known as the district attorneys' per diem act.

You will observe from the provisions of this article the fiscal years recognized by the county and district officials of the State begin December 1st of each year, and all officers named in the

chapter are subject to its provisions. It also provides "whenever such officer serves for a fractional part of the fiscal year he shall nevertheless file his report and make settlement for such part of the year as he serves and shall be entitled to such proportional part of the maximum allowed as the time of his service bears to the entire year."

"However, an incoming officer elected at the general election who qualifies prior to December 1st next following shall not be required to file any report or make any settlement before December 1st of the following year, but his report and settlement shall embrace the entire period dating from his qualification."

I understand from your letter that your predecessor served beginning at the first of the fiscal year 1908, and served until June 15, 1908, when he resigned and you were appointed to succeed him. Under the provisions of the article above referred to, construed in connection with Art. 1081a, Chapter 175, Acts of 1907, the aggregate amount of fees you and your predecessor would jointly draw from the State Treasury for your services for the entire year, if you and your predecessor combined served more than 133 days, would be 133 multiplied by 15, and each of you would receive such an amount of the total as the length of time each of you served would bear to the entire year, and the fiscal year of 1908 would end as the statute provides, viz: December 1, 1908, notwithstanding the fact your predecessor served until June 15 1908, and you served the balance of the fiscal year.

You are therefore advised that according to my construction of these provisions of the law you would continue the service under that appointment until the expiration of the term for which you were appointed and a settlement would be had as herein above stated, and that you would begin counting the 133 days as a basis for your salary for the year 1909 on the date you qualified as district attorney after your election.

The opinions heretofore rendered by the Department which are in conflict with this ruling are withdrawn.

Yours very truly.

R. V. DAVIDSON,
Attorney General.

STATE OFFICERS—COMPTROLLER—DISTRICT ATTORNEY —EXCESS PER DIEM OF.

Where two district attorneys serve the same district during fiscal year, compensation or per diem should be ascertained according to number of days each performs service.

District attorney not chargeable with excess funds drawn by his predecessor, but Comptroller must look to officer who drew excess of funds for replacement of same.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 22, 1909.

Hon. J. W. Stephens, Comptroller, Capitol.

DEAR SIR: We have your letter of the 17th inst., in reference to

the per diem account of Hon. Gordon Boone, District Attorney of the Twelfth Judicial District.

It appears that during the fiscal year beginning December 1, 1907, and ending November 30, 1908, that W. E. Pope was district attorney of said district until the 15th day of June, 1908, during which time he drew warrants which were approved and paid in the amount of $1200 in payment of eighty days' service at the rate of $15 per day and that Mr. Boone drew warrants for services as district attorney in said district which were approved and paid in the amount of $1260; that the total amount so drawn by the two said district attorneys of said district is $2460. An excess over $1995 of $465.

In view of the provisions contained in Article 2831 of the Revised Statutes which prohibits the Comptroller from drawing a warrant in favor of any person or the agent or assignee of any person indebted to the State until such debt be paid, you request the opinion of this Department:

1. "Is Mr. Gordon Boone so indebted to the State of Texas that I, as Comptroller, am without authority to issue a warrant in his favor on either of the two per diem accounts now on file in this Department?

2. "If so, to what extent as shown by the accompanying statement is he so indebted?

3. "If you hold that he is indebted to the State on the account for 1907-1908 in a sum less than the $465 overdraft for the Twelfth Judicial District, who is responsible to the State for the balance of such overdraft?

4. "If you hold that Mr. Boone in the present case is indebted to the State in a sum less than the full amount of overdraft, kindly give me your opinion as to my duty, should a district attorney resign during the fiscal year after having drawn $105 more than his pro rata share of the maximum per diem for that year, and his successor should, after having drawn for the same year an amount sufficient to make the balance of the $1995 present to this Department for the same year an account for $75?"

I am of the opinion that Mr. Boone received compensation for the fractional part of the fiscal year which he served between the 15th day of July and the 30th day of November as district attorney of the Twelfth Judicial District in excess of that to which he was entitled. The compensation to which Mr. Boone was entitled for his services may be ascertained by dividing $1995 by the total number of days served by himself and his perdecesosr Mr. Pope and multiplying this sum by the number of days so served by him. Having so ascertained the amount of compensation to which Mr. Boone was entitled for the fractional part of the said fiscal year so served by him, I am of the opinion that he would be indebted to the State in the difference between this sum and the amount he actually drew, which, according to the account submitted by you, is $1260. This difference you should adjust by charging his account with same.

I desire to say that the opinion expressed in my letter to Mr. Boone of date of May 12, 1909, as to the method by which the com-

pensation due district attorneys, where two or more serve the same district during the same fiscal year, should be ascertained, is hereby modified.

It is my opinion that the compensation to which each is entitled should be ascertained as above stated and in reference to the number of days each performed services for which they were entitled to the compensation of $15 per day under the Act of the Thirtieth Legislature and not to the whole time served by each as district attorney for the district.

I am of the opinion that you would not be justified in charging Mr. Boone with the excess drawn by his predecessor, Mr. Pope, for the reason that this excess is not due by Mr. Boone to the State. As to such excess you will have to look to Mr. Pope.

In view of the opinion above expressed, it is not necessary to answer your fourth question, for the reason that you should pay the last district attorney the amount to which he would be entitled as above stated.

Yours very truly,

R. V. DAVIDSON,
Attorney General.

SHERIFFS, FEES OF—OUT-COUNTY WITNESSES—ATTACHMENTS FOR, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, October 1, 1909.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have your letter of the 27th inst., in which you inclose the account of J. P. Flynt, sheriff of Runnels County, for $21.50, for expenses and milage for conveying a witness (Bud Brown) from Runnels County to Burnet County District Court at the June term, 1909, which account was duly approved by the district judge of said district you say that said account, upon its first presentation, was returned unpaid for the reason:

"The account shows that the officer did not offer the witness an opportunity to make bond. Sec. 8, Art. 1083, C. C. P., reads as follows:

" 'Said account shall also show, before said officer shall be entitled to compensation for expenses of attached witnesses, that before starting with said witnesses to the foreign court, he carried each of them before the magistrate nearest the place of serving the attachment, giving his name and residence, and that said witness made oath in writing before such magistrate, certified copies of which shall be attached to the account, that they were unable to give bond for their appearance at court, or refused to give such bond.' "

You state that the judge of the district court out of which the attachment issued authorized the conveyance without giving the witness an opportunity to make bond. You request the opinion of this

Department as to whether or not your action in refusing to draw a warrant in favor of Mr. Flynt in payment of said account, under the circumstances stated, was correct.

You are respectfully advised that it is the opinion of this Department that your action in returning said account unpaid was proper and in accordance with the provisions of the law governing in such cases. Article 1083, Code of Criminal Procedure contains the provisions above quoted, which requires any sheriff's account for expenses of witnesses conveyed under attachment to a district court outside of the county of the residence of such witness to show that the witness had been "carried before the magistrate nearest the place of serving the attachment", etc. The only provision of the law authorizing attachments to issue for out-county witnesses is contained in Section 8 of Chapter 19 of the Special Session of the Twenty-fifth Legislature, which, briefly stated, provides that where a witness has refused to obey a subpoena issued and served as provided in said chapter, the court shall fine said witness and issue a notice requiring said witness to appear at once or at the next term of court to show cause why such fine should not be made final, and provides that at the same time the court may issue an attachment for said witness, commanding the officer to take said witness into custody and have him before said court at the time named in said writ. No provision was made in such section requiring the officer to allow such witness to make bond conditioned for his appearance, according to the terms of the attachment. At the time of the enactment of said Chapter 19 of the Acts of the Special Session of the Twenty-fifth Legislature, Article 528 of the Code of Criminal Procedure provided:

"When an attachment is made returnable forthwith it shall be the duty of the officer executing the same to take the witness immediately before the court, magistrate, or foreman of the grand jury from whence the writ issued, unless such witness give bail for his immediate appearance in obedience to said writ in accordance with law."

Article 529, C. C. P., provides:

"If the attachment be not returnable forthwith, but at some future day, the officer executing the same shall have authority to take a bail bond of such witness for his appearance in accordance with the requirements of such writ."

Article 1083, C. C. P., contained the following provision:

"Said account shall also show, before said officer shall be entitled to compensation for expenses of attached witnesses, that before starting with said witnesses to the foreign court, he carried each of them before the magistrate nearest the place of serving the attachment, giving his name and residence, and that said witness made oath in writing before such magistrate, certified copies of which shall be attached to the account, that they were unable to give bond for their appearance at court, or refused to give bond after having been advised by said officer of their right to do so."

Said Chapter 19 of the Acts of the Special Session of the Twenty-fifth Legislature expressly repealed articles 528 and 529, Code of

Criminal Procedure, above quoted, and repealed all other articles of the Code of Criminal Procedure authorizing attachments to issue for out-county witnesses.

There was no express repeal, however, of the provision, nor of Article 1083 C. C. P., nor of the provision of said article above quoted. Unless it is held that said Section 8, of Chapter 19 of the Acts of the Special Session of the Twenty-fifth Legislature repealed said provision by implication, then the Comptroller can only pass accounts which are in compliance with said provision. Repeals by implication are not favored by the courts. There is nothing inconsistent in the said Section 8 with said provision contained in Article 1083 C. C. P. The two may stand together. Article 1083 C. C. P. was as to said provision re-enacted in 1901. (First Called Session of Twenty-seventh Legislature) in Chapter 11, Section 8. This act however, was an amendement to Section 4 of the Fee Bill and applies only in counties casting three thousand votes or more at the next preceding presidential election. However, it is clear that it was the intention of the Legislature to change only the fees of officers in the larger counties. The fact that they re-enacted the provision in reference to what the account of the sheriff should show, as the same was contained in Article 1083 C. C. P., evidences that they only intended to make changes in the fees, not in the other provisions relating to the collection of such fees. The Legislature evidently conceived that the provision above quoted contained in Article 1083 C. C. P. was in force and effect at the time the above amendment to the Fee Bill was enacted.

I find that the Attorney General's Department has uniformly advised the Comptroller that sheriffs accounts for expeness of attaching witnesses must comply with the provisions of Article 1083, C. C. P., above quoted. The Comptroller in his last report stated that his Department had uniformly required sheriffs' accounts to comply with said provision and recommended to the Legislature that the law be amended so that sheriffs receiving attachments and being instructed by the district judge to bring the witness without giving such witness an opportunity to made bond for his appearance according to the directions of the attachment would not be required to show in their accounts that they had given the witness opportunity to make bond. The Legislature, however, failed to comply with this recommendation of the Comptroller. It is urged by the sheriffs that this provision of the law is particularly unjust to them in cases where district judges order attachments issued requiring them to bring witnesess out of their counties to the court issuing the attachment, sometimes a great distance from their counties, and at the same time instructing them not to give the witness opportunity to give bond but to personally bring the witness. He has represented that in such cases the officer to whom the writ is directed must either convey the witness to the court from which the attachment issued without giving such witness opportunity to make bond and thereby forfeit his right to compensation from the State, or

or refuses to obey the instructions of the judge and subjects himself to a fine for contempt of court. If this is a correct statement there can be no doubt of the injustice of the law to sheriffs.

It is my opinion, however, that the district judge has no authority to instruct the sheriff to convey the witness to his court without giving the witness opportunity to give bond. There is no express provision of law conferring this authority upon the district judge, and as we have seen the statutes require that the sheriff give the witness an opportunity to give bond.

Because of the above consideration, I am of the opinion that your action upon the account in question was in accordance with law.

I am herewith returning to you the account of J. P. Flynt enclosed in your letter to me.

Yours truly,

R. E. CRAWFORD,
Assistant Attorney General.

WITNESS FEES—CONSTRUCTION OF LAWS.

Witnesses may properly claim fees, regardless of whether they have been compensated as such, in another case during same term of court.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 6, 1909.

Hon. J. W. Stephens, Comptroller, Capitol.

DEAR SIR: In compliance with your request we have considered the accounts of May Bird Scurlock and Jennie Scurlock for witness fees in case No. 1554, the State of Texas vs. W. J. Scurlock, charged with assault to murder in the District Court of Sabine County, Texas, at the March term, 1909.

It appears from the letter of Hon. W. B. Powell, District Judge, that both May Bird Scurlock and Jennie Scurlock were witnesses in the case of the State of Texas vs. J. G. Rowan tried at the same term of court and were in attendance upon the court as witnesses in said Rowan case and as such received their per diem and mileage for attending the court as witnesses in said case.

The question you address to this Department is whether or not the fact that said witnesses having received pay as witnesses in the Rowam case they can also claim compensation for the number of days they attended court as witnesses in the case of the State of Texas vs. W. J. Scurlock.

Article 1093 C. C. P., which provides compensation for attached out-county witnesses in sibdivision 3 thereof, contains the following provision:

"Provided no witness shall receive pay for his services as a witness in more than one case at any one term of the court."

The question is, whether or not the above provision, in view of Section 5, Chapter 19 of the First Special Session of the Twenty-

fifth Legislature and the amendment to said Section 5 contained in Chapter 155 of the General Laws of the Twenty-ninth Legislature, has been repealed.

Section 5 of Chapter 19 of the General Laws of the First Special Session of the Twenty-fifth Legislature, so much as it is here necessary to consider, reads as follows:

"Witnesses shall receive from the State for attendance upon district courts, magistrates sitting as examining courts and grand juries in counties other than that of their residence, in obedience to subpoenas issued under the provisions of this act, such compensation as is now received by witnesses attending such under attachment to be paid as now provided by law * * *".

As amended by the Twenty-ninth Legislature, said section reads as follows:

"Witnesses shall receive from the State for attendance upon district courts and grand juries in counties other than that of their residence, in obedience to subpoenas issued under the provisions of this act, their actual traveling expenses, not exceeding three cents per mile, going to and returning from the court or grand jury, by the nearest practicable conveyance, and one dollar per day for each day they may necessarily be absent from home as a witness, to be paid as now provided by law, and the foreman of the grand jury, or clerk of the district court, shall issue to such witnesses certificates therefor, after deducting therefrom the amounts advanced by the officers serving said subpoenas, as shown by the returns on said subpoenas, which certificates shall be approved by the district judge, and recorded by the clerk in a well bound book kept for that purpose; provided that when an indictment can be found from the evidence taken before an inquest or examining trial no subpoena or attachment shall issue for a witness who resides out of the county in which the prosecution is pending to appear before a grand jury; and provided further, that when the grand jury shall certify to the district judge that sufficient evidence can not be secured upon which to find an indictment, except upon the testimony of non-resident witnesses, the district judge may have subpoenas issued as provided for in this act, to other counties for witnesses to testify before the grand jury, not to exceed one witness to any one fact, nor more than three witnesses to any one case, pending before the grand jury."

It will be noted that Section 5, as amended, provides specifically for the pay of all witnesses subpoenaed under the provisions of Chapter 19 of the Acts of the First Special Session of the Twenty-fifth Legislature and said section contains no such exception as the provision above quoted from Article 1095, excepting witnesses who have received compensation in any other felony case tried at the same term of court. The only question is whether or not the qualifying phrase "to be paid as now provided by law" contained in said amended Section 5, saves from repeal the provision that "no witness shall receive pay for his services as a witness in more than one case at any one term of court" contained in said Article 1093, Code of Criminal Procedure. It is thought that said provision "no witness shall re-

ceive pay for his services as a witness in more than one case at any one term of the court" does not relate to the manner in which attached witnesses were paid prior to the enactment of said Chapter 19 of the Acts of the First Special Session of the Twenty-fifth Legislature and therefore is repealed by said amended Section 5.

You are, therefore, advised that it is the opinion of this Department that you may properly pass for payment the two accounts aforesaid.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

DELINQUENT TAXES—FEES OF DISTRICT AND COUNTY ATTORNEYS—COMMISSIONERS COURT.

Commisioners court has no authority to employ either the county or district attorney by special contract to collect delinquent taxes due county and State.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 12, 1910.

Hon. Frank S. Roberts, District Attorney, Lockhart, Texas.

DEAR SIR: We have had under consideration the question propounded by you in your letter of December 20th, answer to which has been delayed by unusual press of business in this Department. Your statement of facts, including the contract with Jeffrey, Jeffrey & Fielder, is lengthy and it is not deemed necessary to set out the same here.

Taking up the first position of the county attorney in this matter, we call attention to Article 5, Section 29 of the Constitution, which is in part as follows, viz:

"* * * * The county attorney shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the Legislature. * * *"

It seems that the Legislature has sought to regulate the respective duties of the district and county attorneys. See Revised Statutes, Articles 264 and 267; Code of Criminal Procedure, Articles 30 and 32. But an examination of the original statute, (now Article 284 of the Revised Statutes), strongly points to the conclusion that said law was designed to regulate the duties of such officers in criminal cases only. If this be the correct view, then it was the duty and right of the county attorney to appear and represent the State, to the exclusion of any other officer, in the suit referred to by you. The fact that the district attorney or other attorneys, or both, repre-

sented the State in the settlement reached, at the instance or with the consent of the commissioners court, if they did so, would not defeat the county attorney's right to represent the State in the rendition of the judgment agreed upon. See Terrell vs. Green, 88 Texas, 545. It is a familiar rule, however, that no public officer can claim the compensation allowed by law for particular services unless he has actually performed the services. If the county attorney is entitled to any remuneration, upon which we do not pass as it involves a question of fact, it would doubtless be the commissions provided by Article 297 of the Revised Statutes, as far as the State taxes are concerned. We think Article 5212a, Revised Statutes has no application, as this was not a suit instituted "in the name of the State for the recovery of all money due the State and county as taxes due and unpaid on unrendered personal property."

Now, if the Legislature, by said Article 284, Revised Statutes, has regulated the respective duties of the district and county attorneys, in civil cases in the district courts to which the State is a party, it results that the county attorney would have no right to represent the State in the suit in question, except in the absence of or with the consent of the district attorney. But this question has never, as far as we are aware, been decided by our courts.

As to the county taxes involved in this suit, we are of the opinion that it was no part of the official duty of either the district or county attorney to appear and represent the county in this litigation, but that might properly be a matter of special employment by the commissioners court, a question hereafter considered.

As to the right of Jeffrey, Jeffrey & Fielder to claim 10 per cent commission on the agreed judgment by virtue of the contract with the State and county for the collection of delinquent taxes, we think this exceedingly doubtful for two reasons:

1. Chapter 130, General Laws of the Twenty-ninth Legislature, under which the said contract was made, deals especially with delinquent taxes upon real property and the means of enforcing collection of taxes due upon the same, with reference to which a complete law had been enacted by the Twenty-fifth Legislature, viz: Chapter 103. The context of the provision in Section 6 of said Chapter 130, Acts of the Twenty-ninth Legislature, authorizing commissioners courts to contract with any person to collect delinquent taxes, lends some force to the view that such contracts are only authorized as to the character of delinquent taxes referred to above, and we are inclined to that opinion. However, the broad language of the caption and the words "to contract with any person to enforce the collection of any delinquent State and county taxes," found in said Section 6, might perhaps be held to negative the idea just advanced.

2. The statute of 1905 only authorizes commissioners courts to contract for the collection of "delinquent" taxes, and the contract with the attorneys aforesaid in terms practically follows the law. Of course, such contracts could not legally be made to extend beyond the scope of the statute; therefore, it becomes material to inquire whether the taxes in question were "delinquent" within the mean-

ing of the said enactment. Under our tax laws, the said taxes would not become delinquent until February 1, 1908, and the suit was filed by the railway company before said date. It results that the taxes were not delinquent when such suit was filed. To constitute a delinquency of such taxes it was not only necessary that the same should remain unpaid at the time fixed by law for their payment, but the taxes must have been assessed and levied in the manner authorized by law and there must have existed a present obligation to pay the same. Now, the railway company, by this suit, attacked the assessment and valuation of its intangible assets based chiefly upon the ground that the constitutional mandate of equality and uniformity of taxation had been violated. The status of the said taxes in our opinion became fixed as not delinquent, by the filing of said suit, and the mere lapse of time did not operate to disturb that status, at least until an authoritative decision that the Consitution had been so violated. The suit having been compromised by an agreed judgment, without any determination of the issues involved, we conclude that the taxes were not delinquent at the time nor since the contract with Jeffrey, Jeffrey & Fielder was executed. It follows that said taxes were not within the purview of either statute or the said contract, and the commissioners court would be without authority to pay or direct the collector of taxes to pay said firm any compensation under the contract.

It remains to consider whether any compensation at all can be paid to any of the parties claiming same. Commissioners courts are creatures of statute and have all such powers as are expressly and by necessary implication granted them by law. See Baldwain vs. Travis County, 88 S. W. Rep., 484, and authorities cited. However, it is settled that where a county is involved in litigation and it is not the duty of any officer to represent the county, the commissioners court has authority to employ counsel to protect the interests of the county, and to pay for the services actually rendered a reasonable compensation. See Presidio County vs. City National Bank, 26 S. W. Rep., 775.

Under the facts stated by you, together with the correspondence in this office, it appears that the county attorney, the firm of Jeffrey, Jeffrey & Fielder, and yourself all claim to have performed some service in connection with the suit and the agreed judgment rendered therein. We are unable to determine the disputed matters of fact as they must be settled by the commissioners court in the first instance. We have no doubt that, if each of the parties named at the instance and upon request of commissioners court, appeared and represented the county in the matters named and actually performed services in connection therewith the commissioners court would have the legal power to allow a reasonable sum for the work actually done. The commissioners court, however, would not be authorized to take into consideration the State taxes so collected in fixing the reasonable value of the services so performed, but must base it upon the interest of the county alone in said suit.

Furthermore, we are by no means certain that it would not be an abuse of discretion for the commissioners court to allow a corporate fee to each of the claimants, as counsel for the county under

the facts and circumstances of the suit; and it would be safer and more in concurrence with their lawful powers to require an amicable adjustment and sharing of the respective claims and pay whatever sum, if any, the parties may be entitled to for the services rendered by all; or in the alternative to have their rights determined by a suit. This course appears to us to be the fairest and most equitable to all concerned and we hope it will prevail.

Under our view of the proper construction of Section 6 of Chapter 130, Acts of the Twenty-ninth Legislature, construed in connection with the various laws on the subject of delinquent taxes, the commissioners court would not have authority to employ either the county or district attorney by a special contract to collect the delinquent taxes due the county and State.

We believe this substantially answers all your questions and we trust we have suggested a satisfactory and legal solution of the difficulty.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—FEES—FEE BILL—SHERIFF—TAX COLLECTOR, CLERK, ETC., REPORTS OF, ETC.

Basis for determining whether a county comes under the fee bill is number of votes cast at preceding presidential election, counting five inhabitants for each vote cast. When population of a county is 15,000 or less, according to this test, the officers of the county are exempt from making reports and also from maximum compensation provision of said fee bill.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 19, 1910.

Hon. B. F. Quicksall, County Clerk, Beaumont, Texas.

DEAR SIR: We have had under consideration the matter submitted to this Department in your letter of February 8, 1910, which is as follows:

"The undersigned are State and county officials of Jefferson County, Texas, and beg leave that you will advise us as to whether or not Jefferson County is under what is commonly termed 'the Fee Bill', so that we are required to keep reports and turn into the county any excess. The facts are as follows:

"The United States Census of 1900 shows that Beaumont, the largest city in the county, has a population of 9427; That Jefferson County has a population of 14,239; that at the last presidential election in 1908 there were polled less than 3000 votes for presidential electors; in the election held at the same time and place for State and county officials, in a few instances the vote was slightly in excess of 3000, but in the majority of the officials so selected the vote was less than 3000. We are of the opinion that the statute, when it says 'votes cast at the presidential election' means cast for presidential electors, and therefore the vote cast for State and county

officials should not be considered; and are accordingly of the opinion that we are not required to make the reports and turn in any of our fees to the county.

"Your earliest attention will greatly oblige".

This letter is signed by yourself and the tax assessor, tax collector, district clerk and sheriff of Jefferson County.

On November 18, 1908, this Department, in a letter written to you by Mr. J. D. Walthall, decided the question submitted here, under a similar statement of facts, adversely to your contention. However, since the rendering of such opinion, our Supreme Court has decided the case of Itasca Independent School District, et al. vs. McElroy, et al., reported in Volume 123, S. W. Rep., page 117, by the holding and reasoning of which case the question submitted by you and the other officers is at least made doubtful. Therefore, we have been led to make a re-examination of the matter and herewith give our conclusion.

Your statement in reality raises two questions:

1. Whether the officers of Jefferson County are relieved from the operation of Articles 2495d and 2495i, Sayles' Civil Statutes, said articles being part of what is commonly known as the "General Fee Bill", the former article requiring the filing of an annual report of fees collected during the fiscal year by certain officers, and the latter article requiring a statement to be kept by such officers, of the sums coming into their hands as fees and commissions, for examination and report by the grand jury.

2. Whether the officers of Jefferson County are exempted from the General Fee Bill prescribing the maximum amount of compensation and requiring payment of excess in to the county treasury.

The proper solution of the first question depends upon the meaning of the phrases "presidential election" and "each vote cast at such election", as used in Article 2495j Sayles' Civil Statutes. Said article in whole is as follows:

"The officers named in Article 2495c, in those counties having a population of 15,000 or less, shall not be required to make a report of fees as provided in Article 2495d, or to keep a statement provided for in Article 2495i; the population of the county to be determined by the vote cast at the next preceding *presidential election*, on the basis of five inhabitants for *each vote cast at such election*; provided, that all district attorneys shall be required to make the reports and keep the statements required in this chapter".

It is a familiar rule of construction that words and phrases employed in a statute are to be taken according to their usual meaning and their ordinary signification, unless a different meaning is assigned them by the context or the statute itself. Applying this rule, what did the Legislature mean by "presidential election"? At the time of the passage of the law under consideration it was a matter of common knowledge that the President and Vice-President of the United States were not elected by a direct vote of the people, but such election is determined by the vote of electors for President and Vice-President respectively, such elector being selected in the several States on the same day. Such elections are held under and by virtue of the authority of the Constitution and laws of the United

States and Congress had been fully legislated upon the subject and the Legislature of this State had enacted statutes governing the election of presidential electors, in a manner not in conflict with the Constitution and laws of the United States. That this was and is a special election held for a different purpose and for different objects and under another authority than the general election for State, district and county officers, would seem to be beyond question. According to the common and ordinary understanding of the term, a presidential election would certainly not mean the same thing as a general election or an election for other purposes than the selection of presidential electors. If the Legislature had intended the expression to bear a different meaning in view of its generally recognized significance, it does not seem that it would have manifested that intention by some apt and appropriate language? We are strongly inclined to think so, especially in view of the statutory provisions of this State relating particularly to elections for presidential electors in force at the time the General Fee Bill was passed. A brief reference to these statutes may be of value upon the question of construction.

Article 1710, Revised Statutes of 1895, gave the commissioners court in each county the power, when they deemed it advisable to appoint a presiding officer for each election precinct to preside at the ballot box for electors for President and Vice-President of the United States and members of Congress, in addition to the presiding officer at the ballot box used for State, county and district officers.

Article 1737, Revised Statutes, also provided that when the commissioners court had selected the special presiding officer for elections of presidential electors, as provided in Article 1710, one of the two said presiding officers should be designated to receive, count and return, as provided by law, the ballots for electors for President, Vice-President and members of Congress and the other election officers to perform similar duties with relation to State, district and county officers. Said Article 1737 also provided a separate ballot box for these respective purposes.

It is also worthy of note that the Revised Statutes also contained a separate title, devoted entirely to the matter of election and returns for presidential electors and making effective the Constitution and laws of the United States on that subject. The time for holding such election was prescribed in Article 1811, Title 37, and was not made to depend upon the time fixed by law for holding general elections. Furthermore, by Article 1814 the returns for such electors were required to be made to the Secretary of State and by Article 1815 such returns were required to be examined and the result determined by the Secretary of State at a different time than that provided for State and district officers.

By Article 1819 it was made the duty of the Governor to issue and publish a proclamation at least 40 days before "an election for electors" and required the county judge or other proper officer to cause an election to be held *at the time and for the purpose prescribed in this title.*

We have referred to these statutes to show that the Legislature must have known in addition to the ordinary understanding of the term, that the presidential election was recognized in our own laws as a separate and distinct election from those held for State, district and county officers or for any other special thing or proposition.

In determining the meaning of the phrase "presidential election" we think the question really hinges upon whether there is in fact but one election when an election for presidential electors is held at the same time as a general election or an election for some other purpose. On this point we think the decision of our Supreme Court in the case heretofore referred to is strongly significant. We will not unkertake to quote from that decision at any length, but we think it clearly established by the decision that an election upon constitutional amendments, although held at the same time as a general election, is not the same election as that held for such officers. Speaking of elections upon constitutional amendments the Supreme Court said:

"Amendments are to be submitted at 'an election', the time of which is to be specified by the Legislature. This is the only election spoken of at all—the election upon the amendment. None other was in the minds of the authors of the provisions, or, what is more to the point, called to the minds of the people in adopting it. The voting upon the amendment is what is here called an election. Polls are to be opened for, and returns are to be made to the Secretary of State of the votes cast at *said election;* i. e., the election previously provided for upon the amendment. That this is the only question in mind here plainly appears from the fact that the returns are to show only the votes for and against the amendment or amendments, and that the result is to be determined from those returns alone. This is the rule declared for all elections upon amendments, whether held along with other elections for other purposes or not. The test to be applied is uniform and certain, controlling every such election."

It seems to us that the reasons here given for holding that the Legislature had in mind only the specific election for constitutional amendments, whether held separately or along with other elections, apply with equal force to the question before us. Likewise, the reasons given by the Supreme Court in the paragraph succeeding that which we have just quoted, relating to the differences in the character of returns, would be applicable to the matter of presidential election, in view of the state of the statutes governing such elections, at the time of the passage of the Fee Bill. While the authorities are not uniform upon the question similar to those before the Supreme Court in the case under discussion, the great weight of authority is in line with that decision. We will not be able to review the many decisions bearing upon the question, but cite the following cases:

Allie vs. Denman, 8 Texas, 297.
Cass Co. vs. Johnston, 95 U. S., 360.
Douglas vs. Pike County, 101 U. S., 677.
Board vs. Smith, 111 U. S., 556.

Knox County vs. National Bank, 147 U. S., 99.
Gillespie vs. Palmer, 20 Wisconsin, 544.
Dayton vs. City of St. Paul, 22 Minn., 400.
Green vs. Board (Idaho), 47 Pac., 259.
State vs. Barnes, 3 North Dakota, 319; 55 N. W. Rep., 833.
Bott vs. Secretary of State (New Jersey), 40 Atlantic, 740; 45 L. R. A., 251.
Smith vs. Proctor, 130 N. Y., 319; 14 L. R. A., 403.
Nay vs. Bermel, 20 N. Y. App. Div., 53; 46 N. Y., Supp. 622.
Sanford vs. Prentice, 28 Wisconsin, 358.
Howland vs. Board, 109 Calif., 152; 41 Pac., 864.
Fiscal Court vs. Tremble (Kentucky), 47 S. W. Rep., 733; 42 L. R. A., 738.
State vs. Langlie, 5 North Dakota, 294; 32 L. R. A., 723.
State vs. Winkley, 29 Kansas, 36.
State vs. Echols, 41 Kansas, 1; 20 Pac., 523.
Taylor vs. Taylor, 10 Minn., 107.
Citizens, etc. vs. Williams, 49 La. Ann., 437; 37 L. R. A., 768.
Taylor vs. McFaden, 84 Iowa, 269; 50 N. W. Rep., 1070.
People vs. Town Clerk of Harp, 67 Illinois, 62.
Dunnovan vs. Green, 57 Illinois, 67.
State vs. Padgitt, 19 Florida, 339.
Louisville & N. R. Co. vs. Davidson County Court, 1 Sneed, 637; 62 American Decisions, 452.
Madison County vs. Priestly, 42 Federal, 817.
Oldknow vs. Wainwright, 2 Burrows, 1017.
Gosling vs. Vealy, Adol. & E. (N. S.), 406; 7 Q. B.
Rushville Gas Co. vs. City of Rushville, 121 Indiana, 206; 6 L. R. A., 315.
State vs. Dillon, 125 Indiana, 65; N. E. R., 136.
Mobile Savings Bank vs. Board of Supervisors of Okdibbeha County (D. C.), 22 Fed., 580.
State vs. Mayor of City of St. Joseph, 37 Mo., 272.
State vs. Binder, 38 Mo. 455.
Metcalfe vs. City of Seattle, 1 Washington St., 297.
Yesler vs. Same, 1 Washington St., 308; 25 Pac., 1114.
Lamb vs. Cain, 129 Indiana, 486; 14 L. R. A., 518.
State vs. Vanosdal, 131 Indiana, 338; 15 L. R. A., 832.
City of South Bend vs. Lewis, 138 Ind., 512; 37 N. E. Rep., 986.
Railway Company vs. Hardin, 137 Indiana, 386; 37 N. E. Rep., 324.
Schlichter vs. Keiter, 156 Penn., 119; 22 L. A. R., 161.
Kuns vs. Robertson, 154 Illinois, 394; 40 N. E. Rep., 354.

It is true that these cases do not involve a construction of the statute or of constitutional provisions like the one before us, but the holding in all these cases is that when an election is to be held for a specific and different purpose, the votes cast upon other propositions or for other purposes, although at an election held at the same time and place, are not to be taken in account in determining the result of such special election, unless specially provided in the law. The basis for this holding seems to be that the elections for such different

and special purposes are distinct and separate elections from those held for other purposes or objects. Therefore, when we consider the special character of elections for presidential electors, this line of authorities, if not decisive of the question, are at least strongly pursuasive.

The further argument may be made in support of your view that if the Legislature had intended to make the vote cast at the general election or upon any particular proposition or thing voted on at the same time as the presidential election, there would have been some definite language to indicate that purpose. If the purpose had been merely to prescribe the time at which it should be determined whether officers of certain counties were subject to the provisions of the Fee Bill and that this explains the ues of the term "presidential election", it occurs to us that the Legislature would have fixed a definite basis by selecting some year and prescribing the test to be applied every four years thereafter. This is borne out by the fact that in Title 37 of the Revised Statutes relating to presidential elections for presidential electors just such a method was adopted, and also in fixing the second class of officers subject to the maximum fees, the Legislature adopted a similar method in the Fee Bill itself. It seems more reasonable to conclude that the purpose of the Legislature was to select a definite and uniform test or basis for determining the population of counties by counting the votes cast upon a special and definite object, rather than to leave it to a varying and uncertain basis. Certainly, while the vote for presidential electors would not in the very nature of things absolutely determine the number of votes cast at such election, it is at least as definite as would be the vote cast for any particular office or upon any special proposition.

There are, on the other hand, some plausible arguments to be made for the opposite view, which we will not undertake to discuss; but we are inclined to think that our courts, especially under the reasoning of the Supreme Court in the Itasca Independent School District case, would hold that by the phrases "presidential election" and "each vote cast at such election", had reference to and meant the special election for presidential electors alone. At least we are not prepared to affirmatively hold that, under the facts submitted by you, the officers of Jefferson County would be under the operation of the sections of the Fee Bill, now Articles 2495d and 2495i, Sayles' Civil Statutes, but incline to the contrary opinion.

Upon the question as to whether the officers of Jefferson County are subject to the provisions of the Fee Bill prescribing a maximum compensation and are required to account for excess fees, although relieved from the requirements of Article 2495d and 2495i, we have little doubt that this question must be answered in the negative. We are aware of the rule that where any person or class of persons seeks to claim an exemption from the operation of a statute by virtue of some special provision thereof the intention of the Legislature to create such exemption must be clear and definite. Keeping in mind the obvious intent and purpose of Article 2495j, we think it plain that when it appears that the population of a county is 15,000 or less, according to the test prescribed therein, the offi-

cers of such county would be exempt not only from the duty of making the annual report and keeping the statements above referred to, but also from the restriction as to maximum compensation and the requirements to pay over to the county excess fees. To hold otherwise would bring about the anomalous situation of requiring officers to account for excess fees, but relieve them from keeping any books or statement thereof and from the filing of annual accounts. (See Stevens vs. Campbell, 63 S. W. Rep., 163).

We will add that Mr. Walthall concurs in the views above expressed.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ELECTION LAW—TAX COLLECTOR—FEES—POLL TAX—CERTIFICATE OF EXEMPTION.

In counties having a population of 15,000 or less, tax collector entitled to collect 15 cents for each poll tax receipt and certificate of exemption issued by him; in counties of more than 15,000 inhabitants he shall be allowed only 10 cents, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 12, 1910

Mr. J. A. Mattox, County Auditor, Greenville, Texas.

DEAR SIR: Your favor of recent date states that the commissioners court of Hunt County settled with the tax collector for the year 1909 and for three years prior thereto the county's pro rata for issuing poll tax and exemption receipts on the basis of 15 cents each.

You desire the opinion of this Department as to whether the correct amount has been paid by the county for this work.

A determination of this question involves the construction of Section 144, Chapter 11, Acts of the Twenty-ninth Legislature. This section provides:

"The collector of taxes shall be paid 15 cents for each poll tax receipt and certificate of exemption issued by him to be paid pro rata by the State and county in proportion to the amount of poll tax received by each, and this shall include his compensation for administering oaths, furnishing certified lists of qualified voters in election precincts for use in all general elections and primary conventions, when desired, and for all duties required of him under this act: provided, that collectors whose salaries are fixed by what is known as the fee bill, shall receive 10 cents for each poll tax receipt and certificate of exemption issued by him, and such fees shall be ex officio and not accountable under said fee bill".

It will be observed that this section defines two classes of counties and provides for the payment of 15 cents to the collector of taxes for the issuance of each poll tax receipt and certificate of exemption in all counties where the salary of the tax collector is not fixed by

what is known as the Fee Bill, and provides for the payment of 10 cents for the performance of such duty by the tax collector in all counties where the salary of such officer is fixed by the Fee Bill.

The question as to whether the collector of your county is allowed 10 or 15 cents for the issuance of poll tax receipts and certificates of exemption is made dependent upon the fact as to whether your county is under the operation of the Fee Bill. If your county is not under the operation of the Fee Bill the collector thereof should be paid upon the basis of 15 cents for such service. If, however, the salary of such officer is fixed by the Fee Bill then he will only be entitled to receive 10 cents for such work.

In order to ascertain whether the salary of the tax collector of your county is fixed by the Fee Bill it will be necessary to consider the provisions of Chapter 5, Title 45, Sayles' Revised Statutes.

Article 2495c fixes the minimum amount of fees of all kinds that may be retained by certain officers, among which is the tax collector. This article provides that in addition to the maximum amount such officers are entitled to retain one-fourth of the excess fees collected by them, respectively.

Article 2495d requires each of the officers mentioned in the preceding article at the close of each fiscal year to make a sworn statement showing the amount of fees collected by him during the year and provides that all fees collected by the officers mentioned therein in excess of the maximum amount allowed, shall be paid to the county treasurer of the county where the excess accrued.

Article 2495i is as follows:

"It shall be the duty of those officials named in Article 2495c, and also the sheriff, to keep a correct statement of the sums coming into their hands as fees and commissions, in a book to be provided by them for that purpose, in which the officer at the time when any fees or moneys shall come into his hands shall enter the same, and it shall be the duty of the grand jury (and the district judge shall so charge the grand jury) to examine these accounts at the session of the district court next succeeding the first day of December of each year, and make a report on same to the district court at the conclusion of the session of the grand jury."

Article 2495j reads as follows:

"The officers named in Article 2495c, in those counties having a population of 15,000, or less, shall not be required to make a report of fees as provided in Article 2495d, or to keep a statement provided for in Article 2495i; the population of the county to be determined by the vote cast at the next preceding presidential election, on the basis of 5 inhabitants to each vote cast at such election; provided, that all district attorneys shall be required to make the reports and keep the statements required in this chapter".

I assume it to be a fact that there was cast at the next preceding presidential election in Hunt County more than 3000 votes. If this be true, it is clear that the salary of the tax collector of Hunt County is fixed by the Fee Bill. We do not believe that it can be seriously, contended, in view of the provisions of Article 2495j supra, that those counties having less than 15,000 inhabitants, de-

termined by the vote cast at the next preceding presidential election, would have the salaries of their officers fixed by the Fee Bill, or that they would be in any way controlled or affected by the provisions of such law.

It seems absurd to us to argue that the Legislature having exempted officers in counties of less than 15,000 inhabitants from keeping the statement required by Article 2495i and from making the report required by Article 2495d would intend at the same time to apply the provisions of Article 2495c to such counties.

In other words, it would be rediculous for the Legislature to fix a maximum salary with a provisions also for the payment of an excess to the county and at the same time absolutely exempt the officers of the county from pursuing the method by which the amount of the excess could be determined and to also exempt such officers from making any showing of any kind whereby the county could ascertain whether it was receiving its portion of the excess, if any, that was due to it by such officer.

It is, therefore, clear to us that the effect of Article 2495j is to exempt all counties having a population of less than 15,000 from the operation of the Fee Bill absolutely. The salaries of the officers of such counties are therefore not fixed by the Fee Bill. Such officers are permitted to appropriate to their own use and benefit all fees collected by them.

The Legislature, in enacting Section 144 of the Terrell Election Law, quoted above, thereby placed a legislative interpretation upon the provisions of Article 2495j, which in effect interpreted said provision to exempt some counties from the provision fixing the maximum salary by distinctly providing in Section 144 for two classes of counties, in one the salary of the collector being fixed by the Fee Bill and the other being exempted therefrom.

In addition to this legislative construction the Court of Civil Appeals of this State, in the case of Stephens vs. Campbell, 63 S. W. Rep., 161, in construing Article 2495j, uses this language:

"It is further insisted by appellants that inasmuch as Article 2495j of the act in quetsion provides that in counties having 15,000 inhabitants or less none of the officers named in Article 2495c shall be required to make a report of the fees collected by them annually, the county of Gregg is unaffected by the acts and is operating under the old law. *This is practically true so far as the officers affected bythe restriction on the amount of annual fees they are permitted to retain are concerned,* but it is not true as to the nature of the ex officio compensation of the county judge of said county".

The Supreme Court of this State, in the case of Ellis County vs. Thompson, 66 S. W. Rep., 48, has also placed a similar construction on this article in an opinion by Justice Brown during the course of which he said:

"The purpose for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms. If it were true as claimed that the object of the Legislature in enacting the law was to enlarge the rights of the officers named, it should be construed so as to accomplish the legislative intent: and our con-

clusion would not be correct, because it is not reached from that viewpoint. Before the enactement of that statute officers received and appropriated to their own use all fees derived from the performance of their official duties, and their interests would have been best served by leaving the law as it was, *as was done with counties having a populaion of* 15,000 *or less".*

We have thus considered this matter at length for the reason that the contention has been made before the Department in the consideration of this question that Article 2495j, although exempting certain counties from the operation of Articles 2495d and 2495i did not exempt any counties from the provisions of Article 2495c, and that, therefore, the salaries of all county officers of every county in Texas regardless of population, were fixed by the Fee Bill. It was argued from this point that there was, therefore, no basis for the distinction made in Section 144 of the Terrell Election Law and that the proviso with reference to the payment of 10 cents to collectors whose salary was fixed by the Fee Bill would be a nullity and the 15 cent provision would control. We believe that the statutes above quoted and the decision of our courts are absolutely conclusive against this contention.

You are, therefore, respectfully advised that it is the opinion of this Department that the commissioners court of your county was not authorized to settle with your tax collector for the years mentioned upon the basis of 15 cents, such officer being only entitled to 10 cents for the service named.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

OPINIONS RELATING TO INSURANCE AND BANKING AND THE LAWS GOVERNING SAME.

INSURANCE—LIABILITY INSURANCE.

No statute authorizing formation of corporation for the purpose of insuring corporations and individuals employing labor against loss for liability for negligent acts resulting in injury to employes and others.

ATTORNEY GENERAL'S DEPARTMENT.
STATE OF TEXAS.
AUSTIN, TEXAS, September 23, 1908.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter of the 17th inst., which is as follows:

"The Bond Guaranty Co., of Dallas, Texas, was incorporated on December 16, 1907, under the provisions of the subdivision of Section 37, Chapter 130, General Laws Twenty-fifth Legislature as amended by Section 1, Chapter 127, General Laws of the Twenty-eighth Legislature, relating to surety companies, etc., and by its charter is given all the powers which may be granted under the statute referred to.

"I desire to have your opinion as to whether or not this company can lawfully do the business of liability insurance, i. e., business of insuring corporations and individuals employing labor against loss by reason of their liability for negligent acts resulting in injury to employes and others.

"I desire further to know whether the laws applicable to insurance companies generally or any other statute of this State control or affect the class of investments in which may be made by this company, both as to its capital stock and its surplus assets over and above its capital stock.

"I also desire your opinion as to the extent of the power of this Department in the supervision and regulation of the affairs of this company."

In reply I beg to say that in my opinion your questions, in their order, should be answered as follows, namely:

1. When you ask whether or not this company can lawfully do the business of liability insurance, I understand that you desire to know whether or not said company can, in its own name, legally write original policies or contracts or liability insurance, or, in other words, policies or contracts insuring corporations and individuals employing labor against loss by reason of their liability for negligent acts resulting in injury to employes and others.

So understanding your question, I answer it negatively. I find in the statute to which you refer nothing which authorizes a company incorporated thereunder to issue or write original policies or contracts of that character.

But said statute may and probably does authorize a company incorporated thereunder and having all the powers enumerated in that statute to guarantee the fulfilment of such reports when lawfully

made by individuals or corporations having a legal right to enter into such contracts of liability insurance. However, that phase of the statute is hardly within the scope of your inquiry as I understand it.

2. Your next inquiry raises the question whether or not the corporation named by you is or is not an insurance company within the meaning and effect of the general laws of this State relating to insurance companies, and that matter is not free from perplexities and difficulties. There is a great confusion in our statutes relating to the various classes and kinds of insurance companies, in consequence of which it is in some instances difficult to determine whether or not a particular corporation which is, under the latest and broadest definitions of our text-writers and decisions of the courts, an insurance company must or must not submit its articles of incorporation to the Attorney General for his examination and approval, and as to whether or not such articles of incorporation should be filed in the office of Secretary of State, or in the office of Commissioner of Insurance and Banking, and as to whether or not such particular corporation, when created, is or is not subject to the general provision of law when relating to insurance companies set out in Revised Statutes, Title 58.

Such difficulties present themselves in the consideration of your question concerning the corporation mentioned by you. It will be noted that said corporation was incorporated note under Revised Statutes, Title 58, but under subdivision 37 of Revised Statutes, Article 642, which is the general incorporation act. And in this connection we must not lose sight of the provisions of Chapter 165 of the General Laws of the Twenty-fifth Legislature concerning surety and guaranty companies.

The corporation named by you partakes very largely of the nature of an insurance company, and I think that until the courts shall hold otherwise you should consider and treat said corporation as an insurance company, applying to it the general provisions found in Revised Statutes, Title 58, concerning investments by insurance companies.

The State of Texas vs. W. N. Burgess, et al., which was decided by the Supreme Court on the 29th day of April, 1908, not yet reported.

Legion of Honor vs. Larmour, 81 Texas, 71.

Farmer vs. State of Texas, 69 Texas, 561.

People *ex rel.* Kasson vs. Rose, Secretary of State, 44 L. R. A., 124.

Cooley's Briefs on the Laws of Insurance, Vol. 1, p. 4, et seq.

Elliott on Insurance, Revised Impression, p. 14, et seq.

Words and Phrases, Vol. 4, p. 3674, Title "Insurance."

3. As to the extent of the power or authority of your Department in the supervision and regulation of the affairs of said corporation, the statute mentioned by you expressly provides:

(1.) That such corporations shall file in your office a copy of its annual statement of its condition on the previous 31st day of December, showing under oath its assets and liabilities.

(2.) That it pay you a fee of $25 for filing such report.

(3.) That an examination of the affairs of such corporation may be made by you at any time at its expense.

(4.) That such corporation shall keep on deposit with the State Treasurer money, bonds or other securities in an amount not less than $50,000, *which shall be approved by you.*

I think that, in addition, until the courts shall hold to the contrary you should likewise apply to said corporation all of the general provisions for supervision and control of insurance companies which are to be found in Revised Statutes, Title 58, observing the distinction between such general provisions and provisions which are applicable to only particular kinds of insurance companies.

This Department has heretofore held that a surety and guaranty company, incorporated under the statute mentioned by you, and whose business it is to be regulated by the provisions of Chapter 165 of the Acts of the Twenty-fifth Legislature, 1897, is an insurance company within the meaning of Revised Statutes, Title 58, and that its articles of incorporation should be filed in your office rather than in the office of the Secretary of State.

In this connection I beg to call your attention to the provisions of said act of 1897, providing for the issuance by the Commissioner of Insurance of a certificate of authority to do business under said act, and for the surrender or cancellation or revocation of such certificate, and for the return of the deposit required by that act.

I indulge the hope that the Thirty-first Legislature will unify the laws applicable to insurance companies of every kind.

Respectfully,

Wm. E. HAWKINS,
Assistant Attorney General.

STATE BANK—OFFICERS AND DIRECTORS—STATE BANKING LAW.

State bank not authorized to loan officer or director of bank more than 10 per cent of capital and surplus, without the consent of a majority of directors (other than the borrower).

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 23, 1908.

Hon. Thos. B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter of the 18th inst., which is as follows:

"The concluding paragraph of Section 6, of the State Banking Law reads as follows:

" 'No director of a bank in this State shall be permitted to borrow any of the money of the bank of which he is a director in excess of 10 per cent of the capital and surplus without the consent of a majority of the directors of the bank (other than the borrower) first having been obtained at a regular meeting of the board; said consent to be made a matter of record before loan is made; and no offi-

cer, whether a director or not, shall be indebted to such bank in any sum whatever without the consent of the board, obtained and recorded in like manner.'

"I am advised by the officers of one of the banks under the supervision of this Department that at a recent meeting of its board of directors the following was adopted:

" 'Resolved, that the executive committee of this bank be and they are hereby authorized to make such loans from time to time during the current bank year to any director or inactive officer of this bank as said committee may see proper; and to loan such amounts, upon such terms and with such security, as in the judgment of said committee may be for the best interests of this bank.'

"It was the purpose of the board of directors in adopting this resolution to put it within the legal power of the executive committee to make loans and otherwise permit indebtedness to be incurred to the bank by inactive officers and directors. I desire to have your opinion as to whether the passage of this resolution is a sufficient compliance with the provisions of the State Banking Law quoted, or whether it is necessary to definitely authorize or express the consent of a majority of the directors to each particular transaction, or to definitely mention in the record consent to some loan or indebtedness by some particular officer or director or some limit to the indebtedness authorized or consented to by the board."

In reply I beg to answer your inquiries as follows:

The evident purpose and design of the foregoing statutory provisions were to safeguard the interests of State banks and their depositors by placing restrictions upon the making of loans by the bank to any of its directors or other officers, whether such officers be active or inactive.

The statute should be so construed and enforced as to fairly carry such purpose and design into practical effect.

In discussing the powers and duties of bank directors with reference to making loans to others than directors or officers of the bank, Mr. Morse in his treatise on the Law of Banks and Banking, in paragraph 117, Fourth Edition, says:

"The board may give the financial officer by a single resolution power to make a considerable number of discounts or loans, provided they be requested. But this single resolution must name the person or persons to whom the loans may be made, the aggregate sum which they must never exceed, the time, and such other particulars as the directors may deem of moment. Thus, in fact, though many separate acts may be authorized by this one vote, yet nothing is really done beyond the supervision of the directors or without the active exercise of their discretion. They may order the cashier to let A have such loans as he shall wish, in such sums, at such times as he shall ask, within a certain period, up to the amount of a designated sum, to run for specified time, at rates of interest named, and upon designated conditions, concerning indorsers or collateral security. This does not leave each individual discount made to A to be passed upon by the directors; yet in fact no discount is made to him by any offi-

cial authority other than that of the board, or at the substantial discretion of any person save the directors."

It will be observed that the above resolution fails to conform to the usual requirements concerning loans to those who are not directors or officers of the bank.

To my mind it seems obvious that as strict and even stricter rules should be applied to a statute which expressly limits the amount of loans which may be made by the bank to any of its directors or officers.

In the case of the Bank Commissioners vs. The Bank of Buffalo, 6 Paige (N. Y.), 504, which arose under a statute of that State which prohibited the directors of any moneyed corporation from making loans or discounts to the directors of the corpoartion or upon paper on which they or any of them were responsible, of any amount exceeding in the aggregate one-third of the capital stock of the company, it was held, in substance, that if the board of directors authorized or allowed their president or cashier or any other officer of the bank to make loans or discounts in his own discretion without having the same formally passed upon at a regular meeting of the board, the corporation is liable for a violation of its charter or of any law binding upon such corporation in the making of such loans or discounts, and that the making of any loan or discount to the directors of the corporation or upon paper on which they or any of them were responsible, to an amount exceeding in the aggregate one-third of the capital stock of the company, authorized the appointment by the court of a receiver for the purpose of winding up the affairs and dissolving the corporation.

However, the law in that State made the statutory provisions which had been violated in that case a part of the articles of incorporation of every such corporation.

Upon a careful consideration of the laws of this State applicable to State banks, and especially the portion thereof above quoted by you, I have reached the conclusion that our law contemplates that no loan of any of the money of a State bank in excess of 10 per cent of its capital stock shall be made in any instance to any director or other officer of the bank, unless a majority of the directors, other than the borrower, shall have first consented to the making at that particular time of a loan of a specific sum of the bank's money at a specific rate of interest for a fixed period of time to such director or other officer, such consent to be obtained at a regular meeting of the board of directors practically contemporaneous with the making of the loan and in view of conditions then existing, such consent to be actually incorporated in the minutes of the board before the loan is made.

The statute under review vests in the board of directors discretion and authority to make or refuse to make such loans to such directors or officers of the bank.

This statutory right and power carried with it a corresponding duty.

The discretion thus conferred and imposed by law upon the board of directors must be exercised by them through a majority of the

directors. other than the borrower, and can not be delegated or conferred by the board upon an executive committee or any other set of persons or any individual.

Morse on Banks and Banking. Fourth Edition. Paragraphs 116 and 117.

This discretion should, in my judgment be exercised in the light of the surrounding circumstances at the time the loan is made.

The resolution quoted by you does not except from its operation and effect any director whatever; yet, upon its face and by its express terms it purports to authorize loans of the bank's money in unlimited amounts at the discretion of the committee to any and all directors and to any and all inactive officers of the bank. This phraseology necessarily includes each director who voted for the resolution.

Said resolution is, therefore, in that respect clearly in violation of the plain letter of the law.

And whether so intended or not, the necessary effect of said resolution, in all other respects, is to evade the requirements of the law.

I am of the opinion that said resolution confers upon the executive committee no authority whatever and that said resolution is in all respects absolutely inoperative.

Respectfully,

Wm. E. HAWKINS.
Assistant Attorney General.

FOREIGN INSURANCE COMPANIES.

Acts prescribing tax construed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 2, 1909.

Governor T. M. Campbell, Capitol.

DEAR SIR: We have received and carefully considered your letter of the 1st inst., which is as follows:

"I respectfully ask your opinion, in writing, touching the following questions:

"I transmit herewith, for your inspection, House Bill No. 89, passed at the Regular Session of the Thirty-first Legislature, and now in my hands for executive action, and also House Bill No. 71, passed by the first Called Session of the Thirty-first Legislature, also now in my hands for executive action.

"You will note that Section 5, of House Bill No. 89, imposes an occupation tax upon life insurance companies, not organized under the laws of this State, transacting business in this State under certificate of authority; that Section 6, of said act, provides that such companies shall pay no other taxes than those imposed by Section 5; that Section 7, of said act, provides that each such company hereafter granted a certificate of authority to transact business in this

State shall be deemed to accept the same subject to the conditions that, after it shall cease to transact new business in the State under a certificate of authority and so long as it shall continue to collect renewal premium from the citizens of this State, it shall be subject to the same occupation tax in proportion to its gross premium received during any year from citizens of this State as is, or may be imposed by law on such companies transacting new business in the State under certificate of authority during such year; and that Section 8, provides that any life insurance company, which has heretofore been, may now be or hereafter be engaged in writing policies of insurance in this State which has heretofore ceased or may hereafter cease writing such policies and which does not now or may not hereafter have a certificate of authority to transact the business of life insurance in the State, but which has continued or may continue to collect renewal or other premiums upon such policies, shall, before it may again obtain a certificate of authority, report the amount of its premiums collected in the State since the period covered by the last report upon which it paid an occupation tax and pay to the State a sum equal to the percentage of its gross premium receipts for each such year, that was required by law to be paid as occupation tax by such companies doing business in the State during such year or years.

"When the present Called Session of the Legislature assembled, House Bill No. 89, being then in my hands and being of the opinion that the occupation tax rate prescribed by Section 5, was too low, and that the basis of the graduated reduction in the rate provided for should be changed, I recommended to the Legislature in a special message the passage of a bill making the changes desired in this respect; and in pursuance of this recommendation House Bill No. 71, above referred to, was passed.

"It was not my purpose to recommend, and I am confident it was not the purpose of the Legislature to enact any repeal or modification of the provisions of Sections 6, 7, and 8, of House Bill No. 89; and before acting upon either of these bills I desire to have your opinion as to whether the executive approval of House Bill No. 71, following the approval of House Bill No. 89, would have any other effect than to substitute for Section 5, House Bill No. 89, the provisions of Section 1, House Bill No. 71?"

Replying to your inquiry I beg to say that I am of the opinion that if you approve both of said bills in the order indicated by you, the legal effect thereof, in so far as your inquiry seems to extend, may be stated, in general terms, as follows, namely:

1. Section 1 of House Bill No. 71, being a complete revision of Section 5 of House Bill No. 89, will operate as a repeal of said Section 5 in its entirety, although it can not properly be said that said Section 1 will become, in all respects, a substitute for said Section 5. In other words, the amount of taxes to be paid by life insurance companies within the classification set forth in said Section 5 of House Bill No. 89, and in Section 1 of House Bill No. 71, must be ascertained and determined by reference to the terms and provisions of said Section 1 of House Bill No. 71 alone; but said Section 1 of House

Bill No. 71 will not become a substitute for Section 5 of House Bill No. 89 in a physical sense or in the sense that the terms and provisions of said Section 1 are to any extent or for any purpose operated upon, affected by or embraced within any of the sections of the said House Bill No. 89, following said Section 5 thereof, especially Sections 6, 10 and 11 of House Bill No. 89, to which more specific reference is hereinafter made.

2. Considered independently of House Bill No. 71, the legal effect of Section 6 of House Bill No. 89 is to declare that the occupation tax imposed upon life insurance companies by said House Bill No. 89 shall be in lieu of any and all other occupation taxes upon such companies and their agents in favor of the State or of any county, city or town.

Because Section 1 of House Bill No. 71 is no part of House Bill No. 89, the terms and provisions of said Section 1, and the occupation taxes thereby prescribed, are not within the operation and effect of the limitations and restrictions set forth in said Section 6 of House Bill No. 89.

In other words, there is nothing in House Bill No. 89 or in House Bill No. 71, or in both of them, even when considered together, which will have the effect of a legislative declaration that the occupation taxes prescribed by said Section 1 of House Bill No. 71 shall be in lieu of any and all other occupation taxes upon such life insurance companies or theier agents.

However, it would seem that this feature is of little, if any, practical consequence for these reasons:

(a) The provisions of Section 1, Article 8, of the Constitution of Texas, providing that "the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period of said profession or business" merely declare a restriction upon legislative authority, and do not grant to any county, city or town authority to levy any occupation tax whatever. (State vs. G. H. & S. A. Ry. Co., 97 S. W. Rep., 77-78.)

(b) The provision of Revised Statutes, Article 5050, conferring upon the commisisoners courts of the counties the right to levy one-half of the occupation tax levied by the State, applies to only the subjects mentioned in that article, and with the exception of Chapter XVIII of the General Laws of the First Called Session of the Thirtieth Legislature, page 479, there is now an existing statute authorizing the levy and collection of an occupation tax upon any life insurance company.

(c) As between the provisions of Section 8 of said Chapter XVIII of the General Laws of the First Called Session of the Thirtieth Legislature, prescribing occupation taxes to be paid by life insurance companies therein mentioned, and the provisions of Section 1 of House Bill No. 71, the latter, being inconsistent with the former, will prevail and will, in my opinion, be held to prescribe the only occupation taxes which can hereafter be legally levied within this State against any life insurance company.

In fact, the provisions of said Section 6 of House Bill No. 89 appear to me to have been merely declaratory of what the law would be even had said Section 6 been entirely omitted from House Bill No. 89; and I consider it practically unimportant that said Section 6 can not be held to refer to or embrace the tax prescribed by Section 1 of House Bill No. 71.

3. For the reason that Section 1 of House Bill No. 71 is not part of House Bill No. 89, the provisions of Section 10 of House Bill No. 89 do not refer to or embrace the provisions of Section 1 of House Bill No. 71. Consequently, the provisions of said Section 10, conferring upon the Commissioner of Insuranace and Banking power to revoke certificates of authority of life insurance companies, will not be applicable to cases involving failure of such companies to comply with the requirements of said Section 1.

However, this feature likewise appears to be of little, if any, importance in view of the provisions of Revised Statute 3050, Subdivision 15, which confers upon the said commissioner broad and general power to revoke the certificate of authority of any insurance company for failure to comply with any provision of law relative to insurance, which general provisions appear to have been carried into Subdivision 11, of Section 59, of Senate Bill No. 291, adopted by the Thirty-first Legislature.

4. Inasmuch as Section 1 of House Bill No. 71 is no part of House Bill No. 89, the terms and provisions of said Section 1 can not be held to be referred to by or embraced within the provisions of Section 11 of House Bill No. 89, prescribing a penalty of $25 per day for violation of certain provisions of said House Bill No. 89.

I am of the opinion that such penalty will not be applicable to any life insurance company for any failure to comply with the requirements of Section 1 of House Bill No. 71 or any of them.

5. I am of the opinion that the rate of taxes referred to in the proviso set forth in Section 7 of House Bill No. 89 can never exceed the rate imposed by Section 5 of said House Bill No. 89, upon insurance companies embraced within the terms of said proviso, even though Section 1 of House Bill No. 71 repeals said Section 5 of House Bill No. 89, and increases the rate of occupation tax to be paid by life insurance companies for transacting new business within this State under certificates of authority.

6. I will add that in my opinion the provisions of Sections 1, 2, 3, 4, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of said House Bill No. 89 will be and remain practically, and probably absolutely, unaffected by the terms and provisions of the said House Bill No. 71.

Respectfully,

Wm. E. HAWKINS,
Assistant Attorney General.

FRATERNAL BENEFICIARY ASSOCIATIONS.

Payment of benefits must legally be contingent upon death or disability of member to whom certificate may be issued, and can not legally be contingent upon death or disability of any other person.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 12, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter in which you say:

"I desire to respectfully request your opinion as to whether or not, under the provisions of Chapter 115 General Laws of the Twenty-sixth Legislature, governing fraternal beneficiary societies a fraternal beneficiary society organized under the laws of this State is permitted to issue certificates to its members agreeing and contracting to pay such members a benefit contingent upon the death or disability of his minor child or of any person other than the member holding such certificate."

The statute which provides for incorporation, regulation and control of fraternal beneficiary associations, (Chapter CXV of the General Laws of the Twenty-sixth Legislature, Acts 1899, page 195), contains the following provisions:

"Section 1. * * * A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members, and the beneficiaries, and not for profit, or that issues benefit certificates to such of its members only as may apply thereof. * * * Each association * * * shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefiits in cases of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age; provided, that the period of life at which payment of physical disability benefits on acocunt of old age commences shall not be under seventy years, * * *.

"Payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member at the time of his death, and should there be no one of the classes herein mentioned capable of taking the benefit at the death of the member, then the same shall pass, as provided by the laws and rules of the association."

It will be observed that this statute deals with two classes of benefits, the first, which is made compulsory upon the association, being "benefits in case of death", and the second, which is not made compusory upon the association but is left optional with it, being "benefits in case of sickness, temporary or permanent disability, either as the result of disease, accident or old age."

In dealing with both of these classes of benefits, we must consider, first, the member to whom the certificate is issued by the association, and, second, the beneficiary or beneficiaries under such certificate.

With regard to death benefits, it will be observed that the statute

enumerates six classes of persons to whom death benefits may be paid; but in each instance the lines of classification start from and run back to the member of the association to whom such certificate is issued, the reckoning being taken as of the date of the death of such member. From this it is evident that, in so far as death benefits are concerned, it was the purpose of the statute to make the payment by the association contingent upon the death of the member to whom such certificate may be issued. Upon no other contingency whatever can a certificate calling for the payment of a death benefit be legally issued by such an association. The phraseology employed in the statute excludes the idea that such an association can legally issue to a member a certificate agreeing or contracting to pay to such member a benefit contingent upon the death of his minor child, or of any person other than the member holding such certificate. Indeed, I can not see how it is possible under this statute for a member of such an association to legally be the beneficiary under any certificate whatever by the association *to him* and calling for the payment of a death benefit.

From the above quoted statutory provisions, as well as from what I understand to be the commonly understood and generally accepted objects and purposes of fraternal beneficiary associatione, I think it is clear that it was never contemplated by the laws of the State of Texas applicable to fraternal beneficiary associations that a certificate shall be issued to any member of any association providing for the *payment to such member of a death benefit* conditioned upon the continuance or cessation of life *of any other person whomsoever,* whether such other person be or be not a member of such association.

With regard to benefits in cases of sickness, temporary or permanent physical disability, as the result of disease, accident or old age, it will be observed that the statute does not, in terms, define or restrict the beneficiaries, as it does in cases of death benefits.

From this failure of the statute to impose limitations or restrictions as to who may be the beneficiary or beneficiaries in cases of sickness or disability of the member to whom such certificate may be issued, it would seem that it was the purpose of the law to leave that matter to agreement or contract between the association and its members, subject to the charter and by-laws and rules and regulations of the association; but in all such cases, and regardless of who may be the beneficiary or beneficiaries, payment of benefits must legally be contingent upon sickness or disability of the member to whom such certificate may be issued and can not legally be contingent upon the sickness or disability of any other person whomsoever.

I think that the whole framework of the statutes here under consideration, as well as the general plan of organization and purpose of fraternal beneficiary associations throughout the country, is to provide for the payment of benefits in case of death, sickness or disability of the members to whom the association may issue a certificate, rather than for the payment to such member of such benefits contingent upon death, sickness or disability of some other person.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

FRATERNAL BENEFICIARY ASSOCIATIONS—CERTIFICATES OF AUTHORITY—COMMISSIONER OF INSURANCE.

Commissioner authorized by law to issue certificates of authority to fraternal beneficiary associations *not* organized under the laws of this State; not authorized to issue certificates of authority to such associations organized under the laws of this State.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 13, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter of this date in which you say:

"I desire your opinion in writing as to whether or not I have the lawful power to issue certificates of authority for fraternal beneficiary associations, (1) organized under the laws of the State of Texas, and (2) not organized under the laws of the State of Texas.

"I am making this inquiry in view of the decision of the Supreme Court of Texas in the case of the Trinity Life & Annuity Society vs. Love, handed down some weeks ago, and in view of the fact that I have a great many applications from these associations for certificates of authority. I would be glad to have your opinion on the matter with as little delay as possible."

Replying to your inquiry, I beg to say:

Upon consideration of existing laws applicable to fraternal beneficiary associations, in the light of the recent decision of the Supreme Court of Texas in Trinity Life & Annuity Society vs. Thomas B. Love, Commissioner of Insurance and Banking, I am of the opinion, first, that you are authorized by law to issue to fraternal beneficiary associations not incorporated under the laws of the State of Texas certificates of authority to do business within this State; such certificate to be issued only upon compliance by such association with the requirements of the statute; second, that in no instance and under no circumstances are you authorized to issue to a fraternal beneficiary association, incorporated under the laws of this State, a certificate of authority to do business within the State of Texas.

In this connection I beg to add that as I understand the above mentioned decision, it is to the effect that when a domestic fraternal beneficiary association has filed with the Secretary of State its articles of incorporation, as required by law, it should have the right to begin business and continue to do business until enjoined by suit of the Attorney General, and that you then have the authority and it is your duty to issue to any agent of such association, upon demand by him therefor, a certificate of authority showing that such association has complied with the provisions of law and is entitled to do business within the State of Texas; and that such is your right and duty, regardless of whether such association is or is not conducting its business fraudulently or in compliance with law, the only recourse of the State or of your Department in such instances being a suit by the Attorney

General against such association to enjoin it from carrying on any business within this State, and for forfeiture of its charter if it be insolvent, etc.

Concerning the statutory provisions upon which said decision of the Supreme Court is based, that court, through Chief Justice Gaines, observed:

"Whether this be wise legislation or not, is a question we are not called upon to determine."

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

INSURANCE COMPANIES—CONSTRUCTION OF LAWS.

Held, that all companies doing business in this State under provisions of Chapter 165, General Laws 1897, subject to requirements of Revised Statutes, Article 3049, as amended by Chapter 82, General Laws of 1907.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 15, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You have requested of this Department an opinion as to whether or not the corporations which are doing business in this State under the provisions of Chapter 165 of the General Laws of the Twenty-fifth Legislature (Acts of 1897, page 244, et seq.) are subject to the requirements of Revised Statutes, Article 3049 as amended by Chapter LXXXII of the General Laws of the Thirtieth Legislature (Acts of 1907, page 167).

In reply I beg to say:

I am of the opinion that all such companies are and should be deemed and held to be insurance companies.

People vs. Rose, Secretary of State, 44 L. R. A., 124.

Said Article 3049 as so amended is as follows:

"Article 3049. Should said Commissioner be satisfied that the company applying for authority has in all respects fully complied with the law and that it has the required amount of capital stock, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insuranace business, naming therein the particular kind of insurance, for the period of not less than three months, nor extending beyond the 31st day of December next following the date of such certificate. And if any insurance company, organized under the laws ofany State or country, after having obtained a certificate of authority from the Commissioner of Agriculture, Insurance, Statistics and History, or other officer authorized to issue such permit to do business in this State, shall remove, or shall bring in any federal court against any citizen of this State, or any suit or action to which it is a party, heretofore or hereafter commenced in any court in this

State, to the United States district or circuit, or to any federal court, the Commissioner of Agriculture, Insurance, Statistics and History, or other officer authorized to issue such permit, shall forthwith revoke and recall the certificate of authority of such insurance company to do and transact business within this State, and no renewal or authority shall be granted to such insurance company to do business in this State for a period of three years after such revocation, and such insurance company shall thereafter be prohibited from transacting any business in this State until again duly authorized by law".

The history of this statute, so far as I have been able to trace it, is as follows:

First. It appears in the Revised Statutes of 1879 as follows:

"Article 2931. Should said Commissioner be satisfied that the company applying for authority has in all respects fully complied with the law, and that it has the required amount of capital stock, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the 31st day of December next following the date of such certificate; but no subsequent certificate of authority shall be issued to any company, organized under the laws of any other State or country, where it shall be made to appear that such company has moved from any court of this State to a court of the United States for trial, any suit brought against it, by a citizen of this State to recover for a loss under a policy of insurance, issued by such company, and that, by such removal, the suit has been transferred to a place for trial, without and beyond the limits of the county in which such citizen resides".

Second. By Chapter LXXIII of the General Laws of the Sixteenth Legislature (1879), page 83, it was amended to read as follows:

"Article 2931. Should said Commissioner be satisfied that the company applying for authority has in all respects fully complied with the law, and that it has the required amount of capital stock, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business in this State, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the thirty-first day of December next following the date of such certificate; but no subsequent certificate of authority shall be issued to any company organized under the laws of any other state or country, when it shall be made to appear that such company has removed from any court of this State to a court of the United States for trial any suit brought against it by a citizen of this State to recover for a loss under a policy of insurance issued by such company, and that by such removal the suit has been transferred to a place for trial without and beyond the limits of the county in which such citizen resides."

Third. It was carried into the Revised Statutes of 1895 as follows:

"Art. 3049. Should said Commissioner be satisfied that the company applying for authority has in all respects fully complied with the law, and that it has the required amount of capital stock, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business, naming therein the particular kind of insurance, for the period of not less than three months, nor extending beyond the thirty-first day of December next following the date of such certificates; but no subsequent certificate of authority shall be issued to any company, organized under the laws of any other State or country, where it shall be made to appear that such company has moved from any court of this State to a court of the United States for trial any suit brought against it by a citizen of this State to recover for a loss under a policy of insurance issued by such company, and that, by such removal, the suit has been transferred to a place for trial without and beyond the limits of the county in which such citizen resides."

Fourth. It was amended in 1907 to read as first hereinabove set out.

It now appears in that form as a portion of Chapter 2, of Title 58, which is the general title of the Revised Statutes on the subject of insurance.

I am of the opinion that said Article 3049, as amended by said act of 1907, as above shown, is applicable to all of the companies embraced in your inquiry, as above stated.

Respectfully,

WM. E. HAWKINS.
Assistant Attorney General.

COUNTY CLERK—ARTICLES OF INCORPORATION OF STATE BANK, RECORD OF.

Certified copy of articles of incorporation of State bank may be recorded in deed records of county, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 22, 1909.

Mr. F. S. McKeig, Dumas, Texas.

DEAR SIR: Replying to your inquiry as to what book you should use in which to record in your office certified copies of articles of incorporation of State banks I beg to say:

Section 2, of Chapter 10, of the General Laws of the First Called Session of the Twenty-ninth Legislature, expressly requires that a certified copy of such articles of incorporation duly certified to by the Secretary of State "shall be recorded in the office of the county clerk of the county in which the corporation is to be located;" but the statute does not specify in what book such instruments shall be recorded.

In my opinion it is theoretically proper for the county clerk to pro-

vide a special book for that purpose: but I do not regard this as actually necessary, as in some counties such book would not be needed often.

I think the purpose of the law will be met if you record such instruments in the records of deeds, etc., or in any book kept by you in your office for miscellaneous records and duly index same.

Pressure of legislative and court work and serious sickness have prevented earlier response.

Truly yours,

WM. E. HAWKINS,
Assistant Attorney General.

INSURANCE AGENTS—CERTIFICATE OF COMMISSIONER, ETC.

Insurance agents soliciting business for unincorporated association, not required to hold certificate from Insurance Department as an insurance agent, and such agents are not subject to the penalties provided by law against a person soliciting insurance without a license.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 21, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter in which you say:

"This Department is frequently requested to give advice as to who are required by the laws of this State to hold a license from this Department while acting in the capacity of an insurance agent; and I will appreciate it if you will kindly give me your opinion as to whether a person acting as an insurance agent soliciting business for an association which is unincorporated, such as a reciprocal underwriters' association, such association not having a license from this Department, would be required to hold a certificate from this Department as an insurance agent, and whether such a person is subject to the penalties provided by law against a person soliciting insurance without a license."

In reply I beg to say that, in my opinion, both of your questions should be answered negatively.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—GUARANTY OF BANK DEPOSITS—BANKING CORPORATIONS MAY CHANGE PLAN OF SECURING DEPOSITORS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 23, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of the 23rd instant to the Attorney General you say:

"The question has arisen under Chapter 15 of the General Laws of the Second Called Session of the Thirty-first Legislature, relative to the guaranteeing of bank deposits, as to whether or not a bank may accept the guaranty fund plan of guaranteeing its deposits and subsequently change to the bond security plan, and vice versa.

"Please advise me at your earliest convenience as to what your opinion is on this subject."

I beg to answer your inquiry as follows:

The statute to which you refer took effect at midnight of August 9th, 1909.

The answer to your question must be controlled by Sections 1, 3 and 15 of said statute. Said Section 1 requires that each and every corporation embraced therein shall at its option adopt one or the other of the plans of protecting depositors mentioned by you.

Section 3 and Section 15 both contain provisions relating to the time of the exercise of such option.

A careful study of those provisions will disclose the fact that they are not entirely harmonious, in that Section 3 embraces each and every bank and trust company mentioned in Section 1 of this act, which section only includes certain corporations which may be incorporated after the taking effect of the statute as well as certain corporations which were incorporated before the statute took effect, while said provisions in said Section 15 apply to only corporations incorporated after taking effect of the statute. However, I am of the opinion that the legal effect of this statute, when considered as a whole, is to require, in said Section 3 that any and all corporations which are embraced in said Section 1 and which were incorporated prior to the taking effect of said statute shall exercise such option "on or before October 1, 1909," and not thereafter, and also to require in said Section 15 that any and all corporations which are embraced in said Section 1 and which were or may be incorporated after the taking effect of said statute shall exercise such option "on filing this charter before it shall be permitted to receive deposits" and not thereafter.

I find in said statute no express provision authorizing any corporation to change its plan of securing its depositors after it shall have once exercised its option in the premises; but I am of the opinion that it would not be an abuse of your discretion and authority to permit such a corporation which was chartered prior to the taking effect of said statute to make a change in such plan and

to adopt on or before October 1, 1909, in manner and form as set forth in the statute, and in lieu of the plan first adopted by it, the other statutory plan of securing its depositors.

But I do not find in said statute anything which appears to directly or indirectly authorize or permit at any time any change in such plan by any such corporation which was incorporated after the taking effect of said statute.

My conclusion as to the legal effect of said portion of Section 15 is in harmony with the rules promulgated by the State Banking Board governing the incorporation and licensing of State banks.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—BANK GUARANTY LAW—INDEMNITY BOND OF BANKING CORPORATION OR INDIVIDUAL SURETIES.

Shareholders of the stock of a banking corporation may legally become and be accepted as sureties upon indemnity bond given to protect depositors.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 3, 1909.

Judge J. B. Price, County Judge, Bastrop Co., Bastrop, Texas.

DEAR SIR: I hereby make reply to your recent inquiry relative to the Bank Guaranty Act of the Second Called Session of the Thirty-first Legislature, (Acts 1909, page 406), said inquiry being as follows:

"As county judge of this county it will become my duty to pass upon the bond of any State bank in this county which shall determine to adopt the 'bond plan' of guaranteeing its deposits.

"Will you kindly give me your opinion as to whether or not I would be authorized to approve a bond signed by the stockholders and directors of a State bank who were easily worth double the amount of said bond over and above their interest in said bank and signed by no other sureties?"

Section 15 of said statute contains the following provisions:

"Each and every State bank or trust company now or hereafter incorporated under the laws of this State, which shall elect to come under the provisions of the bond security system of this act, shall, on January 1, 1910, and annually thereafter, file with the Commissioner of Insurance and Banking and his successors in office for and on behalf of the lawful depositors of such bank a bond, policy of insurance, or other guaranty of indemnity in an amount equal to the amount of its capital stock, which said bond, policy of insurance or other guaranty of indemnity shall be for and inure to the benefit of all depositors. Such instrument and the security thereby provided shall be approved by the county judge of the county in which such business is domiciled. * * * . In case the bond hereinabove provided for shall be executed by personal obligation or security,

then in no event shall such bond be deemed adequate and sufficient unless and until it shall have been executed by at least three different persons or individuals of financial responsibility and solvency satisfactory to the authorities herein authorized by this act to approve such bond. The bond or other form or guaranty provided for in this act may be made by any person, firm or corporation authorized to execute the same and any and all corporations incorporated under the provisions of Sections 8 and 9 of Chapter 10 of the First Called Session of the Twenty-ninth Legislature, or any act amendatory thereof, shall be and they are hereby authorized and empowered to execute such bonds or guaranties, either singly or collectively, subject to approval as herein provided for; provided that any such corporation which is at the time operating under the guaranty fund system provided for by this act shall not be accepted as a surety on any such bond."

It will be noted that although the Legislature dealt specifically with the subject matter of indemnity to depositors under the bond security system set forth in said statute, fixing the amount of bond, policy of insurance or other guaranty required to be given, providing by whom it shall be be approved and where and when it shall be filed and its legal effect, and that it may be executed by personal obligation or security or by certain classes of corporations, and, by way of exception, expressly prohibiting any such corporation which may itself at the time be operating under the guaranty fund system provided by said act from becoming surety on any such bond, said statute does not expressly inhibit directors or stockholders from becoming sureties upon such obligations of indemnity; and I am of the opinion that they may legally become and be accepted as such sureties.

It seems reasonable to assume that if it had been the purpose of the Legislature to prohibit such stockholders from becoming sureties upon such obligations, such inhibition would have been expressly embodied in said statute.

As to the personal worth of such shareholder sureties, that is a matter upon which the county judge must pass.

However, I beg to suggest that in doing so the county judge should take into consideration the facts under our State Banking Law each director must be a stockholder and each stockholder is already personally liable to creditors of such bank or trust company for the full amount of his stock therein, and also that in determining in a particular instance whether or not such proposed director or other stockholder surety may become a proper and legal surety to the amount of his stock aforesaid and also the amount of his aforesaid statutory liability as such stockholder should be deducted from his present worth over and above all exemptions allowed him by law.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CORPORATIONS—INSURANCE COMPANY—CAPITAL STOCK, INCREASE OF, ETC.

Capital Stock can not be issued in consideration of promissory notes or other contracts or agreements to pay for such stock. Stock can not be issued except for money paid.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 10, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You have transmitted to this Department a letter of 7th inst., addresesd to you by Mr. John D. Mayfield, Secretary of Texas Life Insurance Company, and the literature therein mentioned, same being (1) a prospectus for sale of an authorized increase from $100,000 to $2,000,000 in the capital stock of said company, (2) a form of subscription to such capital stock, (3) a form of promissory note to be given in payment for such capital stock, and (4) a form of receipt for first payment upon such stock, and you have requested our opinion as to the legality of the plan of selling stock shown by said letter and printed literature.

It is impracticable to set out here said printed matter in full but I make the following excerpts therefrom:

Said prospectus declares:

"Stock will not be issued until all notes are paid in full".

Said form of stock subscription embodies the following paragraph:

"A majority of the present board of directors and a majority of every board of directors which may hereafter be elected, prior to the time when the stock and subscribed surplus herein provided for shall have been paid, are hereby vested with full power to vote any and all equities I may have in said company, or any and all subjects which may come before said company, until this stock and subscribed surplus shall have been paid in full. They shall in every matter act irrevocably as my attorneys in fact."

It thus appears that under said plan a very large amount of treasury stock of said corporation is to be sold with the understanding that while no stock is to be actually issued until paid for in full, it is to be voted and treated as stock of the company prior to such payment and while perhaps nothing more than the first installment payment for such stock shall have been made.

Section 6 of Article 12 of the Constitution of Texas declares:

"No corporation shall issue stock or bonds except for money paid, labor done, or property actually received * * * ".

Section 1 of Chapter CLXVI of the General Laws of the Thirtieth Legislature provides:

"The stockholders of all private corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21, Revised Statutes of the State, shall be required in good faith to subscribe the full amount of its authorized capital stock, and to pay 50 per cent thereof before said corporation shall be chartered; and whenever the stockholders of any such company shall furnish satisfactory evidence to the Secretary of State that the

full amount of the authorized capital stock has in good faith been subscribed, and 50 per cent thereof, paid in cash, or its equivalent in other property or labor done, the product of which shall be to the company of the actual value at which it was taken, or property actually received it shall be the duty of said officer, on payment, of office fees and franchise tax due, to receive, file and record the charter of such company in his office, and to give his certificate showing the record thereof. Satisfactory evidence above mentioned shall consist of the affidavit of those who executed the charter stating therein (1) the name, residence and postoffice address of each subscriber, to the capital stock of such company; (2) the amount subscribed by each and the amount paid by each; (3) the cash value of any property received, giving its description, location, and from whom and the price at which it was received; (4) the amount, character and value of labor done, from whom and price at which it was received."

While it is true that this last quoted statute is by its terms restricted to corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21 same being the general incorporation law, and while domestic insurance companies are generally treated and considered as being incorporated under insurance laws specifically providing for such corporations, it is also true that Subdivision 46 of Article 642, which is found embodied in said Chapter 2, Title 21, provides for the incorporation of life insurance companies.

Said last quoted statutory provisions (Acts of 1907, page 309), if not directly applicable to life insurance companies, at least indicate the general policy of our laws with regard to fictitious issuance of capital stock of domestic corporations.

Section 3 of Chapter CLXXXIII of the General Laws of the Thirtieth Legislature (page 342) provides:

"Where any corporation has issued and has outstanding any stocks or bonds given or issued for any purpose, other than money paid to, labor done for, or property actually received by the corporation it shall be the duty of the Attorney General of this State, when convinced that the facts exist which authorize the action to institute quo warranto or other appropriate judicial proceedings in some court of competent jurisdiction in Travis County or in any other county of this State where such corporation may be sued, to have any such stocks or bonds issued in violation of the Constitution and statutes of this State cancelled, expunged and held for naught."

I think it is clear that under our State Constitution and laws no capital stock of any corporation can legally be actually issued except for money paid or for labor done or for property actually received by the corporation; or, in other words, that no such capital stock can be issued in consideration of promissory notes or other contracts or agreements to pay for such stock.

And I am of the opinion that in so far as the plan outlined in said printed literature contemplates that capital stock of said corporation shall be voted by any one or treated by the corporation as

valid capital stock of such corporation, such plan is at least to that extent illegal and repugnant to the spirit and effect of said constitutional provisions.

Said form of stock subscription recites:

"The par value of each share is one hundred dollars ($100); and I, we, or either of us agree and promise to pay to the order of said company at its offices in Waco, Texas, the sum of two hundred and fifty dollars ($250) per share; one hundred dollars per share of said amount to go to the credit of the capital stock account, and one hundred and fifty dollars per share of said amount, less necessary expenses, to be placed in the surplus of said company."

It will be observed that said stock subscription form does not specifically enumerate or indicate what such "necessary expenses" are to be; the natural inference being, however, that such expenses are to be reasonable only.

However, said letter from Mr. Mayfield to you says:

"We are placing this stock at $250 per share the par value of which is $100. We are paying general agents $40 per share for placing this stock, out of which they pay soliciting agents from $25 to $30 per share."

It will be observed that in none of said printed literature is there any intimation that such excessive commissions are to be paid for the sale of such capital stock.

Our statute plainly prohibits insurance companies from conducting their business in a fraudulent manner. (Chapter 108, Section 59, Subdivision 11, General Laws of 1909, page 221.) Whether an insurance company is or is not conducting its business fraudulently is perhaps a question of fact; but it seems to me that under the circumstances above set forth the plan of operation in the sale of such stock by said company, as above disclosed, would probably, if not unquestionably, involve fraud in the management of its business.

It is hard to believe that any investor would subscribe for such stock if he knew that such enormous commissions were being paid for the sale thereof and that such excessive commissions were to be diverted from the surplus of the company.

Upon the whole I am constrained to believe that said plan of selling capital stock is in its material features in contravention of the Constitution and laws of this State and such as should not receive your sanction. Respectfully,

WM. E. HAWKINS,
Acting Attorney General.

CONSTRUCTION OF LAWS—BANK GUARANTY LAW—STATE BANKS, ADVERTISEMENTS OF, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 10, 1909.

Hon. Thomas B. Love, Commissioner of Insuranace and Banking, Capitol.

DEAR SIR: Careful consideration has been given to your letter of yesterday which is as follows:

"I have this day received an inquiry from a State bank, as to whether or not they will be permitted to use the following language as an advertisement in connection with printed copies of their statement to this Department under call of September 1, 1909, to wit:

" 'To our patrons and friends:

" 'We want your business; and submit to you, on the opposite sheet, a statement of this bank.

" 'You are, no doubt, aware of the law passed by the Second Called Session of the Thirty-first Legislature of the State of Texas, providing for the security of depositors in State banks.

" 'This bank held its stockholders' meeting on the 24th day of August, 1909, to decide which mode of insurance it should adopt, and upon careful consideration, keeping its depositors' interests in mind, they decided to take advantage of the Mutual Guaranty Fund Plan. As a result of the action taken, on and after January 1, 1910, The non-interest-bearing and unsecured deposits of this bank are to be protected by the Depositors' Guaranty Fund of the State of Texas".

" 'While the officers of the Kilgore State bank knew the deposits were safe before the passage of this law, and enjoyed the confidence of a number of depositors, but now, you will know your deposits are safe in the Kilgore State bank.

" 'Call in and see us when in town, and we will be glad to explain the law to you more fully.'

"Please furnish me with a copy of your opinion on this subject at your earliest convenience, and oblige."

In reply I beg to say:

Section 31 of Chapter 15 of the General Laws of the Second Called Session of the Thirty-first Legislature of Texas, page 424, is as follows:

"All guaranty fund banks provided for in this act are hereby authorized and empowered, if they desire so to do, to publish by any form of advertising which they may adopt, or upon their stationery, the following words: 'The non-interest-bearing and unsecured deposits of this bank are protected by the depositors' guaranty fund of the State of Texas.' All bond guaranty banks provided for in this act are hereby authorized and empowered, if they desire so to do, to publish by any form of advertising which they may adopt, or upon their stationery, the following words: 'The deposits of this bank are protected by guaranty bond under the laws of this State.' Said banks are authorized to use the terms 'Guaranty Fund Bank,' or 'Guaranty Bond Bank', as the case may be, but they are hereby prohibited from describing said forms of guaranty by any other terms or words than herein named. Any guaranty fund bank or bond security bank or any officer, director, stockholder, or other person, for any such bank shall write, print, publish, or advertise in any manner or by any means or permit any of them, or for said bank, to write, print, publish or advertise any statement that the deposits of any such bank are secured otherwise than is permitted in this section, or who shall make or publish any advertisement or statement to the effect that the State of Texas guarantees or secures the deposits in any such bank or banking and trust company shall be deemed guilty

of a misdemeanor and upon conviction shall be fined not less than one hundred dollars, nor more than five hundred dollars, or confined to the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment. Any person who shall write, print, publish or advertise the above statement authorized to be used by bond security banks or guaranty fund banks other than as herein authorized shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than $500 or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment."

It is not entirely clear whether the word "otherwise", as used in said section, relates to the words "write, print, publish or advertise", or to the words "are secured".

Of these two theories of construction the latter would probably afford to banks the wider range in advertising; but I consider it erroneous.

The former theory appears to be much better supported by the context.

The natural sequence in the minds of the legislators appears to have been to make it a misdemeanor for any bank to "write, print, publish or advertise * * * (concerning guaranty of deposits), otherwise than is permitted in this section" rather than make it a misdemeanor for such bank to write, print, publish or advertise that its deposits "*are secured* otherwise than is permitted in this section".

The clause "otherwise than as permitted in this section" seems to refer to advertisements or statements concerning guaranty of deposits rather than to plans or methods of guaranteeing security. Certain kinds of advertisements or statements are "permitted" by this Section 31, but it can not be fairly said that said section "permits" either the guaranty fund plan or the bond security plan of which it declares may be used in advertising, and then declares that banks "are hereby prohibited from describing said form of guaranty in other terms or words than those herein named."

This view as to the effect of the particular language here under consideration is supported by the fact that said Section 31 expressly and specifically sets out within quotation marks certain language language which it declares may be used in advertising, and then declares that banks "are hereby prohibited from describing said form of guaranty in other terms or words than those herein named."

Upon the whole I am of the opinion that the purpose and legal effect of said section 31 is to require that in advertising that their depositors are guaranteed, under either of said plans. State banks shall adopt and use the stereotyped phraseology or legends so specifically set out within quotation marks in said Section 31 and none other relating to the guaranteeing of deposits.

Respectfully,

WM. E. HAWKINS,
Acting Attorney General.

CORPORATIONS, FOREIGN—LOAN COMPANY—PERMIT FEE —FOREIGN INSURANCE COMPANY MAY BE GRANTED PERMIT TO DO LOAN OR INVESTMENT BUSINESS, ONLY, IN THIS STATE—FEE BASED UPON CAPITAL INVESTED WITHIN THE STATE.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 23, 1909.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: You have requested our opinion as to whether or not the John Hancock Mutual Life Insurance Company is entitled under our laws to a permit from you authorizing it to transact business only within this State, and if so, the amount of fee, if any, which it is required to pay you for such permit. Accompanying your inquiry is a letter upon the subject from George A. Titterington, Esq., of Dallas, attorney for said company.

It appears that said company is a foreign mutual life insurance company without capital stock chartered by a special act of the Legislature of the State of Massachussetts the purpose of its creation being to insure the lives of persons with the incidental right of investing its funds in certain classes of securities. Said company does not propose under such desired permit to write any policy of insurance whatever, but does desire to loan money within this State under such permit.

Answering your questions in their order, I beg to say:

Section 18 of Chapter 122, page 247, of the General Laws of the Thirty-first Legislature (1909) provides:

"That any life insurance company not desiring to engage in the business of writing life insurance in this State, but desiring to loan its funds in this State, may obtain a permit to do so by complying with the laws of this State relating to foreign corporations engaged in loaning money in this State without being required to secure a certificate of authority to write life insurance in this State."

This statute if not designed for the special benefit of the above named corporation, appears to be at least applicable to it and should, in my opinion, be construed as authorizing the issuance to it of a permit for the transaction of a loan business only within this State, upon compliance by such company with the conditions therein set forth, or in other words upon compliance by it with our laws relating to foreign corporations engaged in loaning money in this State.

Turning to Chapter 4, page 267, of the General Laws of the First Called Session of the Thirty-first Legislature, which fixes fees to be charged by the Secretary of State, we find that while as a general rule permit fees of foreign corporations having capital stock are therein fixed upon a graduated scale based upon the amount of capital stock of the foreign corporation applying for such permit, it is also therein provided that the fee for issuing a permit to a foreign mutual building and loan company "shall be based upon the capital invested in the State of Texas; and it shall be the duty of the Secretary of State to require satisfactory proof as to the amount of

capital invested in this State before issuing any permit to any foreign building and loan company to do business in this State; provided, that the minimum fee for any foreign building and loan company shall be two hundred and fifty dollars ($250); provided further, that the fee required to be paid by any foreign corporation for a permit to do the business of loaning money in this State shall in no event exceed one thousand dollars ($1000)".

It is true, as claimed by the attorney for said corporation, that it does not fall within any classification declared by said Chapter 4, but foreign mutual building and loan companies are clearly within such classification and when doing business here "are engaged in loaning money in this State" and are required by law to pay to you certain fees for issuance of permits; and the permit fees which they are required to pay are adopted by said Section 18 as the permit fees which are required for life insurance companies not desiring to engage in the business of writing life insurance in this State, but desiring to loan their funds within this State.

I am of the opinion that the above mentioned statutory provisions should be construed together and that when so construed, their legal effect is to authorize the issuance of a permit to the above named corporation for the sole purpose of loaning money in Texas and to authorize and require you to charge for such permit a fee to be based upon the amount of capital already actually invested within this State at the rate of fifty dollars for the first ten thousand dollars and ten dollars for each additional ten thousand dollars or fractional part thereof, such fee, however, to be in no event less than two hundred and fifty dollars nor more than one thousand dollars.

The contention of said attorney of said corporation as I understand it, is in effect, that said company is in nowise subject to the operation of said Chapter 4, which fixes your fees. If that contention be sound it must follow either that said company is not entitled to any permit or that you are not authorized to charge any fee for issuing any such permit. I can not concur in his views.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

BANK GUARANTY LAW.

State banks may advertise prior to January 1, 1910, that after said date their depositors will be protected, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 24, 1909.

Hon. Thomas B. Love, Commissioner of Insuranace and Banking, Capitol.

DEAR SIR: You have requested our opinion as to whether or not State banks may, prior to January 1, 1910, advertise their present or future purpose or status with regard to guaranteeing their de-

posits under the provisions of Chapter 15 of the General Laws of the Second Called Session of the Thirty-first Legislature, commonly known as the bank guaranty law.

Section 31 of said statute is as follows:

"All guaranty fund banks provided for in this act are hereby authorized and empowered, if they desire so to do, to publish by any form of advertising which they may adopt, or upon their stationery, the following words: 'The non-interest-bearing and unsecured deposits of this bank are protected by the depositors guaranty fund of the State of Texas.' All bond guaranty banks provided for in this act are hereby authorized and empowered, if they desire so to do, to publish by any form of advertising which they may adopt, or upon their stationery, the fololwing words: 'The deposits of this bank are protected by guaranty bond under the laws of this State.' Said banks are authorized to use the terms 'Guaranty Fund Bank,' or 'Guaranty Bond Bank,' as the case may be, but they are hereby prohibited from describing said forms of guaranty by any other terms or words than herein named. Any guaranty fund bank or bond security bank or any officer, director, stockholder or other person, for any such bank who shall write, print, publish or advertise in any manner or by any means or permit any one for them, or for said bank to write, print, publish or advertise in any manner any statement that the deposits of any such bank are secured otherwise than as permitted in this section, or who shall make or publish any advertisement or statement to the effect that the State of Texas guarantees or secures the deposits in any such bank or banking and trust company, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, or confiined in the county jail for not less than three months, nor more than twelve months, or by both such fine and imprisonment. Any person who shall write, print, publish or advertise the above statement authorized to be used by bond security or guaranty fund banks other than as herein authorized shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment."

The first above quoted penalty clause applies to only "any guaranty fund bank or bond security bank or any officer, director or stockholder or other person for any such bank." None of the deposits of any State bank will be guaranteed under the provisions of said statute prior to January 1, 1909, and consequently no State bank will, prior to that date, occupy the status of coming within the classification aforesaid.

Moreover, the inhibition is against the printing, publishing or advertising of "any statement that the deposits of any such bank are secured," the present rather than the future tense being employed.

The provision that "any person who shall write, print, publish or advertise the above statement authorized to be used by bond security bank or guaranty fund banks otherwise than as herein authorized shall be guilty of a misdemeanor," etc., was evidently de-

signed to merely prevent State banks and other institutions entitled to the privileges of the act from advertising in the language set out in quotation marks in said Section 31, that its deposits are at the time of such advertisement in fact secured, unless such advertisement be true at the time, and its deposits be then really secured. And inasmuch as no deposits of any such institution will be in fact guaranteed under the statute prior to January 1, 1910, no such institution can legally advertise prior to that date that its deposits *are* secured.

While the general purpose of the Legislature in enacting said Section 31 into law was, doubtless, to prevent misrepresentations as to the effect of said bank guaranty law, and as to the status of any such institution thereunder, and while it is true that even though a State bank should now advertise that on and after January 1, 1910, its deposits will be secured under said statute such bank may, meanwhile, fail to take the steps which are necessary under such statute in order to actually secure its deposits on and after the aforesaid date, it is also true that, except as provided by law, any bank or individual may advertise at will; and the Legislature has not in said Section 31 used phraseology which appears to have been designed to prevent, prior to January 1, 1910, a State bank from publishing or advertising a statement to the effect that it has adopted or will adopt the one or the other of the two prescribed plans of guaranteeing deposits, or to the effect that on and after January 1, 1910, its deposits will be so guaranteed.

I am unable to find in said statute any provision which in my opinion prohibits a State bank from printing, publishing or advertising, prior to January 1, 1910, a statement that on and after January 1, 1910, its non-interest-bearing and unsecured deposits *will be* protected by the depositors' guaranty fund of the State of Texas, or that on and after Jaunary 1, 1910, its depositors will be protected by guaranty bond under the laws of this State.

Your attention is called to the fact that my opinion to you of date of September 10, 1909, on the subject of advertisements by State banks dealt with advertisements to be made on and after January 1, 1910, and not before that date.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

INSURANCE COMPANIES, LIFE—SURVIVORSHIP FUND.

Shall not issue policy containing special or board contract, or similar provision, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, October 15, 1909.

Hon. Thos. B. Love, Commissioner of Insurance and Banking, Capitol.

SIR: We have given careful consideration to your letter of recent date in which you say:

"By Section 19 of the Life Insurance Code, passed by the Regular Session of the Thirty-first Legislature it is provided that no life insurance company shall, among other things, not "issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or charge against any portion of the premium of any other policy."

Attached to the enclosed letter from the Secretary of the Sam Houston Life Insurance Company, addressed to myself, is a form of special provision which that company desires to attach to certain forms of its policies providing for a survivorship fund. I am writing to ask your opinion as to the queries propounded to me respecting this special provision in the enclosed letter from the Secretary of said Company."

The body of said inclosed letter from the secretary of said insurance company addressed to you, is as follows:

"Referring to the recent correspondence and conferences with the Department, by the Sam Houston Life Insurance Company, we wish to submit the following:

"First. Is the contract as set out in the rider—a copy of which is hereunto attached—contrary to the Life Insurance Act of March 22nd, 1909?

"Second. Would such contract be contrary to said act, if the first sentence in the paragraph entitled "Survivorship Fund" was changed to read as folows:

"The company agrees to create and maintain a Survivorship Fund for this class of contracts by setting aside annually the sum of one dollar from each renewal premium paid on each one thousand dollars of insurance issued and continued in force on this plan, it being understood that said sum of one dollar on each one thousand dollars applies equally to this policy and to all other policies issued on this plan, and that said sum of one dollar, so set aside, is not taxed to nor taken from the premiums of any policy save policies issued on this plan,' and the last sentence in the first paragraph of said head to be changed to read:

"For purposes of computation and distribution all contracts containing this clause, issued during the same calendar year on this plan, and none other, shall constitute a class.'

"Third. Would said contract be contrary to said act, either in its present form, or amended as suggested, if the matters contained in said rider were printed in the main policy forms and not attached by way of rider."

The form of said "rider" is as follows:

SAM HOUSTON LIFE INSURANCE CO.

of DALLAS, TEXAS.

Attached to and forming a part of the Company's contract No.....

SPECIAL PROVISIONS.

IT IS HEREBY AGREED, That if the above numbered Contract on the

life of ..... shall become a claim by death occurring within Twenty Years from date of said Contract, and subsequent to the....day of....., the Contract being in full force under its original conditions, all premiums that shall have become due on and after the date last named shall be returned together with the face amount of the contract, thereby making the total amount of insurance according to the year in which death occurs, as follows:

11th Year $.....	16th Year $.....
12th Year $.....	17th Year $.....
13th Year $.....	18th Year $.....
14th Year $.....	19th Year $.....
15th Year $.....	20th Year $.....

Should the Contract be continued under extended insurance, the amount of insurance to be extended shall be as provided on the second page of the contract. Except as herein specifically provided the contract is not in any way altered or changed.

IT IS ALSO AGREED, That if there be no indebtedness hereon to the Company, and if all the premiums required hereunder to and including the tenth year have been duly paid, the Company will, for the purpose of continuing the insurance in full force, loan to the owner, upon written request, every subsequent premium as it becomes due, provided interest be paid annually in advance at the rate of six per cent per annum upon the aggregate of all such loans, and provided any indebtedness thus created shall be deducted in any settlement made upon this contract.

SURVIVORSHIP FUND.

THE COMPANY AGREES to create and maintain a Survivorship Fund for this class of contracts by setting aside annually the sum of one dollar ($1.00) from each renewal premium paid on each one thousand dollars of insurance issued and continued in force on this plan. The Company also agrees to improve this fund at 6 per cent per annum compounded annually. The Company further agrees to distribute the said Survivorship Fund among the surviving, persistent members of this class at the end of twenty years from the date of issue, in proportion to the net amount of insurance then in force on the life of each policy-holder in said class. For purposes of computation and distribution all contracts containing this clause, issued during the same calendar year, shall constitute a class.

Each surviving, persistent member of this class, at the end of twenty years from date of issue, may use his or her proportion of the Survivorship Fund in purchasing additional, paid-up insurance, subject to satisfactory medical examination.

Dated at Dallas, Texas, this .... day of ..... 19...

..... (Litho) I. J. WILLIAMS,

Signed President.

In response to the inquiries thus propounded I beg to say:

Chapter 108 of the General Laws of the Regular Session of the Thirty-first Legislature of Texas, (1909) contains, among others, the following provisions:

"Sec. 18. Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company issuing any policy upon such application be regarded as the agent of the company and not the agent to the insured, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy.

Sec. 19. No insurance company doing business in this State shall make or permit any distinction or discrimination in favor of individuals between insurants (the insured) of the same class and of equal expectation of life in the amount of or payment of premiums or rates charged for policies of life or endowment insurance or in the individuals or other benefits payable thereon; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as expressed in the policy issued thereon, nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give directly or indirectly as an inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; or give, sell or purchase, or offer to give, sell or purchase, as an inducement to insurance, or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership or any dividends or profits to accrue thereon or anything of value whatever not specified in the policy or issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium of any other policy."

I am of the opinion that under said statute no rider to a contract of life insurance is permissable unless each, upon its face, expressly and plainly refers to the other, the purpose of the statute, as I understand it, being to require that each such contract when made shall be complete and plainly set out all its terms and provisions regardless of the number of sheets which may in fact constitute such single contract.

I am further of the opinion that inasmuch as our statute contemplates that the above named insurance company may write participating policies, whether it in fact now does so or not, and further contemplates that the business of the company is to be estimated upon a 4 per cent basis and that all receipts in excess of 4 per cent shall become surplus, it is not permissible for this company to issue a contract which guarantees that the supervisorship fund mentioned in said rider shall earn the 6 per cent per annum which is therein mentioned.

I have found much difficulty in reaching a conclusion as to whether the provisions of said rider relative to the survivorship fund are or are not violative of the above quoted statutory provisions to the effect that "no insurance company doing business in this State * * * shall issue any policy containing any special

or board contract or similar provision by the terms of which said policy will share or practicipate in any special fund derived from a tax or a charge against any portion of the premium of any other policy."

It will be noted that the classification of policies, which it is declared must not contain such obnoxious provision, is not sweeping, and does not, in terms, include all policies of life insurance which contain such obnoxious features; but said classification is by the terms of the statute restricted to policies containing (a) special contracts, (b) board contracts, (c) similar provisions.

It is not quite clear whether the words "by terms of which said policies will share or participate in the special fund derived from a tax or a charge against any portion of the premium of any other policy," relate to all three or to only the last of the three above enumerated kinds of contracts.

It will also be observed that there is nothing in the face of the rider to indicate that it is to be limited to any particular number or class or set of persons; and on the contrary I am assured by the officers of said insurance company that the benefit of such riders are to be thrown open to the insuring public without restriction or discrimination.

Personally I have grave doubts whether any form of insurance policy which is thus open to acceptance by the public generally can fairly be held to constitute a board contract or a special contract or a contract embodying "similar provisions" within the meaning of the above quoted statute. The view that such contracts are not "special contracts" at all but merely a different form of contract offered generally by the issuing company is not without reason and authority to support it.

However, in view of the fact that in the administration of affairs of your Department you have taken the other view and have held said survivorship fund feature of said contract which it set out in said rider, obnoxious to the provisions of the above quoted statute, I hesitate and decline to say that in my opinion your construction of said statute is in that respect incorrect.

It is the settled policy of even the courts to uphold the construction which an executive officer, charged with the duty of its enforcement, places upon a statute of doubtful construction, unless such construction is clearly erroneous; and I am not fully convinced that your construction of said statute in this instance is erroneous.

It appears that the question might readily, and without much expense, be tested by an application to our Supreme Court for a writ of mandamus to compel you to register such contracts, which I understand you now have before you for consideration, and I am inclined to consider that as the best way to dispose of the matter.

Truly yours,

WM. E. HAWKINS,
Assistant Attorney General.

CORPORATIONS, FOREIGN—FIRE INSURANCE COMPANIES.

Indemnity bond to be filed by, etc., based on premium receipts of preceding year, etc. No part of Commissioner's duty to furnish surety with evidence of cancellation, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 29, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Austin, Texas.

DEAR SIR: I have given careful consideration to your letter of 20th inst., in which you say:

"Chapter 102 of the Regular Session of the Thirty-first Legislature provides for all foreign fire insurance companies to furnish a bond before being authorized to transact business based upon the premium receipts of the preceding year. Many of these companies have already furnished such a bond with surety company as surety which runs continuously in favor of the State, the premiums on said bond having been paid to the various surety companies for one year from the date of their execution, which would carry one life of said bond beyond the date of the renewal of permits for 1910, when, under the law, a new bond will be required before such renewals are granted. Can this Department lawfully furnish evidence of cancellation of the existing bonds or release of liability thereunder to the various surety companies interested; and if so, what form of evidence of such cancellation or release can this Department so furnish?"

The statute places no express time limit upon the life and effectiveness of such bonds and makes no provision for its cancellation.

The statutory conditions of such bond are inconsistent with the idea of such time limit or cancellation, and the fact that the law requires the filing of another bond before the issuance by you of a new certificate of authority to transact business in Texas for another year furnishes no reason why the old bond shall not remain in full force and effect, at least as to obligations and liabilities arising under it prior to the filing and approval of such new bond.

Whether obligations and liabilities of the insurance company, of the character embraced by such statutory bond, which shall arise after the filing and approval of such new bond are legally referable to such new bond alone or to both the new and the old bond, is a question upon which I express no opinion—none being called for by your inquiry.

Really, I think that your official duties in connection with such bonds begin and end with requiring that they be executed, filed and approved as required by law.

The legal effect of such bonds and the duration thereof are questions which concern only the obligors upon the bonds and the statutory beneficiaries referred to in such bonds.

I, therefore, answer you by saying that in my opinion, under the

existing laws, there can be no legal cancellation of any such bond, and, consequently, no evidence of such cancellation can be furnished.

The most that you can legally do in the premises will be to certify officially that such new bond has been filed and approved, after that shall have been done, or to furnish a certified copy of such new bond with its file marks and certificate of approval.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—FIRE RATING BOARD.

Said law applies to such insurance companies as insure against loss by fire only, and not to marine and inland insurance companies.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, December 31, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: I have carefully considered your letter of the 15th inst., in which you say:

"At the request of the State Fire Rating Board I desire your legal opinion upon the following question.

"The law creating the State Fire Rating Board, being Chapter 18 of the Acts of the First Called Session of the Thirty-first Legislature, provides that 'every fire insurance company' shall comply with the provisions and requirements of the law. There are a number of corporations transacting within this State the business commonly know as Marine Insurance and Inland Isurance which consist of indemnifying the owners of property, which is being, or is to be transported, by land or water, or both, against loss or damage from any cause, including loss or damages by fire. Are such companies fire insurance companies within the meaning of the law referred to and are they required to comply with the provisions of the same?"

I answer your inquiries negatively.

In view of the phraseology of the statute mentioned and the history of legislation in this State providing for the incorporation of fire insurance companies and of other insurance companies, and of other legislation affecting insurance companies I am of the opinion that the statute to which you refer applies to only such companies as insure against loss by fire only.

Respectfully,

WM. E. HAWKINS.
Assistant Attorney General.

CORPORATIONS—STATE BANK—DIRECTORS, ETC.

After charter filed, corporation hasn't power to adopt by-laws fixing time for first annual meeting to elect directors at less than one year after date upon which bank was incorporated; must state in its articles specific number of directors. Number of directors may be increased or diminished by vote of stockholders.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 14, 1910.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Your favor of November 13, 1909, submits to this Department for a ruling the following questions:

"1. Can the stockholder of a State bank, after its charter has been filed and during the first year after its incorporation, adopt by-laws fixing a time for the first annual meeting to elect directors, which time will be less than one year after the date upon which the bank was incorporated, and thereby supercede the directors named in the charter to serve the first year before they have served a full year?

"2. Are the incorporators of a State bank required to fix definitely in the articles of association the number of directors, or may they legally provide in such articles that the number of directors, shall be 'not less than five nor more than twenty-five?'

"3. In view of Article 651 of the Revised Statutes of the general incorporation law, if the number of directors of a State bank is required to be definitely stated in the charter, can such number thereafter be increased or diminished by the adoptions of by-laws or other action by the stockholders, or is an amendment to the charter necessary in order to change the number of directors?"

Under Subdivision 5 of Section 2, Chapter 10, of the Acts of the First Called Session of the Twenty-ninth Legislature, known as the State Banking Law, a charter must, among other things, specify "the number of directors or managers and the name of those agreed upon for the first year."

Section 6 of said act provides "the affairs and business of every banking corporation shall be managed by a board of directors or managers consisting of not less than five nor more than twenty-five shareholders, who shall be elected annually," ect.

It is our opinion that, inasmuch as the statute provides that the original articles of incorporation shall state the number of directors and the names of those agreed upon for the first year, the corporation would not have the power to adopt by-laws fixing the time for the first annual meeting to elect directors at less than one year after the date upon which the bank was incorporated.

We do not believe it would be in compliance with the statute authorizing the incorporation of banks for such a proposed corporation to provide in its articles of incorporation that the number of directors shall "be not less than five nor more than twenty-five", but that they must state in the articles of incorporation the specific number of directors agreed upon. The language "not less than five nor

more than twenty-five'' does not definitely fix any number, and, therefore, does not comply with the plain requirements of the statute which provides that the number of directors or managers shall be stated in the articles of incorporation.

We have given the inquiry submitted in your third question a very careful consideration and have reached the conclusion that the number of directors of a State bank can be increased or diminished to not less than five nor more than twenty-five by a vote of its stockholders cast as its by-laws may direct, and, therefore, it is unnecessary that such institution amend its charter in order to so increase or diminish the number of its directors. We will briefly recite the facts upon which we base such opinion.

Under the State Banking Law no authority is given a State bank to increase or diminish the number of its directors by amendment and it is well established by the decisions of the courts that in the absence of specific authority so to do no corporation has the right to amend its charter.

It will also be noted that the State Banking Law does not give such corporations the right to increase or diminish the number of their directors, in any manner, the only provision being that its directors shall be not less than five nor more than twenty-five.

Article 647, Revised Statutes, gives the authority to private corporations ''heretofore organized or incorporated, or which may hereafter be organized or incorporated *for any of the purposes mentioned in this chapter* to amend or change its charter or act of incorporation, by filing, authenticated in the manner required by this chapter'', etc.

It is clear that a State bank not being incorporated for any of the purposes mentioned in the general incorporation act would not have the authority to amend its charter under this article.

Article 651, Revised Statutes, in defining the general powers of a corporation provides, ''every private corporation, as such, has power * * * to increase or diminish by a vote of its stockholders cast as its by-laws may direct, the number of its directors or trustees, to be not less than three nor more than twenty-one; provided, that any corporation formed under Subdivision 1, 2 and three of Article 642, Chapter 3, Title 21 of the Revised Statutes of the State of Texas, may increase the number of its directors or trustees to not more than twenty-five''.

Article 651 being a general statute applies to all corporations created under the laws of this State and should control, except where the Legislature has enacted a special law in conflict therewith. There is nothing in the State Banking Law in conflict with this provision. Construing this article and that section of the State Banking Law which provides that the board of directors for State banks shall be not less than five nor more than twenty-five together, we believe that it furnishes authority for the stockholders of a State bank to increase or diminish by a vote cast as its by-laws may direct the number of its directors or trustees to be not less than five nor more than twenty-five. Inasmuch as a State bank can not amend its charter and thereby increase or diminish its directors

under Article 647 and in view of the further fact that in enacting the State Banking Law the Legislature made no provision for such amendment, it is evident that the failure to make such provision was on account of the fact that Article 651 gave a State bank full power and authority to increase or diminish the number of its directors by a vote of its stockholders, cast as its by-laws might direct, thereby rendering it unneccessary for the Legislature to make any provision in the State Banking Law authorizing an amendment to the charter for such purpose.

You are, therefore, respectfully advised that after one year the stockholders of a State bank can, by a vote cast in accordance with its by-laws on that subject, increase or diminish the number of its directors to be not less than five nor more than twenty-five.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—STATE BANKING LAW— CORPORATIONS—STATE BANKS—TRUST COMPANIES.

"First State Bank and Trust Company, of Brady, Texas." Said corporation must eliminate word "Trust" from name of corporation, or include within its charter some of the trust powers mentioned in act, before charter can legally be filed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 25, 1910.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: We have your favor of the 22nd inst., in which you state that there has been submitted to your Department a charter for a proposed corporation styled "First State Bank & Trust Company of Brady, Texas"; that this charter provides that the corporation shall have banking powers merely and does not provide that it shall have any of the powers of a trust company specified in Section 11 of the Acts of the Twenty-ninth Legislature, known as the State Banking Law. You desire to know whether the charter for such bank should be filed by you with the word "trust" as a part of the corporate name of said company.

Section 1 of the State Banking Law provides:

"Five or more persons, a majority of whom shall be residents of this State, who shall have associated themselves by articles of agreement, in writing as provided by the general corporation law, for the purpose of establishing a bank of deposit or discount or both deposit and discount may be incorporated under any name or title *designating* such business."

Section 2 of this act sets out what the articles of agreement shall contain, embracing six subdivisions.

Section 3 of this act provides, in substance, that all corporations organized under Section 1 shall be authorized and empowered to

conduct the business of receiving money on deposit and allowing interest thereon and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; also of buying and selling, and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper. In other words, corporations organized thereunder are given full banking power.

Section 8 of this act is as follows:

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

Section 9 provides what the articles of agreement shall set forth. The first six subdivisions under Section 9 contain substantially the same requirements to be set forth in the articles of agreement as are required under Section 1 for the organization of a bank. However, this section contains an additional subdivision, No. 7, which is not set out under Section 1, which states:

"The purposes for which the association or company is formed, which shall be the establishment of a bank of deposit or discount, or both of deposit and discount, with the power set out in Section 3 of this act, and *may* include any or more of the purposes set out in Section 11 of this act."

Section 11 provides:

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

Then follows eleven subdivisions which provide in different forms general powers of trust companies.

An answer to your inquiry depends upon the proposition as to whether a corporation can be chartered under Section 8 of the above mentioned act with banking powers alone. That is to say, whether it is optional with said company incorporating under said section to included as a part of its articles of agreement one or more powers set out in Section 11 of said act.

A careful consideration of the entire State Banking Law leads us to the conclusion that a corporation incorporating under Section 8 must include one or more of the trust powers mentioned in Subdivision 11 thereof. It is true that in Section 9 the word "may" is used, and if this word is given its ordinary significance a corporation would have the right to incorporate under Section 8 without including one or more of the trust powers set out in Section 11. It was evidently the intention of the Legislature to provide only for the incorporation of banking and trust companies under Section 8 because this section provides "parties may associate themselves together by articles of agreement in writing for the purpose of establishing a

banking and trust company under any name or title designating such business".

The Legislature evidently did not intend to provide two distinct plans for the organization of State banks. Inasmuch as they had fully provided for the organization of State banks alone under Section 1, we can see no logical reason why they should again provide for incorporation with banking powers alone. Section 11 confirms this view for the reason that it provides that corporations may be created under Sections 8 and 9 for the purpose of establishing a bank of deposits or discounts or both for deposits and discounts with the powers set out in Section 3 of this act, *and* any one or more trust company powers. The use of the word "and" clearly indicates that a corporation can not be organized under Section 8 unless it embraces as a part of its articles of incorporation one or more of the general powers given to trust companies.

It will be noted that the Legislature has, with a great deal of strictness, provided both in Section 1 and Section 8 that the name of the corporation organized under either of these subdivisions must be such a name or title as will designate the *character* of business to be transacted. It was evidently not contemplated that a State bank could incorporate and use as a part of its corporate name the title of a trust company when its charter does not give it any of the powers of a trust company as its name will be misleading and would not designate the character of business it was authorized under the law to pursue. Such name would be misleading to the general public transacting business with such institution and would constructively be a fraud upon the general public. We believe that wherever it is supposed to incorporate a State bank alone, it must be done under Section 1 of this act, and if it is sought to incorporate a concern under Section 8, such proposed corporation must include as a part of its articles of incorporation one or more of the trust powers specified in Section 11 of said act.

In order to reach this conclusion, it is necessary to construe the word "may" in the sense of "must" or "shall". The courts have frequently construed the word "may" to mean "must". In the case of Dowling vs. City of Oskaloosa, 53 N. W., 256, the rule is clearly stated in this language:

"The word 'may' in a statute is sometimes used in a mandatory and sometimes in a directory and permissive sense. It has always been construed to mean 'must' or 'shall' whenever it can be seen that the Legislature's intent was to impose a duty and not simply a privilege or discretionary power, and where the public is interested and the public or third person have a claim *de jure* to have the power exercised, but it is only where it is necessary to give effect to the clear policy and intention of the Legislature that it can be construed in a mandatory sense and where there is something in connection with the nature or in the sense and policy of the provisions to require an unusual interpretation, its use is merely permissive and discretionary. The application of the rule depends upon what appears to be the true intent of the statute."

When used in statutes "may" will be construed to mean "shall"

when necessary for the sake of justice or public good. (People vs. Livingston, 68 N. Y., 114; Malcom vs. Rogers, 15 Amer. Dec., 464; Steins vs. Franklin County, 48 Mo., 157.)

To give this act any other construction would lead to a view that is contrary to the general policy of this entire law and of other laws upon the same subject inasmuch as we find that the Legislature has zealously guarded chartering banks or bank and trust companies, except under names that designate the character of business they are authorized to pursue.

By referring to Chapter 15 of the Acts of the Thirty-first Legislature, which provides for the guaranteeing of deposits of State banks, we find that no State bank or trust company could continue to use the word "savings" as a part of its corporate name or as a part of any sign or advertisement unless it has established a savings department. (See Acts of Thirty-first Legislature, page 424.)

You are, therefore, respectfully advised that unless the proposed corporation eliminates the word "trust" as a part of its corporate name or unless it includes come of the truts powers mentioned in Section 11 as a part of its articles of incorporation, the charter should not be filed by you. I am,

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—FIRE RATING BOARD LAW—INSURANCE COMPANIES—AGENTS—NO DISCRIMINATION.

If a fire insurance company extends credit to customers, must extend to all alike. Agent has no authority to extend credit to insured beyond term of credit provided for in basis schedule.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 29, 1910.

Hon. Robert M. Hamby, Secretary State Fire Rating Board, Capitol.

DEAR SIR: Your recent inquiry submits to this Department the following questions, which involve the construction of Chapter 18, of the Acts of the Thirty-first Legislature, known as the "State Fire Rating Board" law, namely:

1. Can a fire insurance company extend thirty day credit on deferred premiums on policies issued by them and would this be considered as cash transaction?

2. Can such insurance company legally charge interest on deferred payments of premiums on policies, and if so, what rate of interest can legally be charged?

2. Can an agent of a local fire insurance company pay the company premium upon the policy and credit the assured where he makes himself personally responsible to the company for all premiums as between the company and the assured?

Section 4 of this act is as follows:

"Every fire insurance company transacting business in this State shall, not later than January 1, 1910, after this act takes effect, file with the Secretary of said board general basis schedules showing the rates on all classes of risks insurable by said company in this State, and all charges, credit, terms, privileges and conditions which in anywise affect such rates or the value of the insurance issued to the insured, and any one or more of such companies may employ for the making of such schedules and rates the services of such experts as they may deem advisable for such purpose."

It will be observed that under Section 4, quoted above, it is necessary that each fire insurance company file with the Secretary of the Fire Rating Board the general basis schedules showing the rates on all classes of risks, insurable by such company *and all charges, credits, terms, privileges and conditions* which in anywise affect such rates or the value of the insurance issued to the assured. The foregoing provisions are mandatory and must be complied with.

It will only be necessary to notice a few of these requirements in order to answer the specific questions propounded. There are no provisions of law which attempt to regulate the terms or conditions upon which insurance companies may sell insurance. So far as the statutes are concerned a company may require payment of all premiums in cash upon issuance of policy, or it may provide that payments shall be made at a subsequent date either with or without interest. All these matters are wholly within the discretion of the company; but the law requires the company to file with the Secretary of the board the *terms, privileges,* conditions, etc., and when so filed they must be observed both by the company and its agents.

If the company provides that the terms shall be cash then the agents are required to collect upon the issuance of the policy. The use of the word "cash" excludes all idea of credit. It is a contract for a "cash" transaction and not an agreement for a credit sale.

Lawder vs. Mackie Grocer Co., 54 Atl., 634.

Dozet vs. Landry, 30 Pac., 1064.

Such company or its agents are not permitted by law, after having specified in such schedule that policies are issued for cash, to discriminate amongst any of its policy holders, granting credit to some and requiring cash from others, but must treat all alike.

If a company or its agents desire to issue policies upon which thirty, sixty, ninety days or a greater length of time shall be allowed for the payment of premium, either with or without interest they have the legal right to do so; but such company must so provide in the schedule filed with the board, and in such case, it will be compelled to extend the same credit, privileges, concessions or favor to all of its policyholders who desire to avail themselves of such provisions.

We do not believe that the agent of the fire insurance company would have the authority to individually extend credit to any insured beyond the term of credit provided for in its basis schedule. The language of that portion of Section 11, which provides, "that if any insurance company or any officer, agent or repersentative

thereof, have violated any of the provisions of this act their certificate of authority may be revoked," is broad enough to cover the independent act of the agent.

Under Section 7 of the act the company is prohibited from extending to any insured or other person any *privileges, advantages, favor, inducement or concession,* except as is specified in the schedule provided for in Section 4. If there could be any doubt as to the authority of an agent to extend credit without the authority of the company it is removed by the provisions of Section 13, which provides that "any fire insurance company, director or officer thereof, *or any agent or person acting for or employed by any such company who alone or in conjunction with any corporation, company or person,* shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing prohibited or declared to be unlawful by this act, etc., shall be deemed guilty of a misdemeanor and upon conviction thereof be punished by a fine," etc.

To construe this otherwise would be to nullify these plain provisions and defeat the manifest purpose of the enactment of the statute, which was to prohibit unjust discrimination in rates and in terms, conditions and privileges extended to the insuring public.

If a company desires to transact its business on a credit basis, it may do so.

If it desires to extend credit it may do so.

If it wishes to take notes in settlement of premiums it may do so.

If it decided to charge no interest on deferred payments it can do so.

Terms, conditions, privileges, favors or concessions are all within the descretion of the company, but the law compels it to decide such questions, to file same with the board and thereafter the company and its agents must live up to such schedule and accord all the same treatment thereunder.

Trusting that this will suffice for your future guidance, I have the honor to remain,

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

CORPORATIONS—TITLE GUARANTY COMPANY—INSURANCE COMPANY.

Title Guaranty Company is an insurance vompany, and should file charter with Commissioner of Insurance, Banking, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 29, 1910.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your favor inclosing a letter from the Mayfield Realty Company which propounds the following question to your Department:

"We are contemplating organizing a title guaranty company and propose to issue the three usual certificates issued by such companies, which are, as you know, limited, unlimited and warranty. The two first, limited and unlimited, are based on the records certifying that the records show the title to be so and so. The warranty means that the title and the company warrants it to be so.

"Would they come under the insurance laws of the State in any way? If so, how and to what extent and what would be required of us?"

You desire the advice of this Department as to how this question should be answered and whether the charter of such proposed corporation should be filed with your Department under the insurance laws or in the office of Secretary of State under the general corporation laws?

Article 3028, Revised Statutes which provides for the organization of insurance companies in this State, is as follows:

"Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation and submit the same to the Attorney General, and if said articles shall be found by him to be in accordance with the laws of this State, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the Commissioner of Insurance."

One of the requirements to be stated in the charter of such company is, that it shall state the kind of insurance business which the company proposes to engage in. (See Art. 3029 Revised Statutes.)

If the certificate of the proposed companywhich guarantees the title to land is a contract of insurance, it is clear that the company in incorporating would be required to comply with the insurance laws of this State and file its articles of incorporation with the Commissioner of Insurance. Insurance has been defined in general terms as a contract by which one party undertakes to indemnify another againts loss, damage or liability arising from an unknown or contingent event. (Cooley on Insurance, Vol. 1, page 4).

Perhaps a more comprehensive definition would be that a contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest.

"Insurance in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect to a specified subject by a specified peril." (11th Amer. & Eng. Ency. of Law, page 280.)

May, in his valuable work on insurance, Sections 1 and 2, defines it to be a "contract whereby for a stipulated consideration one party undertakes to indemnify the other against certain risks."

Again it is defined by Phillips, in his work on insurance, Section 1, to be "a contract by which a person in consideration of a gross sum or a periodical payment undertakes to pay a larger sum on the happening of a particular event."

Insurance is defined by the Century Dictionary as "An act or system of insuring or assuring against loss; specifically a system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party in certain contingencies upon specified terms."

Mr. Joyce, in his treatise on insurance, defines guaranty insurance as follows:

"Guaranty insurance is a contract whereby one, for a consideration agrees to indemnify another againts loss arising from the want of integrity, fidelity, or insolvency of employes and persons holding positions of trust against insolvency of debtors, losses in trade, losses for non-payment of notes, and other instances of indebtedness, or against other breach of contract. It includes other forms of insurance which are specially classified as 'fidelity guaranty,' 'credit guaranty,' etc." (1st Joyce on Insurance, Sec. 12.)

In Shakman vs. United States Credit System Company, 92 Wis., 366; 32 L. R. A., 383, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance and the court in passing upon the question said:

"We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by an insolvency of customers is just as definite and real a peril to a merchant or broker as the peril of loss by accident, fire, lightning or tornado and is in fact much more frequent."

This very character of contract has been construed by the Supreme Court of New Jersey to be a contract of insurance. (Robertson vs. U. S. Credit Co., 57 N. J. L., 12.)

In the case of Tebbets vs. Mercantile Credit Guaranty Co., 38 U. S. Apps., 431, 73 Federal Reporter, 95, the court held that a contract to indemnify against business losses or "uncollectible debts" was a contract of insurance.

The organization of companies for the purpose of guaranteeing owners of real estate against defects in the title thereto are of recent origin. There are a number of decisions in which such companies have been held to be an insurance company. A contract to indemnify against loss through defects in the title to real estate or liens or incumbrancies thereon has been regarded as a contract of title insurance. Such a contract was held to be an insurance policy in Gauler vs. Solicitors Loan & Trust Company, 9 Pa. Co. Ct. R., 634. A similar construction has been given to like contracts in the following cases:

Wheeler vs Real Estate Title Ins. Co., 160 Pa., 408; 28 Atlantic, 849.

Stensgaard vs. St. Paul Real Estate Title Ins Co., 50 Miss., 429; 52 N. W., 910.

Minnesota Title Ins. & Trust Co., vs. Drexel, 70 Fed., 194; 17 C. C. A., 56.

Trenton Potteries Co. vs. Title Guaranty & Trust Co., 10 App. Div., 490; 64 N. Y. Supp., 116.

We have been unable to find a single authority which holds that such contracts are not contracts of insurance. Independent of these authorities the statutes of this State specifically recognize the business of guaranteeing land titles as an insurance business.

Section 1, Chapter 143 of the Acts of the Twenty-eighth Legislature, known as the "Resident Agents Law", which provides that all insurance business must be transacted through authorized and licensed agents and providing a penalty therefor, specifically includes agents of a title insurance company. Section 2 of the same act provides that the Insurance Commissioner can require an affidavit of all the insurance companies mentioned therein that they have not violated any provision of the laws of this State and a title insurance company is included among those mentioned in said section. Section 3 of the same law, known as the "Anti-Rebate Statute" also makes special provision, forbidding the agent of any title insurance company from doing the things prohibited by said act. Section 4 of this act gives the Insurance Commissioner the power to investigate violations of the insurance laws by different companies, among which is specified the title insurance company, and provides for the revocation of the license of such company for any infraction of the laws of this State.

You are, therefore, advised that a title guaranty company which proposes to issue certificates guaranteeing land titles is an insurance company and that such proposed company must file its articles of incorporation with the Commissioner of Insurance and comply with the law governing and controlling insurance companies generally.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—BANK GUARANTY LAW—STATE BANKS—NATIONAL BANKS—PRIVATE BANKS—BOND SECURITY SYSTEM.

All State banks electing to come under provisions of bond security system shall file bond by January 1st each year with Commissioner of Insurance, etc.

National banks permitted to file bond at any time during the year, and to file new bond January succeeding. Dito as to private banks.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 2, 1910.

Hon. Willam E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Yuor favor of the 28th ultimo submits to this Department for a ruling the following questions:

1. Can a national bank at any time since the 1st day of January, 1910, avail itself of the protection of the bond security system provided for in Chapter 15, Acts of the Thirty-first Legislature by filing a bond?

2. Can private banks now avail themselves of the bond security system?

Section 32 of Chapter 15 of the Acts of the Thirty-first Legislature, providing for the guaranty of deposits, is as follows:

"Any national bank in this State may voluntarily avail its depositors of the protection of the bond security system herein provided for State banks."

Section 15 of this act provides substantially that all State banks or trust companies now or hereafter incorporated under the laws of this State, which shall elect to come under the provisions of the bond security system, shall, on January 1, 1910, and annually thereafter, file with the Commissioner of Insurance and Banking, a bond, etc.

Inasmuch as the Legislature has not specifically provided in Section 32 that national banks must, in order to avail themselves of the protection of the bond security system, file their bond by January 1, 1910, it leaves the matter open to construction as to whether time is of the essence of the bond security system, in so far as the same is applicable to national banks.

While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words. (First Sutherland Statutory Construction, 722.)

Section 32 and Section 15 should be read in a sense which harmonizes with the subject matter and general purpose of the statute. Taking into consideration the fact that the guaranty law is made compulsory as to State banks, the reason is obvious for the fixing of a specific rate by the Legislature. This was done in order to put the act into operation. This reason would apply to national banks for the reason that the Legisalture had no authority to compel them to adopt the bond security system, and it is significant that the Legislature, in enacting Section 32, should fail to specify any time limit with reference to national banks. If time is considered of the essence of the bond security system when applied to national banks, then it logically follows that all national banks that fail to avail themselves of the bond security system by January 1, 1910, would be forever debarred from doing so.

A careful consideration of the scope and purpose of the entire act leads us to the conclusion that no such meaning was intended. We believe that the object and purpose of this act, read as a whole, was to compel the protection of depositors in State banks, and to extend its operation, as far as possible, by permitting national banks to avail themselves of the salutary provision which effectually gives security to those transacting business with such institution.

If we be correct in this conclusion, then the further question arises as to whether a national bank, in order to avail itself of the provisions of the bond security system, can file its bond at any time dur-

ing the year, or only on January 1st of each year. We believe that such bank can take advantage of this system by the filing of its bond, conditioned as required by law, with the Commissioner of Insurance and Banking at any time during the year, but that such bond would only be effective until January 1st succeeding the filing thereof, at which time a new bond would be required to be filed and annually thereafter. The evident purpose of the Legislature in enacting this law was to protect the depositors in banks from loss by the failure of such institutions and we believe it is a reasonable construction and well within the evident purpose of the Legislature to say that it was the intention to permit national banks to put into effect the provision which will secure their depositors against loss at any time during the year. No good policy could be subserved by compelling a national bank that desired to protect its depositors by this system to wait several months and until January 1st, succeeding.

In our opinion, what has been said above with reference to national banks applies with equal force to private banks. We believe that such banks should be permitted to file under the bond security system at any time during the year, and that said bonds would be effective until the succeeding January 1st, at which time they would be required to file a new bond, and annually thereafter, on January 1st, to file such bond.

Had the Legislature intended that private and national banks could not take advantage of the bond security system at any time except upon the first day of Janpary, of each year, we believe it would have used language apt and appropriate to convey that intention, and would have made a specific provision with reference to the date on which such banks could avail themselves of such system as it did with reference to State banks.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

INSURANCE COMPANIES—FIRE RATING BOARD LAW.

Insurance companies which do strictly a marine and automobile business not subject to provisions of fire rating board law.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 4, 1910.

Hon. Wm. E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your favor of the 24th ultimo, which is as follows:

"Herewith I enclose forms of automobile policies of the Mannheim Insurance Company and of the Union Marine Insurance Company, Ltd., respectively. Please advise me at your earliest convenience whether or not, in your opinion, such policies may be issued by said companies, respectively, or either of them, without bringing

the company issuing such policy within the terms and subject to the provisions of Chapter 18 of the General Laws of the First Called Session of the Thirty-first Legislature of Texas, commonly known as the State Fire Rating Board Statute.

"In that connection, I beg to refer to an opinion from the Attorney General's Department of date of December 31, 1909, addressed to the Commissioner of Insurance and Banking relative to said statute, and to ask if you concur in the conclusion therein announced."

You also enclose the following letter from Torrey & Company of Houston, relating to the same matter, viz:

"In compliance with your favor of the 29th we now enclose you sample copies of automobile policies issued by both the Mannheim and Union insurince companies, for which we are the general agents for Texas.

"These two companies do not write regular fire insurance, but do strictly a marine and automobile business."

We think your first question should be answered in the affirmative, especially under the statement made by Torrey & Company that "these two companies do not write regular fire insurance, but do strictly a marine and automobile business." It is our opinion that the statute referred to by you, from its phraseology and from the general history of insurance statutes in Texas, would not include companies which do not do the usual and ordinary business carried on by fire insurance companies, but which, incidental to their well defined lines of insurance, write policies upon property, indemnifying any loss by fire, as one of many casualities insured against.

It is difficult to formulate any fixed rule, and we believe it safer to hold that the facts of each particular case will determine the application or non-application of the Fire Rating Board statute. We are clear, however, that the mere writing of the particular policies enclosed by you in your letter, by companies not writing regular fire insurance and doing strictly a marine and automobile business would not alone suffice to bring such companies within said statute.

Answering your second question, we respectfully advise that we concur in the conclusion reached by you, as Assistant Attorney General, on December 31, 1909, in so far as the same answers the questions propounded by the Commissioner of Insurance and Banking. However, we are hardly prepared to go as far as that opinion seems to extend, namely, the concluding clause in said opinion: "I am of the opinion that the statute to which you refer applies to *only such companies* as insure against loss by *fire alone.*" If a company doing the business generally and usually carried on by fire insurance company, and writing regular fire insurance, should also undertake to write other lines of insurance, we do not think the latter fact would operate to exempt such companies from the provisions of the Fire Rating Board Law.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

CORPORATIONS—FRATERNAL BENEFICIARY ASSOCIATIONS—EXAMINATIONS PRIOR TO ISSUANCE OF PERMIT TO FOREIGN FRATERNAL BENEFICIARY ASSOCIATIONS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 18, 1910.

Hon. Wm. E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your favor of the 17th inst., you request our construction of the provisions of Chapter 36, of the General Laws of the Thirty-first Legislature of Texas, the same being an act defining and regulating fraternal beneficiary asosciations.

Section 18 of this act prescribes certain conditions precedent to the isuance of a license to a foreign fraternal beneficiary association by the Commisioner of Insurance and Banking, one requirement being that such association shall file with the Commissioner of Insurance and Banking "a statement under oath of its president and secretary, or corresponding officers, in the form required by the Commissioner of Insurance and Banking, duly verified by an examination made by supervisory insurance official at its home State, of its business for the preceding year."

Section 28 of this act contains the following provision, relative to the examination of such foreign associations:

"Examination of foreign associations: The Commissioner of Insurance and Banking, or any person whom he may appoint, may examine any foreign association transacting or applying for admission to transact business in this State. The Commissioner may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the association and may summon and quailfy as witnesses under oath and examine its officers, agents, employes, and other persons in relation to the affairs, transactions and conditions of the association. He may in his discretion accept in lieu of such examination the examination of the insurance department of the State, Territory, district, province or country where such association is organized. The expenses of such examination shall be paid by the association examined upon a sworn itemized statement thereof being presented by the Commissioner of Insurance and Banking or his authorized representative, a copy of which statement shall be filed in the office of said Commissioner. If any such association or its officers refuse to submit to such examination, or to comply with the provisions of this section relating thereto, the authority of such association to transact business in this State shall be revoked until satisfactory evidence is furnished the Commissioner of Insurance and Banking relating to the condition and affairs of the association and during such revocation the association shall not transact any business in this State. Provided no such revocation shall be made until thirty days written notice shall be given to such association at its home office. Provided that the

total cost of this examination shall never in any one year exceed the sum of fifty dollars."

You desire to know whether the provisions of Section 28, which authorize the examination by the Commissioner of Insurance, are merely cumulative of those set out in Section 18 relative to the admission of such foreign associations, or is the Commissioner of Insurance and Banking of this State authorized to grant such licenses to such association upon original examination made by himself, or by some person appointed by him under the provisions of Section 28, without requiring the statement referred to in Section 18.

We are of the opinion that you would not be authorized to grant a license to a foreign fraternal beneficiary association, unless it had theretofore complied with all the provisions of Section 18, which, of course, includes the statement under oath of its president or other officer duly verified by an examination made by the supervisory insurance official of its home State, of its business for the preceding year. The provisions of Section 28 are clearly intended to be cumulative of the provisions of Section 18 and furnish merely an additional safeguard which the Commissioner in his discretion may use.

Section 28 contains the following provision:

"He (Commissioner) may in his descretion accept in lieu of such examination the examination of the insurance department of the State, Territory, district, province, or country where such association is organized."

This would be authority for the Commissioner to grant a license to a foreign association without making the examination provided for in Section 28, but there is no similar provision referring to Section 18 which authorizes the Commissioner to admit such an association by making the examination required in Section 28.

You are, therefore, respectfully advised that no license should be issued to any foreign fraternal beneficiary association, unless it has complied with all the provisions of Section 18, and if after an association has complied with these provisions in your judgment you desire an additional examination made under the authority of your Department, you have the right to require such examination before granting the license.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CORPORATIONS — INSURANCE COMPANIES—REDUCTION OF CAPITAL STOCK—STOCKHOLDERS—ASSIGNMENT OF INTERET IN CHARTER, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 2, 1910.

Hon. Wm. E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your favor of the 14th ultimo, in which you seek the opinion of this Department relative to the increase or de-

crease of the capital stock or other amendments of articles of incorporation of a life and accident insurance company which was chartered under the provisions of Chapter 4, Title 58, of the Revised Statutes of Texas. In this connection you propound the following questions:

"1. Can such increase or decrease in capital stock or other amendment be legally made by the corporators of such company prior to the meeting of stockholders which such corporators are required by Section 3 of Chapter 108 of the General Laws of the Thirty-first Legislature, to call for the adoption of by-laws and for the election of a board of directors of such company?

"2. Can such corporators, or any of them prior to such meeting legally sell and assign to others, or to another, the right and interest of such assignor or assignors in and to such charter and in and to such unorganized corporation, and can such assignee or assignees, acting in conjunction with the remaining original corporators, if any, legally reduce or increase the capital stock or otherwise amend the charter of such corporation, and can they legally call such meeting pursuant to the requirements of said Section 3 of Chapter 108?

"3. When neither such corporators nor their assignees have called such meeting for the adoption of by-laws and the election of directors of such company, and no such meeting has been held, are subscribers to the capital stock of such company 'stockholders' to all intents and for all the purposes within the meaning of said Section 3 of said Chapter 108, and can they legally increase or decrease the capital stock or otherwise amend the charter of such company?

"4. When the corporators of such company have duly called a meeting for the adoption of by-laws and for the election of directors of such company pursuant to the requirements of Section 3 of said Chapter 108 of the General Laws of the Thirty-first Legislature, and such meeting has been duly held and such by-laws adopted, and directors of such company elected by the subscribers to the capital stock of such company, but when no certificate of authority to do business in this State has been issued by the Commissioner of Insurance and Banking to such company, are such subscribers 'stockholders' of the company to all intents and for all the purposes within the meaning of said Section 3 of said Chapter 108, and can they legally reduce or increase the capital stock of such company or otherwise amend its articles of incorporation?"

We have given this matter a most careful consideration and have reached the conclusion that the first three questions should be answered in the negative and the fourth in the affirmative.

Section 3 of Chapter 108 of the acts of the Thirty-first Legislature, which provides for the organization of life, health and accident insurance companies, requires the articles of incorporation to be filed with the Commissioner of Insurance and Banking, who thereupon shall furnish a certified copy of the same to the corporators, upon which they shall be a body politic and corporate. These corporators are then given authority to complete the organization of the company by calling a meeting of stockholders, adopting by-laws, electing officers, etc.

With reference to the filing of amendments, this section provides that at a regular or called meeting of the stockholders they may by resolution provide for any lawful amendment to the charter or articles of incorporation, and that such amendment must be accompanied by a copy of such resolution duly certified by the president and secretary of the company, and shall be filed and recorded in the same manner as required of an original charter.

It is well settled by all the authorities that a corporation can not amend its charter except as is specifically authorized by statute. This act nowhere gives the original corporators the power to amend the original articles of incorporation, but only authorize an amendment after there has been a stockholders' meeting and officers elected, inasmuch as the resolution providing for the amendment is required to be certified by the president and secretary of the company. It is clear this provision could only be complied with after the corporators had called a meeting of the stockholders at which there had been an election of officers.

In considering your second question we have applied the general rule that a corporation can neither sell nor mortgage its corporate existence in the absence of express authority to do so.

Thimpson on Corporations, Sections 552-553, and Note 1

1st Jones Mortgages, Section 161.

City Water Company vs. State, 32 S. W. Rep. 1063

Upon the filing of the original articles of incorporation this act provides that the organization thus effected shall be a body politic and corporate. In other words, it is a corporation with limited power until it is furnished with a certificate of authority to do business. It occurs to us that the authority of the original corporators is expressly limited to completing the organization of the company, and there is no authority in the entire act authorizing such corporators to sell or assign their right and interest in and to such charter. Charter rights in a private corporation organized for profit can only be acquired by transfer by the purchase of the stock of such corporation. When the original corporators file their articles of incorporation no stock has been issued, nor can be legally issued, until an organization is affected and stock is sold. It, therefore, follows that there is no method by which such corporators can sell and assign their interest in the articles of incorporation.

We are also of the opinion that when the corporators have called a meeting, elected officers and directors, adopted by-laws and the stock has been duly subscribed and paid in, that thereafter such stockholders may, by resolution, provide for any lawful amendment to the charter or articles of incorporation, and that this can be done prior to the time that the Commissioner issues such company a certificate of authority to transact an insurance business.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CORPORATIONS—INSURANCE COMPANIES—RE-INSURANCE—FORFEITURE OF PERMIT.

Foreign fire insurance company which has reinsured Texas marine risks in companies which have no authority to do business in Texas, has violated law, and Commissioner should refuse to grant it a renewal of permit for one year.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 29, 1910.

Hon. Wm. E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your favor of the 24th inst., in which you submit the following questions to this Department for a ruling, namely:

"1. Where a foreign fire insurance company which has heretofore been doing business in Texas makes application to this Department for a renewal of its certificate of authority to do business in Texas, and sets forth under oath in its annual statement the fact that it has re-insured certain Texas marine risks in companies which were not authorized to do business in Texas at the dates of such re-insurance, the company having in all other respects complied with law, should the application be granted or rejected?

"2. If under the conditions mentioned above, such company is willing to now re-insure all such business in a company which has been duly authorized to do business in Texas, should such applicant be perimtted to do so and be granted a certificate of authority or should such application be denied?"

An answer to your questions depends upon the proper construction of Article 3075 of the Revised Statute as amended by Chapter 80 of the General Laws of the Twenty-ninth Legislature. Subdivision 2 of Article 3075 as amended permits any insurance company transacting a fire or marine insurance business to re-insure the whole or any part of any policy obligation in any other insurance company legally authorized to do business in this State. This subdivision also provides that the Commissioner of Insurance shall require every year from such insurance company doing business in this State an affidavit to the effect that no part of the busines written by such company has been re-insured in whole or in part by any company or association not authorized to do business in this State. Subdivision 3 of this act provides that any insurance company authorized to transact the business of fire, marine, or inland insurance which fails to comply with the provisions of this act shall forfeit its authority to do such business for the period of one year: that upon satisfactory proof being made as to a violation of this statute, it is the duty of the Commissioner of Insurance to revoke the certificate of authority of the offending company.

It will be noted that this statute does not affirmatively provide that the Commissioner of Insurance has the power to refuse to grant a certificate of authority to a company which has violated any provisions of this act. However, where the Commisisoner of Insurance

is empowered to revoke an existing permit issued to an insurance company because it has violated the law, it necessarily follows that he may refuse to grant a permit for the same reason. Glenn Falls Insurance Company vs. Hawkins, 126 S. W. Rep., 1114.

It is clear from the facts stated in your letter that the insurance company in question has violated the provisions of this act. The company having admitted such violation under oath it is clearly the duty of the Commissioner of Insurance to enforce the penalty provided by the act, and that is the denial to said company of the right to do business in this State for a period of one year.

The mere fact that such company is now willing and will re-insure the business in question in companies legally authorized to do business in Texas can not have the effect of relieving it from the penalty it has already incurred by its illegal act.

This statute deprives any insurance company from doing business for the period of one year as the penalty for violating its provisions; and where a company has offended against such provisions the mere ceasing of such violation does not releave it of the penalty.

You are, therefore, respectfully advised that it is the opinion of this Department that the company in question should be denied a permit by you until it has suffered the penalty denounced by this statute.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General.

CORPORATIONS—INSURANCE COMPANY—REDUCTION OF CAPITAL STOCK, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 20, 1910.

Hon. Frederick C. von Roscnberg, Commissioner of Insuranace and Banking, Capitol.

DEAR SIR: Your letter of the 16th inst., seeking a ruling of this Department, presents the following question:

"The Prudential Life Insurance Company was incorporated on June 10, 1909, with an authorized capital stock of $200,000 under the provisions of Chapter 73, General Laws of the Twenty-fourth Legislature, which was subsequently repealed by the Acts of the Thirty-first Legislature, Chapter 109.

"Section 2 of said last named act requires the amount of capital stock to be not less than $100,000, and Section 3 provides that all the stock must be subscribed and fully paid for.

"The above named company has sold much of its stock, but not a sufficient amount to organize under its charter, in accordance with your opinion of the 2nd day of April, 1910, to former Commissioner Hawkins.

"However, the company is anxious to begin business for the purpose of writing industrial insurance, and in connection with the

above statement, I desire your opinion on the following questions, viz:

"Can the company organize under this charter, reduce its capital stock under Section 3, Chapter 108, Acts of the Thirty-first Legislature, and write industrial insurance in accordance with Section 56 of said act?"

If the Prudential Company has the power to amend its original articles of incorporation and reduce its capital stock to $25,000, it must obtain its authority so to do from Section 3, Chapter 108, Acts of the Thirty-first Legislature. That portion of said section which applies to such amendment as follows:

"At any regular meeting or called meeting of the stockholders, they may by resolution provide for any lawful amendment to the charter or articles of incorporation and such amendment, accompanied by a copy of such resolution duly certified by the president and secretary of the company, shall be filed and recorded in the same manner as the original charter and shall thereupon become effective. Stockholders representing a majority of the capital stock of any such company may in such manner also increase or reduce the amount of its capital stock; provided that the capital stock shall in no case be reduced to less than $100,000 fully paid up."

This company would not obtain its authority to reduce its capital stock by virtue of that portion of the section above quoted, which provides for the filing of any lawful amendment to the charter or articles of incorporation as a general power to amendment does not authorize a corporation to file an amendment increasing or reducing its capital stock. There must be an express enactment providing for the increase and reduction of the capital stock before a company would be authorized to increase or reduce its capital stock by amendment.

Cook on Corporations, Vol. 1, Sec. 281.

Scovill vs. Thayer, 105 U. S., 143.

Sutherland vs. Alcott, 95 N. Y., 93.

Granger Insurance Co. vs. Kamper, 73 Ala., 325.

The Legislature of this State has recognized this principle of law as applied to corporations created under the general law and has therefore made special provision for corporations to increase and reduce their capital stock by enacting a separate statute from that authorizing them to file any lawful amendment. See Arts 647 and 652, Revised Statutes.

It, therefore, necessarily follows that the company in question would obtain its authority to reduce its capital stock alone from that provision which also authorizes such reduction.

We find upon examination that this statute contains a proviso that the capital stock "shall in no case be reduced to less than $100,000 fully paid up."

It seems, therefore, that a company taking advantage of this provision and reducing its capital stock must comply with all of its terms, one of which is that it can not be reduced below the sum of $100,000. It is true that Section 56 of the same act provides that companies may do an industrial insurance business with a capital stock of $25,000. However, this provision provides that companies may be incorporated in the manner prescribed for the incorporation of life,

health and accident insurance companies with a capital stock of $25,000. There is no provision in Section 56 that authorizes any amendment reducing the capital stock of a corporation organized under Subdivision 2 of this act, and if the Prudential Company desires to take advantage of the provisions of Section 56, it will be necessary for them to incorporate the character of the company defined in this section, there being no authority for them to change the character of the company they now have into such a company as is contemplated by Section 56.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General

CONSTRUCTION OF LAWS—STATE BANKING LAW—CENSUS.—CAPITAL STOCK OF STATE BANKS GOVERNED BY.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 24, 1910.

Hon. Frederick C. von Rosenberg, Commissioner of Insuranace and Banking, Capitol.

DEAR SIR: Your letter of the 17th inst. states that the North Texas State Bank was chartered with a paid up capital stock of $25,000, to be located in the town of North Fort Worth, the population of which consisted of less than 10,000 inhabitants. That some time after the filing of the charter of this bank the town of North Fort Worth was legally made a part of the city of Fort Worth; that this bank is still doing business within the limits of the original town of North Fort Worth, which has now become a part of the city of Fort Worth; that the city of Fort Worth has a population of more than 20,000 inhabitants, as shown by the last census. You desire to be advised:

1. Whether or not this bank can continue to do business within the limits of the original town of North Fort Worth without amending its charter and increasing its capital stock to $100,000.

2. Whether or not this bank would have the right to remove its place of business from the limits of the original town of North Fort Worth as constituted before North Fort Worth was made a part thereof and without amending its charter and increasing is capital stock to $100,000.

Section 5 of the State Banking Laws Digest of 1909 is as follows:

"That the capital stock, which shall be fully paid up, shall not be less than $10,000 for banks located in towns and cities having less than 2500 inhabitants, nor less than $25,000 for banks located in towns and cities having 2500 or more and less than 10,000 inhabitants, nor less than $50,000 for banks located in towns and cities having 10,000 or more and less than 20,000 inhabitants, nor less than $100,000 in towns and cities having 20,000 inhabitants or more. The population of all towns and cities for the purpose of fixing the minimum capital stock of banks under this act shall be ascertained

by reference to the last United States census taken prior to their incorporation."

It will be observed that this section establishes a rule for determining the minimum capital stock of banks according to population to be ascertained by referring to the last United States census taken prior to their incorporation. The North Texas State Bank having designated in its charter that it was to be located in the city of North Fort Worth, a town of less than 10,000 inhabitants, as shown by the last United States census, was only required to have a paid up capital stock of $25,000. This bank, therefore, fully complied with the statute as to the amount of the capital stock required at the time of is incorporaion, and we do not believe that the subsequent action of the city of Fort Worth, in abolishing the municipal corporation of North Fort Worth, by annexing the same to the city of Fort Worth, would have the legal effect of requiring said corporation to increase its capital stock to $100,000. It seems clear to us that so long as such corporation conducts and carries on its business within the limits of the town specified in its charter as they existed at the time of its incorporation, it can do so with a capital stock of $25,000.

A similar question to the one here presented was decided by the Court of Criminal Appeals in the case of Ex Parte Pollard, reported in 103 S. W. Rep., page 878. Under the Constitution and laws of this State, the commissioners court of each county has the power to re-district such county into justice or commissioners precincts. In the case cited above, local option had been adopted in a justice precinct by a vote of the people. Subsequent to the time of the adoption of the same, the commissioners court re-districted the county, cutting off a portion of this justice precinct. An election was held in the new justice precinct containing a part of the old and the election resulted against local option. In passing on the question as to whether such election resulted in repealing local option in that portion of the old justice precinct which had been made a part of the new justice precinct by the commissioners court the court held that such election did not operate to repeal local option in any portion of the old justice precinct; that while the commissioners court had authority to re-district the county and change the lines of the different justice precincts for all general purposes, that it did not have the power to abolish such precinct for local option purposes; that the lines of the original district were still in existence until local option was repealed by an election embracing the boundaries of the old precinct.

We believe that the principle laid down in this case is applicable to the question here presented. The population of the town of North Fort Worth fixed the status of the bank as regards the amount of its capital stock and the place at which it was to do business and the abolishment of the limits of such town for municipal purposes could not affect that status. The original limits of the town of North Fort Worth, as they existed prior to the time that same was made a part of the city of Fort Worth, remained in existence so far as the rights of the bank in question are concerned just the same as if they had never been abolished.

It necessarily follows from what we have stated above that such bank would not have the right to remove its place of business from the limits of the original town of North Fort Worth to the city of Fort Worth as constituted before North Fort Worth was made a part of it without filing an amendment to its charter changing its place of business and also increasing its capital stock to $100,000. The latter portion of Section 4 of the State Banking Laws Digest of 1909 provides "corporations created under the terms of this act shall not be authorized to engage in business at more than one place, *which shall be designated in their charters.*" The bank in question designated in its charter the place at which it would do business as the "City of North Fort Worth." They could not therefore, remove from that place, even though the municipal lines of such city were abolished, without filing an amendment, designating the place at which they desired to do business, and if they should file such amendment and designate the place of business of such bank to be the city of Fort Worth they would, in order to comply with the provisions of Section 5, be required to increase their capitol stock to $100,000.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General.

CORPORATIONS—FIRE INSURANCE COMPANIES—CAPITAL STOCK.

Capital stock of all insurance companies, including fire insurance companies, must be fully paid up before such companies are entitled to certificate authorizing them to do business in Texas.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 30, 1910.

Hon. Frederick C. von Rosenberg, Commissioner of Insuranace and Banking, Capitol.

DEAR SIR: We have your favor of the 15th inst., in which you seek the opinion of this Department as to whether a foreign fire insurance company, whose capital sttock was $200,000, fully paid in, the same having afterwards been increased to $250,000, $30,000 of the increase having been paid in, and lacking, at this time, $20,000 of having the entire $250,000 fully paid up, would be entitled to have a certificate of authority licensing it to do business in Texas.

The only statute that we have been able to find specifically authorizing the Commissioner of Insurance and Banking to issue a certificate of authority to such company is Section 40 of Chapter 108, Acts of the Thirty-first Legislature which reads as follows:

"Should the Commissioner of Insurance and Banking be satisfied that any company applying for a certificate of authority has in all respects fully complied with the law and that if a stock company, its capital stock has been fully paid up that it has the required amount of capital or surplus to policy holders it shall be his duty to issue

to such company a certificate of authority under the seal of his office, authorizing such company to transact business, naming therein the particular kind of insuranace, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate."

The question naturally arises whether this subdivision, being part of the chapter with reference to life, health and accident insurance, was intended to be limited in its application to such companies, or whether it was intended to apply its provisions to every insurance company desiring to transact business in this State.

Section 1 of this act contains the following provision:

"When consistent with the context and not obviously used in a different sense, the term 'company' or 'insuranace company,' as used herein, includes all corporations engaged as principals in the business of life, accident or health insurance."

Under this provision, unless we are able to say that the term "company" and "insurance company" used in this section is obviously used in a different sense, its application would be limited to life, health and accident insurance companies. A careful consideration of the entire act, taken in connection with the history of legislation upon this subject, leads us to the conclusion that the term "company" and "insurance company" used in Section 40 is obviously used in a different sense than applying only to life, health and accident insurance companies. The language in Section 40 "any insurance company", considered in connection with that provision requiring the Commissioner to name "the particular kind of insurance" any company is authorized to transact, seems to preclude the idea that the Legislature intended to limit the provisions of this section to life, health and accident insurance companies.

A consideration of existing law on this subject at the time of the enactment of the statute in question will tend to assist us in arriving at a proper construction to be given such statute. Articles 3048 and 3049 of the Revised Statutes of 1895, which were in force at the time of the passage of Chapter 108 by the Thirty-first Legislature, contained practically the indentical provisions now embodied in Section 40 of Chapter 108, the only difference being that under these articles the company was not required to have all its capital stock fully paid up. That Section 40 of Chapter 108 was intended as a substitute for Articles 3048 and 3049 is clear when we refer to Section 69 of Chapter 108, and find that it expressly repeals Articles 3048 and 3049, Revised Statutes. These articles were a part of Chapter 2, Title 58 of the General Insurance Laws and prior to their appeal clearly applied to every character of insurance company doing business in this State and granted the power to the Commissioner of Insurance and Banking to issue certificates of authority to every character of insurance company desiring to transact business in this State.

The Legislature, in enacting Section 40 of Chapter 108 having re-enacted the provisions of Articles 3048 and 3049 in practically the same language, must have intended the amended articles to have the same applications as the old articles, except in so far as their terms were specially changed by Section 40. There being no amend-

ment of Section 40 in regard to its application, it logically follows that it should be construed to have the same application as articles 3048 and 3049.

To hold that Section 40 applies only to life, health and accident insurance companies would, in effect, take away the only authority provided by law which authorizes the Commissioner of Insurance and Banking to issue certificates of authority to any other character of insurance companies. We do not believe that the Legislature intended to accomplish this result, but, on the contrary, intended that Section 40 should apply to all insurance companies unless the same was in conflict with some provision of law made specially applicable thereto. It seems to us that any uncertainty that might arise as to this being the proper construction of this act is removed when we consider the provisions of Section 55, which reads 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 is applicable, govern and apply to all companies transacting any other kind of insurance business in this State, so far as they are not in conflict with the provisions of law made specially applicable thereto."

If, therefore, Section 40 should only be held applicable to life insurance companies, the provisions of Section 55 would apply its provisions to fire insurance companies as there is no statute in conflict with the provisions of Section 40 as applied to fire insurance companies.

We are, therefore, of the opinion that Section 40 applies to all insurance companies except where there are special provisions applicable to certain character of companies. It is also clear that the provisions of Section 40 apply to both foreign as well as home companies, as a portion of this section provides for the revocation of the certificate of authority obtained from the Commissioner by foreign companies when such companies shall do certain prohibited acts. This language necessarily presupposes that a certificate of authority has been issued to such company by virtue of the provisions thereof. You are, therefore, respectfully advised that you would not, in our opinion, be authorized to issue a certificate of authority to the fire insurance company in question until said company has fully paid up its capital stock.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General.

OPINIONS CONSTREING LAND LAWS

SCHOOL LAND—TOWNSITE, LOCATION OF

Failure to file proof of occupancy within time prescribed by law.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 25, 1908.

Hon. John J. Terrell, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: I have received and have given careful consideration to your letter, which is as follows:

"The records of this Department show that by applications filed with the county clerk of Howard County, on October 9, 1902, Sections 4, 6, 10 and 30, Block 35, T. & P. Ry. Co., in Dawson County, were purchased under the act of April 19, 1901, Section 6 being taken as the home and the other three sections as additional thereto. In February 1905, evidence was filed in this office showing that a townsite had been established on Section 6, the home section, as well as proof of occupancy by the original purchaser of said section. Such proof of occupancy, however, did not show improvements placed on the land, and on the basis of the evidence that a townsite had been established on said Section 6 the same was patented to the original purchaser in March of 1905. On May 11, 1908, another proof of occupancy was filed in this office showing three years occupancy on the home Section 6 above described, together with the required $300 worth of improvements. This proof was made and filed in this office for the purpose of maturing the additional sections above mentioned, but the Department did not issue a certificate of occupancy because such final proof was not filed within five years from the date of the purchase of the home section. On the 6th instant a certified copy of a transfer was submitted to this Department, wherein the three additional sections above described were conveyed. This transfer is dated the 6th of October, 1908, and is acknowledged on that date by the grantor though it is also acknowledged by the grantee and the date of certificate of acknowledgement by the said grantee is given as October 9, 1905. You will observe that the additional tracts above mentioned were transferred prior to the expiration of three years from the date of purchase of the home tract. My opinion is that the assignee did not live on the land. Under the above state of facts, I would thank you to advise this Department if under the law I would be authorized to compel a showing that the vendee lived on the land and completed the three year's occupancy and in the event of non-occupancy would I be authorized to cancel the sale of the additional tracts for non-occupancy of the assignee and again place said land on the market under competitive bid. The land involved is considered valuable land, and this, together with other considerations, necessitates my submitting this matter to you for your advice in the premises."

In reply I beg to say:

It is clear that inasmuch as the second proof of occupancy was not filed within two years next after the expiration of the three year's occupancy prescribed by law, no certificate of occupancy, should have been issued thereon.

The presumption of law is that said conveyance of said additional lands became effective on October 6, 1905, the date thereof, that being the date upon which said conveyance was acknowledged for record; but that presumption is not conclusive.

From your statement of facts I do not think it appears quite conclusively that the original purchaser transferred the land within the three years' period of occupancy prescribed by law, or that he did not reside upon said home section for three years and place thereon within that time improvements of the value of $300, all in compliance with the conditions of the purchase.

I note your statement that in your opinion the assignee did not live on the land. Your letter does not set out the contents of the second proof of occupancy.

In view of the uncertainties as to the actual facts involved I trust that I may be excused for not expressing at this time any opinion upon the legal effect of failing to file final proof of occupancy within the time prescribed by law, that being a question which I have not had opportunity to run out to my entire satisfaction.

In Rogan vs. Curry, 5 Texas Court Reporter, 252, our Supreme Court said:

"Every purchaser, as a condition subsequent to his title, must, within two years after the expiration of three years from the time of his purchase or that of his vendor, make such proof."

If we assume that the status of this case when fully developed will show failure to occupy the land, or make proof of occupancy, as by law required, or permitted, the question thus presented is as to the construction which should be given to the provisions of Revised Statutes, Article 4218k, which are as follows:

"That whenever a town shall be located and established upon any land sold under this or any former act, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the State upon such land and obtain a patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the General Land Office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of five disinterested and creditable citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied, by bona fide citizens, twenty business and residence houses or either or both."

Did the Legislature intend that in compliance with these provisions and the patenting of the land should relieve the purchaser of compliance with the requirements of law concerning occupancy and improvement and proof thereof? If so, then in this assumed case the sale of said additional lands should not be cancelled; but if not, such sale thereof should be cancelled by you for failure to occupy and improve the land and make proof thereof as by law required.

It will be noted that Article 4128l expressly relieves heirs of deceased purchasers from the State of the statutory conditions prescribing settlement and residence, but neither in that statute, (which was enacted in 1897 prior to the enactment of said Article 4218k, which provides for patenting lands embracing such townsites), nor in any other statute which I have found, is there any express declaration or suggestion that patenting the home section under such circumstances will relieve the purchaser of the home section so patented or of additional lands from the statutory requirements concerning occupancy and improvements.

However, I am inclined to believe that the Supreme Court will probably hold that the patenting of the home section under such conditions absolutely relieves the purchaser of it and of additional lands from all statutory conditions of occupancy and improvements and that the proof that a town has been located and established upon said home section and that twenty business and residence houses, either or both, have been constructed thereon and are being occupied by *bona fide* citizens takes the place of and should be accepted by the Commissioner of the General Land Office in lieu of the statutory proof of occupancy and improvements which is ordinarily required by law of such purchaser or his assignee. But in view of the uncertainty as to what is the proper construction of the statute in question, I am inclinded to believe that you should test the matter in the Supreme Court, at this juncture, before accepting the construction which, as I have stated, I think will probably be given by the Supreme Court to the above quoted statutory provision.

The question may be made before the court by an application by the assignee for a patent on one of the sections of additional land after payment of balance of purchase money thereon, and your refusal to patent same, and an application by the assignee of a writ of mandamus to compel you to do so; or upon forfeiture by you of sale of such additional lands and an application by the assignee thereof for writ of mandamus to compel you to reinstate such sales.

Respectfully,

WM. E. HAWKINS.
Office Assistant Attorney General.

PUBLIC LANDS—ACT OF 1905 CONSTRUED.

General rules prescribed by law for applications for surveys and for purchase of *unsurveyed* public school lands apply to *surveyed* lands referred to in Section 2 of Chapter 103, General Laws of the Twenty-ninth Legislature, except that such lands shall not be sold within less than sixty days after receipt by the county clerk of the notification prescribed in said Section No. 2.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 6, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: We have your leeter which is as follows:

"A lease covering unsurveyed land in Ector County was cancelled

October 1, 1908, and notice of that fact mailed to the county clerk October 6th. The date fixed for it to come on the market was January 1, 1909. A. Q. Cooper filed an application with the surveyor of Ector County for a survey of the land October 1, 1909. The survey was made October 19th. The papers were returned to the Land Office November 13th. Mr. Cooper had no connection whatever with the former lease.

"Others filed on the same land October 8th, and again on January 2, 1909. It is contended by those representing those who filed on October 8th and January 2nd that those files, or at least the files of January 2, 1909, have rights superior to the rights of the parties first filing, October 1st, after the cancellation of the lease.

"Will you please advise this Department as to whether or not the land was subject to applications filed with the county surveyor on October 1st, or whether it was not subject to applications filed with the county surveyor until January 2nd, in preference to those filed in October? None of the applications were reached by the Commissioner for classification and valuation until after January 1, 1909."

In discussing this matter with me orally you have stated that in numerous instances your Department has heretofore made awards upon the theory that a proper construction of the law involved in the case presented in your letter calls for an award to A. Q. Cooper in this instance.

As I understand your theory of construction, it is, in substance that the provisions of Section 2 of Chapter 103 of the General Laws of the Twenty-ninth Legislature, (1905), were primarily intended to apply to *surveyed lands;* that except for the provision in said Section 2 requiring the Commissioner to notify the county clerk of the county in which the land is situated of the fact that the lease has been cancelled and "fix a date not less than 90 days thereafter on and after which applications to purchase may be filed", there is nothing in said act of 1905 to alter or vary the general rule prescribed by law for applications for surveys and for purchase of *unsurveyed* public school lands; and that, consequently, Mr. Cooper had the right under the law to file, on October 1, 1908, with the county surveyor of Ector County, application for a survey of the land, and that it was the duty of the surveyor to make the survey and return the field notes thereof under the general provisions of law, all subject to the above mentioned restriction in said Section 2 to the effect that such land should not be sold within less than 90 days after receipt by said county clerk of said notification.

Stated in other words, the proposition is, in effect, that said Section 2 engrafts upon the general rule prescribed by law no restriction or limitation whatever, except that the Commissioner shall not make a sale of the land within less than 90 days after receipt by the county clerk of such notification.

Upon consideration of the matter we are not prepared to say that your theory of construction of this statute is erroneous. On the contrary, we are inclined to believe that it will be upheld by the courts.

We understand the settled rule of construction adopted by the courts of this State to be that a construction of a statute which has

been adopted and carried into practice by the head of an executive Department charged with the duty of administering such law will not be disturbed unless it be clearly erroneous. Upon the whole, we advise adherence to the settled practice of your Department in such instances until the Supreme Court of this State shall have held it to be erroneous. If your construction of this statute is not correct anyone who claims the land under an application for a survey filed on January 2, 1909, has his remedy.

Truly yours,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—LAND LAW—PUBLIC SCHOOL LAND.

Two or more parties may purchase, jointly, home section, and in such case each joint purchaser would, under the law, be entitled to complement of additional land.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 2, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: I am in receipt of your letter of recent date, in which you say:

"A and B are purchasers of State school land. Their home tract is private land and jointly owned by the two. They have only one house on this home tract, and both of them live in that one house and eat at the same table. Each one of them has purchased a separate complement of school sections as additional to their ownership and residence upon this tract of private land.

"Question: Can one home or place of residence be a sufficient basis for the purchase of two or more complements of additional land? To put it differently, does the law contemplate that every purchaser shall establish a home or, could there be a dozen or a hundred purchasers of additional land from only one home?"

Replying I beg to say that following the construction of the statutes heretofore given by Judge T. S. Reese, I have to advise that under the circumstances set out in your letter one home or place of residence may be a sufficient basis for the purchase of two or more complements of additional land. This seems to me to be an unfortunate condition of affairs calling for additional legislation; but under existing laws I see no escape from the construction above indicated.

Respectfully yours,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—PUBLIC SCHOOL LANDS.

Concurrent resolution for relief of purchasers of school land who purchased upon condition of occupancy, and their vendees, from effect of failure to comply with the conditions of occupancy and to authorize issuance of patent upon compliance with other requirements of law, repugnant to certain provisions of the Constituion.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 1, 1909.

Hon. T. M. Campbell, Capitol.

DEAR SIR: You have requested the opinion of this Department as to the constitutionality of Senate Concurrent Resolution No. 12, which was adopted at the Regular Session of the Thirty-first Legislature.

The purpose of said resolution is to relieve a purchaser of public school lands, who bought upon condition of occupancy, and his vendees from the effects of failure to fully comply with the condition of occupancy and to authorize the issuance of patent to said land upon compliance with other requirements of law.

Section 4 of Article 7 of the Constitution of Texas contains among others the following provisions:

"The lands herein set apart for 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".

I am of the opinion that said Current Resolution is repugnant to the above quoted constitutional restriction that the Legislature shall not have power to grant any relief to purchasers of public school land.

Barker vs. Torrey, 69 Texas, 11.

Flannagan vs. Nasworthy, 20 S. W. Rep., 840.

Savings Bank vs. Dowlearn, 94 Texas, 383.

Section 56 of Article 3 of the Constitution of Texas enumerates restrictions upon legislative action and adds:

"And in all other cases where a general law can be made applicable, no local or special law shall be enacted."

I am of the opinion that said Current Resolution is within this inhibition against the enactment of special laws.

Clark, Sheriff, vs. Finley, Comptroller, 93 Texas, 178; and cases there cited.

City of Topeka vs. Gillett, 4. Pac., 800; 32 Kan., 431.

People vs. Wright, 70 Ill., 388.

Town of Montgomery vs. Boylies, 19 Iowa, 43.

State vs. Colorado Mining Co., 15 Nevada, 234.

State vs. Irwin, 5 Nevada, 111.

Toledo L. & B. Ry. Co. vs. Nordyke, 27 Ind., 95.

Respectfully yours,

WM. E. HAWKINS,
Assistant Attorney General.

VALIDATION OF LAND SALES—ACT VETOED BY GOVERNOR.

Act to "validate sales of real estate within this State heretofore made by foreign executors of wills probated in any of the States of the United States" criticized.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 1, 1909.

Hon. T. M. Campbell, Capitol.

DEAR SIR: At your request I have examined Senate Bill No. 20, which was passed by the First Called Session of the Thirty-first Legislature, same being entitled:

"An Act to validate sales of real estate within this State heretofore made by foreign executors of wills probated in any of the States of the United States".

and I now beg to say that in my opinion said bill is subject to the following objections, namely:

First. The provision that "this act shall not validate any sale where a will has been fraudulently probated" constitutes an exception which is not mentioned in the caption..

Second. The provision that "the validation of such sales shall not defeat the rights of creditors of the testators of such will, nor affect the title of purchasers for the value from the heirs or devisees of the testator of such wills, where such purchases were made prior to the enactment hereof" likewise constitutes an exception which is not mentioned in the caption.

Third. The provision that "where in such will, testament or testamentary instrument of any character, executors or trustees are named with power conferred upon them sufficient to make them independent executors under the laws of this State, including power to sell real estate, then the filing of the will, as provided in Article 5353, Revised Statutes of 1895, shall be sufficient to authorize such executor or trustee to sell any real estate belonging to the estate of testator and situated in this State without the necessity of an ancillary administration in this State" seeks to confer upon such executors and trustees under certain circumstances power and authority to make future sales of real estate, although the caption makes no reference to and does not include any future sale. The caption relates merely to the validation of sales already made by foreign executors and does not refer to or include sales by trustees.

Fourth. Revised Statutes, Article 5353, after providing for the filing and recording in this State of certified copies of wills, etc., which have been probated in any of the United States or Territories, declares that "at any time within four years from the date of the record of such will in this State, the validity of such will may be contested in a proceeding instituted for that purpose, as the original might have been."

This Senate Bill No. 20 does not recognize or preserve the right given by Revised Statutes, Article 5353, to contest the validity of such wills, but seeks to validate all sales embraced by the terms of said Senate Bill No. 20, regardless of whether the time fixed by Revised

Statutes, Article 5353, for institution of such contest has or has not elapsed.

Respectfully yours,
WM. E. HAWKINS,
Assistant Attorney General.

PUBLIC LANDS—SCHOOL LANDS—CANCELLATION FOR NON-SETTLEMENT AND NON-OCCUPANCY.

Where previous sales of land by the State have been canceled for non-settlement and non-occupancy, and said lands resold, and where such former purchasers have filed suits against the subsequent purchasers, Commissioner is advised that such subsequent sales should be canceled as having been improvidently made.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 18, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: You have called for the advice of this Department in several cases in which previous sales by the State of public school lands upon conditions of settlement and occupancy have been cancelled for failure of the purchaser to comply with such conditions and in which the lands embraced in such former sales have been resold by you and in which such former purchasers from the State have, respectively, brought suit against such subsequent purchasers, respectively, for such lands. You desire to know whether in our opinion you should concel such subsequent sales as having been improvidently made.

Upon careful consideration of the question so presented we have reached the conclusion that such subsequent sales should be cancelled by you as having been improvidently made.

Under the decision of our Supreme Court in Juencke vs. Terrell, it is clear that you can not be compelled to make an award of school lands which are held and claimed adversely to the State, and we think that under our statutes relative to sale of public school lands and the decision of our appellate courts construing them it is the settled policy of this State not to sell public school lands when the State's title to same is disputed by adverse claimants in possession of such land. Such, as we understand it, are the cases first above mentioned which you have submitted for our consideration.

I am of the opinion that in any and all instances in which previous sales by the State of public school lands are cancelled by the Commissioner of the General Land Office upon statutory grounds other than non-payment of interest and subsequent awards of such lands are made by the Commissioner and it afterwards develops that at the date of such subsequent award such lands were claimed and held in possession adversely to the State by a previously cancelled purchaser from the State, the Commissioner has and in his discretion should exercise the power and authority to cancel such last award

as having been improvidently made in order that the State's title to such lands may be cleared up by suit or otherwise prior to a final award of such lands.

The action of the Commissioner in cancelling a prior sale for non-settlement or non-occupancy is not conclusive and such cancellation is not valid unless the facts involved constitute statutory grounds for such cancellation. And it would seem that not until there has been either overt or tacit acquiescence by such former cancelled original or substitute purchaser in the action of the Commissioner in making such cancellation, or a final judgment of a court of competent jurisdiction determining the validity or invalidity of such cancellation could such former sale be properly considered as having been definitely wiped out or the State's title to the land cleared up.

In the specific cases out of which your inquiry grows I advise cancellation by you of the last awards. In support of my views and conclusions as above set forth, I refer you to the following cases:

Juencke vs. Terrell, 11 Texas Court Rep., 236.
Zettlemeyer vs. Shuler, 115 S. W. Rep., 79.
Pohle vs. Robertson, et al., 115 S. W. Rep., 1166.
Rawls vs. Terrell, 105 S. W. Rep., 489.
Bumpas vs. McLendon, 101 S. W. Rep., 491; and cases cited.

Truly yours,

WM. E. HAWKINS,
Acting Attorney General.

PUBLIC SCHOOL LANDS—TRANSFER OF, TO CORPORATION —FOFEITURE OF, ETC.

Transfer of such lands to corporation has legal effect of forfeiture, terminating title of original individual purchaser.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, Sepember 3, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Careful consideration has been given to your letter in which you say:

"There has been submitted to this office a transfer executed by Daniel J. Rogers, conveying to Pecos Sandstone Co., the N. W. ¼ of Section 152, Certificate 46-4956, Block 34, H. & T. C. Ry. Co. in Ward County together with substitute obligation executed by Pecos Sandstone Co., by its president, John T. McElroy, and a copy of the charter of said corporation, showing it was formed for the purpose of quarrying, cutting, mining and selling stone, and the transaction of all business incident thereto, and necessary to successful operation, and re-

questing that said obligation be filed and said corporation substituted as purchaser on the records of this office. The land conveyed by this transfer by purchase by said Daniel J. Rogers, on condition of settlement and occupancy by application filed in this office January 21, 1891, same being under the provision of act of April 1, 1887, and amendments of act of April 8, 1889."

I am of the opinion that said conveyance of said land to said corporation had the legal effect, upon delivery thereof, of forfeiting said sale by the State to Daniel J. Rogers, and of terminating *ipso facto,* without judicial ascertainment and without any action whatever on your part, the title of Rogers to said land, thereby reinvesting the State with full title to said land to be held in trust for the public school fund as before sale to Rogers. Revised Statutes. 4287.

However, I think it proper for you to endorse such forfeiture upon the balance of purchase money obligations in favor of the State, reciting that such forfeiture is as of a certain date, such date to be that upon which such conveyance to said corporation was delivered, if you know the date of such delivery; otherwise, to be the date of the certificate of acknowledgement of such conveyance, the presumption of law being that it was delivered on the date of such acknowledgement thereof.

If Daniel J. Rogers or said vendee corporation decline or refuse to surrender to the State possession of said land after being notified of your action in the premises as hereinabove suggested, please notify us promptly in order that we may institute suit in behalf of the State for said land.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 3, 1909.

W. T. Daniel, Esq., County Attorney, Stonewall County, Aspermont, Texas.

DEAR SIR: We have your letter of the 30th ultimo making the following inquiries:

"A man makes application to purchase school lands, the application is approved by the Commissioner of the General Land Office, and the land is awarded to him.

"When does the land become subject to taxation? Is it from the date of award or when the three years occupancy expires?

"When land is purchased from the State and afterwards forfeited and re-sold does the forfeiture and subsequent sale set aside and make void the tax lien for taxes assessed under the first sale?"

I beg to answer your questions in their order as follows:

First: Public school land purchased from the State becomes sub-

ject to taxation on January 1st next after the filing in the General Land Office of application to purchase such land. See Revised Statutes, Article 5087.

Second: Where public land is sold by the State and such sale is subsequently finally forfeited such forfeiture terminates any and all liens for taxes which may have attached to such land prior to such forfeiture; and this, whether such land be re-sold by the State after such forfeiture or not.

However, such forfeiture does not relieve the taxpayer from personal liability for taxes upon such lands, and I see no reason why payment of such taxes should not be required. See Revised Statutes, Articles 5176, 5178 and 5179.

Respectfully,

WM. E. HAWKINS.
Assistant Attorney General.

CONSTRUCTION OF LAWS—PUBLIC SCHOOL LANDS.

Manner and form of making payments to State for, etc.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 17, 1909.

Hon. Sam Sparks, State Treasurer, Capitol.

DEAR SIR: At your request I have duly considered Sections 1 and 2 of the Acts of the Thirty-first Legislature approved May 12, 1909, being an act to regulate the manner and form of making payments to the State for public lands and to define the duties of the Commissioner of the General Land Office, the State Treasurer and the Comptroller of Public Accounts in respect thereto, etc:

Section 1 provides:

"That all applicants to purchase public lands * * * shall transmit with their application the required first payment in the form of money or remittance collectible on demand in Austin and convertible at par into money on the order of the State Treasurer without liability. * * * If the payment is not made as required in this section the application shall be void."

The next section provides for the transmission of these remittances to the State Treasurer by the Commissioner of the General Land Office and has this sentence:

"The Treasurer shall at once collect all collectible remittances and report to the Commissioner and the Comptroller all remittances not collectible in Austin."

I construe the words "* * * all remittances not collectible in Austin" in Section 2 as those remittances only which the Commissioner is authorized to receive; and as stated in Section 1, is "money or remittances collectible on demand in Austin and convertible at par into money on the order of the State Treasurer."

The law does not authorize the Commissioner to receive any other remittances, and in fact, provides that if any other payment or remittance is made than as above required the application to purchase the land will be void.

The law does not authorize the Commissioner to receive any other remittance and does not contemplate any other remittance, and therefore, the remittances that he is required to transmit to the Treasurer are those, and only those, which he is authorized to receive. Any other remittance is not evidence of payment or part payment of the land purchased by any one: and in order that there might be on mistake as to the manner of payment the law expressly provides, as above stated, that the application to purchase shall be void if the payment is not made as required in the section wherein the remittances are defined.

That provision of Section 2 requiring the Treasurer to collect all collectible remittances and report to the Commissioner all remittances not collectible in Austin means that paper which is sent here as legal evidence of payment and which is not paid upon presentation.

My conclusion as to remittances for first payment on land apply also to remittances for interest, lease rentals or balance of principal due on land mentioned in Section 4 of the act, the said section providing as follows:

"All payments on account of interest, lease rentals or the balance of the principal due on lands treated of in this act shall be transmitted to the Commissioner of the General Land Office, and shall be payable to the State Treasurer and be in form the same as is herein required for first payment and subject to the same rules for collection as are remittances for first payment."

Therefore, I advise you that the Commissioner has no right to receive or recognize in any manner or transmit to you anything except money or drafts or postoffice money orders or express money orders payable on demand in Austin.

Yours very respectfully,

R. V. DAVIDSON,
Attorney General.

NAVIGABLE STREAMS—WHAT ARE, ETC.—SAND AND GRAVEL IN, ARE PROPERTY OF STATE.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, September 14, 1909.

G. G. Kelly, Esq., Wharton, Texas.

DEAR SIR: Further replying to your letter of August 24, 1909, relative to the right of a citizen to pump sand out of the Colorado river at Wharton, I beg to advise:

In so far as I know our courts have not determined whether a citizen has that right or not. The common law rule as to what are and what are not navigable streams in Texas was modified by the act

if December 14, 1837; P. D. 4529; Sayles' Revised Statutes, 4147, and cases cited.

I assume, without being sure of the facts, that the Colorado river at Wharton is a navigable stream within this statutory definition.

There is throughout the States of the Union a contrariety of opinion as reflected by the decisions of the courts as to the right of riparian owners; some holding that such right extends to high water mark, some holding that such right extends to low-water mark, and some holding that it extends to the middle or thread of the navigable stream. I think it probable that in Texas our courts will hold that the individual property right of riparian owner extends to low-water mark.

Revised Statutes, Article 4147.

City of Austin vs. Hall, 93 Texas, 591.

Denny vs. Cotton, 22 S. W. Rep., 122.

In the latter case Judge Fisher indicates as much. That view seems supported by the better reason, especially under conditions existing in Texas, and under the general policy of our laws with respect to property rights in water courses.

This Department holds that sand and gravel in the bed of a navigable stream within this State belongs to the State of Texas, and that no one may legally remove such sand or gravel from such river bed without lawful permission. In this connection see Chapter 32 of the General Laws of the Twenty-ninth Legislature, (Acts of 1905), page 39.

Under the rules of this Department our opinions are restricted to inquiries from public officers concerning the proper discharge of their official duties; but an exception is made in this instance in view of the fact that the question presented affects property of the State that appears to be unsettled.

Press of work which would not admit of delay has prevented earlier reply.

Truly yours,

WM. E. HAWKINS.
Assistant Attorney General

STATE OFFICERS—SUPERINTENDENT OF PUBLIC BUILDINGS AND GROUNDS—NAVIGABLE STREAMS—SAND AND GRAVEL IN, ETC.

Superintendent not authorized to permit sand and gravel to be taken from Colorado River Bed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 29, 1909.

Hon. W. C. Day, Superintendent Public Buildings and Grounds, Capitol.

DEAR SIR: Careful consideration has been given to your letter of 20th inst., which is as follows:

"If authorized by law—(See Concurrent Resolution, Acts 1903, First Called Session, p. 77)—I desire to make, with a private individual, without previous competitive bidding the following contract:

"The State to lease to said individual, for a term of five years, the bank and beach of the Colorado river from extreme low-water mark on the south to the north line within the present limits of the city of Austin, and also the islands and sand bars in said river within said limits; and also to give said individual and his assigns the authority to take and dispose of as he or they should think fit, any and all sand and gravel, mixed or unmixed, they may wish, from all or either said bank or beach, said islands and sand bars and bed of the river, it being the purpose of said individual to install a plant and pump sand and gravel for commercial use, from the bed of the river, and he or his heirs or assigns to pay the State for all such material whence ever taken, at the rate of seven and one-half cents per cubic yard, payable monthly, in full of all rent for said permission, and compensation for such material.

"In view of the above statement I should like to have the opinion of your office in reply to the following questions:

"First: Is the said northern bank and beach of the Colorado river within the city of Austin such property of the State as I have authority so to lease?

"Second: Are the said islands and sand bars within said limits, such property of the State as I have the authority to lease?

"Third: Have I authority to allow such lessee to take and carry away, for commercial use or otherwise, sand and gravel from said bank and beach, islands and sand bars, and bed of the river or either of them?

"Fourth: Have I power, in case you should find that I am authorized to lease any of said premises, and allow the taking of such sand and gravel, to make the contract therefor above indicated?"

The Concurrent Resolution to which you refer authorizes you to lease not to exceed five years "any lots, parts of lots, or land belonging to the State situated in the city of Austin, subject to the approval of the Governor, except the land once occupied by temporary capitol."

I have been unable to find any other legislative authority for you to lease any land whatever.

I am of the opinion that the language of said Concurrent Resolution should not be construed as authorizing you to lease for any purpose any sand bar or beach of the Colorado river between low water-mark and ordinary high water mark of said rixer, and am inclined to believe that said language should not be construed as authorizing you to lease for any purpose any island in said river.

The Colorado river within the corporate limits of the city of Austin is a navigable stream.

De Merritt vs. Robison, Com'r. 116 S. W. Rep.. 796.

Roberts vs. Terrell, Com'r. 110 S. W. Rep.. 733.

I think it is clear that said Consurrent Resolution confers upon you no authority whatever to permit any sand or gravel or mixed sand and gravel to be removed from islands, sand bars or beaches of said

river or from any lots or parts of lots or land belonging to the State situated in the city of Austin.

If any portion of the bank of the Colorado river, which is embraced in your inquiry, lies within said city and above ordinary high water mark of said river and belongs to the State of Texas, you have authority under said Concurrent Resolution and with the approval of the Governor to lease same for not more than five years, but not to permit waste thereon.

I find nothing in said Concurrent Resolution to authorize you to permit any one to remove any sand or gravel from any lands whatever belonging to the State of Texas, whether such lands be islands or sand bars in the Colorado river or town lots or parts of town lots or other lands.

Respectfully,

WM. E. HAWKINS.
Assistant Attorney General.

PUBLIC SCHOOL LANDS—CONSTRUCTION OF LAWS—VALIDATING SURVEYS.

In a revision of laws, the incorporation therein of a law enacted prior thereto is not a re-enactment of said statute, but simply a continuation of said statute in force.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, November 26, 1909.

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

DEAR SIR: This Department is in receipt of your letter of recent date, in which you state:

"The act of February 3, 1883, appears to have been brought forward in the Revised Statutes of 1895, being Article 4265. Said article reads as follows: 'Any and all public lands heretofore surveyed by railroads, corporation or any company, or any person in this State, for the benefit of the public free schools of this State by virtue of any certificate, valid or invalid, void or voidable, be and the same are hereby declared to be lands belonging to the public free schools of this State.'

"I would now like to be advised as to the effect of the bringing of this act forward and adoption of the same in the Revised Statutes. In other words, whether or not the adoption of this article has the effect of validating surveys made for the benefit of the public free schools of this State by virtue of valid or invalid, void or voidable certificates where such certificates were made after February 3, 1883, the date of the original act, and before the adoption of the Revised Statutes of 1895."

I am of the opinion that your question should be answered in the negative. Section 10 of the Final Title of the Revised Statutes reads as follows:

"That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into effect, or of he common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same."

By the phrase "shall be construed as continuations thereof", means simply that the statute, as originally passed, is continued in force with all its provisions, limitations, etc., and that no enlargement of its original scope is intended.

The word "heretofore", as used in the act referred to relates to time before the taking effect of said act and the adoption of it in the Revised Statutes in no way changes its limitations.

See Adams vs. Railroad, 70 Texas, 270.

In Re Western Bank & Trust Co., 163 Federal, 714.

Moffett vs. Moffett, 67 Texas, 742; 4 S. W. Rep., 70.

McKenzie vs. Baker, 88 Texas, 669; 32 S. W. Rep., 1038.

Yours truly,

L. A. DALE,
Assistant Attorney General.

PUBLIC SCHOOL LAND—MINERALS—MINERAL LAND.

Right to buy mineral land is reserved to prospector who files proper application, etc.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, December 20, 1909.

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

DEAR SIR: This Department is in receipt of your letter of the 18th inst., in which you state:

"On the 19th of April there was filed in this office application to prospect on unsurveyed lands under Article 3498j Revised Statutes. Each application describes by metes and bounds a section of land. These applications were accepted May 5th, and the land taken off the market.

"Now come the applicants with applications to purchase this land in 40, 80 and 320-acre tracts, and each has offered for filing field notes for the section designated in his application to prospect, which field notes were made by the county surveyor and are in proper form.

"Our question is, can a sale be based on such survey: that is, by virtue of his application to prospect or to purchase or should the applicants be required to proceed under Section 8 of the act of 1905, regulating the sale of unsurveyed school lands?

"The land is situated in El Paso County and the applications were filed with the county surveyor April 13, 1909, and in this office on the 19th following."

In reply will say that the Mines and Mining Act passed in 1895 (See Acts of 1895, p. 197), provides for prospect files on (and applications to purchase under such prospect files) lands containing the baser minerals; and in Article 3448j, which is Section 10 of said act, it is provided that "any person desiring to acquire any lands under the provisions of this article shall have the right to prospect said land for a period of twelve months before the making of any payment thereon, upon condition that said prospector shall file with the proper surveyor his affidavit in writing setting forth that he has gone upon the land in good faith with the intention of purchasing same under the provisions of this article."

It is further provided in said article that, "and all of said lands are reserved from sale or other disposition than under this title."

Article 3498n provides as follows:

"Whenever any application shall be made to buy or obtain title to any of the lands embraced in Article 3498a, except where the application is made under this title, the applicant shall make oath that there is not, to the best of knowledge and belief, any of the minerals embraced in this title thereon, and when the Commissioner has any doubt in relation to the matter, he shall forbear action until he is satisfied. Any such sale or disposition of such lands shall be understood to be, with a reservation of the mineral thereon, to be subject to location as herein provided."

I am of the opinion, therefore, that the Mines and Mining Act referred to above governs the sale of all mineral bearing lands; and an applicant to purchase any of the land described in Article 3498j should purchase under said act; and that the sale of such lands to him it in nowise governed by Section 8 of the Acts of 1905 regulating the sale of unsurveyed school lands. See Schendell vs. Rogan, 63 S. W. Rep., 1005; Colquitt-Ligner Mining Co. vs. Rogan, 95 Texas, 452, 68 S. W. Rep., 154-159.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

CONSTRUCTION OF LAW—SCHOOL LAND LAW.

Purchaser of, etc., must make settlement of within ninety days; only exception in case of death; this provision mandatory.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 30, 1909.

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

DEAR SIR: I am in receipt of your inquiry of this date, which is as follows:

"Section12, Blck A47, surveyed for the public school fund, and situated in Andrews County, was awarded to Joseph Martin, August 4, 1909.

"The 90 days within which he had to make settlement expired November 2nd, and the time within which he had to file affidavit of settlement expired December 2nd. It appears that he filed his affidavit of settlement November 19th, and states therein that he settled upon said section on the 12th day of November, preceding.

"In explanation of his failure to settle before the 12th day of November, he says that his child was too ill to permit his removal from his former home in Plainview. Two letters from him on this subject, together with certificate of the attending physician, are enclosed.

"Will you kindly advise this Department whether the requirements of law have been met in this case and whether the sale should be allowed to stand.

"Please return enclosed letters and affidavits in your reply."

In reply I beg to say that in my opinion your statement shows that the requirements of law have not been met in this case and that the sale should not be allowed to stand. As I understand the statute, its requirements relative to settlement within 90 days from date of award are rigid and mandatory, the only exception being in case of death of the purchaser, in which event the requirements concerning settlement and occupancy become no longer applicable to that purchase.

The facts in this case, as stated by you, are such as to arouse sympathy for the purchaser, but that, of course, can not affect the operation of a statute which is clear and unambiguous in meaning.

The papers enclosed by you are herewith returned.

Yours truly,

WM. E. HAWKINS.
Assistant Attorney General.

PUBLIC SCHOOL LANDS—COUNTY SURVEYORS.

Commissioner can not legally sell to county surveyor public lands, whether surveyed or unsurveyed. "Public lands" includes all public school lands belonging to State.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 31, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: I have given careful consideration to the subject matter of the letter wherein inquiry is made on behalf of your Department as to the validity of sales of public school lands made to the county surveyor of the county in which the lands lie, the awards having been made without knowledge upon the part of the Commissioner of the General Land Office that the applicant was at the time such county surveyor.

I am of the opinion that all such awards are contrary to law and should be cancelled by you as having been erroneously made.

Our Penal Code provides in Article 123:

"If any person who is an officer or clerk in the General Land Office, or a district surveyor, or deputy district surveyor, or county surveyor, or his deputy, shall directly or indirectly be concerned in the purchase of any right, title or interest in his own name or in the name of any other person or shall take or receive any fee or emolument for negotiating or transacting any business connected with the duties of his office, other than the fees allowed by law, he shall be fined in a sum not exceeding $500."

This statute has been in force for many years and indicates the settled policy of the Legislature.

I am of the opinion that there is no merit in the contention of the county surveyor in this instance to the effect that since 1883 the provisions of said statute concerning county surveyors are applicable to only unsurveyed public domain. The term "public lands" includes all public school lands belonging to the State.

Willis vs. Abbey, 27 Texas, 204.

Keith vs. Fountain, 3 Texas Civil Appeals, 391

Cotulla vs. Laxson, 60 Texas, 443.

State vs. Thompson, 64 Texas, 690.

The county attorney's letter is herewith returned.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

PUBLIC SCHOOL LANDS: SETTLEMENT OF, ETC.—AFFIDAVIT, WHAT SAME MUST SHOW.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 31, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: I have given careful consideration to the subject matter of the letter wherein inquiry is made on behalf of your Department as to the legal effect of Revised Statutes, Article 3498j, relative to affidavit required, and in reply beg to say:

In my opinion said statute requires that the applicant shall make affidavit that he has himself already actually gone upon the land in good faith with the intention to purchase same under the provisions of the statute.

In other words, the statutory affidavit can not be legally made by an agent and must relate to what has alredy been done, rather than to what such applicant or his agent intends to do.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—SCHOOL LAND LAW.

Purchaser is prohibited from selling any part of his land prior to one year from date of award of home tract.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 15, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Your letter of the 5th inst., addressed to this Department, has been received. You state:

"Sections 86 and 80, Block 11, H. & G. N. Ry. Co., Pecos County, were awarded to A. W. Long on June 23, 1909, the first as a home and the second as additional thereto.

"He desires to plat Section 80 as a townsite, contract for sale of lots to be deeded when patent is issued or when he may have the right to convey and to patent the tract under the provisions of Article 4218k, Revised Satutes.

"Will you kindly advise whether Section 6d of the act of 1907, regulating the sale of school land, applies in this case or whether under the law Mr. Long has a right to proceed as indicated prior to the expiration of one year from date of his award?"

The school land law of 1895 purports to be an independent Act of the Legislature for the purpose of sale and lease of public free school, asylum and other public lands. The first section of said act reads as follows:

"Be it enacted by the Legislature of the State of Texas: That all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the lunatic asylum, the blind asylum, the deaf and dumb asylum and the orphan asylum, shall be sold and leased under the provisions of this act."

Section 10 of said act, among other things, provides:

"Provided, that whenever a town shall be located and established upon any land sold under this or any former act, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the State upon such land and obtain a patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the General Land Office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied by bona fide citizens, twenty business and twenty residence houses, or either, or both."

This is the only provision in the law authorizing the location of a townsite on public school lands purchased from the State. The act of 1895, with all its provisions, together with some supplemental statutes passed in 1897, 1899 and 1900, remained in force until the

19th day of April, 1901, at which time the act of 1901 became effective. Under the law as it existed prior to said date, applications for the purchase of school lands were required to be filed in the office of the Commissioner of the General Land Office and the one who first filed his application for such purchase after the land came on the market for sale was entitled to purchase. This, however, was changed by the Act of April 19, 1901, so as to require all persons desiring to purchase school lands to file their applications with the clerk of the court of the county in which the land or a part thereof is situated.

That the Legislature recognized this act as a separate act is made clear by some of the provisions thereof. Section 3 of the act in question prohibits the Commissioner of the General Land Office from selling to the same party more than four sections of land, and provides that applications to purchase land should also disclose the prior lands purchased by the applicant from the State, if any, since the taking effect of that act. This brings into existence a new era so far as the purchase of school land from the State is concerned, and after said date all applicants for the purchase of school land were limited to four sections since the date of the taking effect of that act.

The Legislature of this State, by an act passed in 1903, (see Acts 1903, page 82), provided as follows:

"That any applicant who has, since the passage of the act of 1887, and prior to the act approved April 19, 1901, made application to purchase any public free school or asylum lands which at the time were under lease, but which lease had been assigned by the lessee to an actual settler, or which had been abandoned or relinquished by the lessee, and who in good faith made actual settlement as required by law in the purchase of any of said lands, and who made first payment thereon, and executed his obligation for the balance of the purchase money and such lands have been awarded to such applicant by the Commissioner of the General Land Office under any of the acts of 1887, 1895 and 1897, * * * ."

This may be taken as a legislative interpretation of the meaning of the word "act" as applicable to the several acts of the Legislature on the subject of the purchase and sale of school lands and refers to each of said acts of the Legislature as separate school land acts.

Section 10 of the act of 1895 has been brought down into the statutes as Article 4218k, and while it is evident that some of the provisions of said article are still in force and are applicable to lands purchased under the several acts passed subsequent to the passage of said act of 1895, yet it seems clear that this particular provision providing for the location of townsites on school land has no application to lands purchased under the Act of April 19, 1901, and the several subsequent acts. The peculiar wording of the provision in question should be taken into consideration. It will be noted that the exact language is, "whenever a town shall be located and established upon any lands *sold* under this or any former act," and surely it can not be successfully maintained that our school lands have been sold under the provisions of the Act of 1895 since the passage of the Act of April 19, 1901.

Under the Act of 1895 applications to purchase were filed in the General Land Office and the application first filed after the land was on the market for sale took the land; while under the law of April 19, 1901, all applications were required to be filed with the clerk of the county court of the county wherein the land was situated. In 1905, (see Acts 1905, page 167), the procedure was again changed, and under said act all applications to purchase should be filed with the Commissioner of the General Land Office through due course of mail, and not by any one in person, in an envelope addressed to the Commissioner of the General Land Office at Austin, Texas, and when the land is to come on the market at some future date, the envelope shall have endorsed thereon, as follows: "Application to buy land, Section....., Block....., Grantee....., County....., Date on Market.....," and provided when an envelope so endorsed is received in the Land Office it shall be safely and securely kept and preserved by the Commissioner or his Chief Clerk, without being opened, until the day following the date endorsed thereon as to when the land comes on the market, and that one or both of them shall begin at ten o'clock a. m., of the day following the date that the land comes on the market to open the envelopes for inspection of the applications and sales thereunder, and the one offering the highest price for the land will be awarded same. In other words, the land is sold to the highest bidder.

Again under the act of 1895, the applicant to purchase must have been an actual settler on the lands at the time of his application; while, under the Act of 1905 he may settle within 90 days after he is awarded the land. Then, again, under the act of 1895, the purchaser was permitted to sell any lands immediately after he received the award thereto; while under the existing law, the purchaser is prohibited from selling any part of his land prior to one year after the date of award of home tract, and prior to one year after date of award of the first additional tract purchased to a formerly acquired home, unless the required residence has sooner been completed. (See Section 6d, of the act of August 10, 1907.)

Holding as we do that the provisions or Article 4218k of the Revised Statutes have no application to lands purchased since April 19, 1901, it becomes necessary for us to determine whether or not Section 6d of the act of August 10, 1907, repeals said provisions. It is clear, however, that one purchasing under the act of 1907, on condition of settlement, will not be permitted to sell any part of such purchase prior to one year after date of award.

Yours truly,

L. A. DALE,
Assistant Attorney General.

CONSTRUCTION OF LAWS—SCHOOL LAND LAW—CORPORATIONS.

A corporation can not purchase school land, or be made substitute purpurchaser, etc.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 19, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: This Department is in receipt of your favor of the 5th of November 1909, in which you state:

"This Department has received transfers conveying 9 sections of school land in Webb and La Salle counties to the Texas Land & Livestock Co., together with substitute obligations executed by the president and secretary of said company. Said sections were purchased under the act of April 15, 1905, occupancy thereon has been completed and proper proof filed in this office. Inasmuch as there exists some doubt as to whether corporations can purchase school land I would thank you to advise me as to what course I should pursue with reference to the filing of said transfers and making substitution thereof.

"In this connection I will further state that school land purchased under the various laws are being transferred to corporations and such transfer forwarded to this office for filing and substitution, and I would thank you to give me your opinion as to the proper construction to be placed upon the various acts with reference to the transfers of school land to corporations and the filing of such transfers in this office."

In reply thereto I beg to say that the act of April 8, 1889, (see acts of 1889, pages 50-53), amended Sections 5, 8, 11, 13, 14, 15 and 22 of the act of 1887. Section 5 of the amended act reads as follows:

"When any portion of said land has been classified to the satisfaction of the Commissioner under the provisions of this act or former laws, such land shall be subject to sale, but to actual settlers only, and in quantities of not less than 80 acres and in multiples thereof, nor more than one section containing 640 acres, more or less; provided, that when there is a fraction less than 80 acres of any section left, such fraction may be sold; but lands classified as purely pasture lands and without permanent water thereon may be sold in quantities not to exceed four sections to the same settler; and in no event shall sale be made to a corporation, either foreign or domestic, and all sales to a settler shall be upon the express condition that any sale or transfer of such land to any corporation, directly or indirectly, before patent is issued thereon, shall *ipso facto* terminate the title of the purchaser or owner, and such land shall be forfeited to the State without re-entry and become again a part of the particular fund to which it formerly belonged."

This act as amended was brought down into the Revised Civil Statutes as Article 4287 and the effect of its incorporation in the Revised Statutes is explained in Section 19 of the final title to the Revised Statutes, which is as follows:

"That the provisions of the Revised Statutes so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same."

And while although Article 4287 does not apply to the sale of any land made after the taking effect of the act of 1895, yet its adoption by the codifiers and having been brought down into the Revised Statutes makes it applicable to all sales made while it was in force.

Section 1 of the act of 1895 reads as follows:

"All lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the lunatic asylum, the blind asylum, the deaf and dumb asylum, and the orphan asylum shall be sold and leased under the provisions of this chapter."

This section has been brought down into Sayles' Texas Civil Statutes of 1897 as Article 4218b. From this section it will be observed that all sales made after the taking effect of the act of 1895 should be made under its provisions. Except certain lands mentioned in Section 26 of the act of 1895, all lands sold under the provisions thereof are required to be sold on condition of settlement and occupancy for three years. Section 26 is brought down into the Revised Statutes as Article 4218y, and as amended by the acts of 1897, reads as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter."

It can hardly be contended that corporations could purchase any lands under the act 1895. Certainly they could not purchase any lands requiring settlement and occupancy; and they are expressly prohibited from purchasing detached lands as mentioned in Article 4218y, *supra;* so that, under this act no lands could be purchased by corporations.

The Twenty-sixth Legislature provided for the re-purchase by any person, not a corporation, lands bought from the person, firm or corporation who originally located such land and paid full value therefor without actual knowledge of any defect of title of said lands prior to the institution of proceedings on the part of the State to recover such lands and not having been made a party to such suit, etc., (see acts 1900, page 29), thus expressly prohibiting corporations from purchasing lands so conditioned as to their title.

Article 2216y of the Revised Statutes as amended by the act of 1897 remained in full force and effect until the enactment of the statute of April 19, 1901. By Section 7 of said act the Legislature expressly provided that all detached lands should thereafter be sold to actual settlers only on such terms and conditions as were then or might thereafter be provided by law; so that, under this act, no lands were sold without the condition of actual settlement and residence; and this being true, no corporation could purchase under the provisions thereof.

Under the act of April 15, 1905, (see acts of 1905, page 167), certain scrap lands were permitted to be purchased without condition of actual settlement and residence. The Legislature took occasion to expressly provide in Section 8 of said act that "when the land is applied for and purchased under this section, without condition of settlement and improvement, the application to purchase shall otherwise conform to the requirements of application for surveyed land except as to settlement and designation of home tract." It will hardly be contended that a corporation can purchase under the conditions described.

By the act of 1907, Sections 5 and 6 of the act of 1905 were amended, and Sections 6a, 6b, 6c, 6d, 6e, 6f and 6g were added. Section 6a named certain counties as settlement counties and provided that all of the surveyed school lands wholly or partly within the counties named shall be sold on condition of settlement as provided by this act and existing statutes, except tracts of 100 acres or less shall be sold for cash. Thus it will be observed that in the majority of counties in the State settlement and residence is not required. But in Section 6e of this act it is expresly provided that "no corporation shall purchase any land under the provisions of this act." In other words, since some of the public lands were being placed on the market without condition of settlement and occupancy, the Legislature expressly provided that no corporation could purchase. So, throughout the entire fabric of our school land law since the act of 1887, there clearly appears an intention on the part of the several Legislatures of this State to prohibit a sale of any of our public lands to a corporation for any purpose or under any circumstances or conditions whatsoever. In every instance where land could be purchased without conditions of settlement and occupancy they have stipulated that such land should not be sold to a corporation. While it is true that since the passage of the act of 1895 there is no express provision of the statutes prohibiting a qualified purchaser, purchasing direct from the State, from transferring his land to a corporation; yet when there were defects in the titles of certain lands the Legislature provided that the owners and holders of said lands might re-purchase, excepting corporations only from such privilege. Article 4218k, Revised Statutes, among other things, provides:

"Purchasers may also sell their lands, or a part of the same, in quantities of 40 acres or multiples thereof, at any time after the sale is affected under this chapter, and in such cases the vendee, or any subsequent vendee, or *his heirs or legatees*, shall file *his* own obligation with the Commissioner of the General Land Office, together

with the duly authenticated conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years' residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land from any other person or corporation, and that no oher person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or cancelled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties prescribed by this chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon."

It will be observed that it is provided in this section that the vendee under the circumstances named therein shall become the purchaser direct from the State. Courts of this State have uniformly construed this provision in the light of the vendee becoming, to all intents and purposes, an original and direct purchaser from the State. There is no other ample provision in the statutes for the transfer of public lands, and I hardly think that it can be successfully maintained that this article authorizes the transfer of such lands to corporations.

In the case of Wurzbach vs. Burkett, 60 S. W. Rep., 590, Mr. Justice Fly, speaking for the court, said:

"This is a contest, it will be noted, between two parties whose applications have been rejected by the Commissioner of the Land Office, and the grounds upon which Burkett contends that he should have the land are that there was fraud and collusion between Wurzbach and Roth, whereby the former was to get the land for the latter, and that Burkett has precedence over Wurzbach because he is an actual settler. If the first ground could be available to defendant in error there is nowhere evidence of any fraud or collusion; but if there had been such evidence, we do not think a person buying land under the law applying to detached land could have his title attacked because he may desire to let some one else have the benefit of the purchase. (Referring here to the charge that Wurzbach was purchasing for Roth.)

"The sale of such lands is inhibited as to none but a corporation. Sayles' Civil Statutes, Article 4218y and amendment thereto in General laws of 1899, page 235."

Aside from the question that the question of collusion could hardly have been raised by Burkett because of the fact that such collusion, if it existed, would have been a fraud upon the State and not upon Burkett, the court in this case refused to consider a charge of collusion between Wurzbach and Roth on the ground that there was no inhibition against the sale of lands in question to a minor; but it is strongly intimated that had Wurzbach attempted to purchase these lands for a corporation there would have been some merit in the charge of collusion.

In Lufkin Land & Lumber Co. vs. Terrell, 100 S. W. Rep., 134, the lumber company, a Missouri corporation, which had acquired the right to do business as such in the State of Texas, alleged in its petition that it was organized for the purpose of buying timber and timbered lands and manufacturing timber into lumber, and that it had power under its charter to conduct such business; that on the 25th day of June, 1902, one Frost bought the timber on two sections of timebered lands described in the pleadings, and that the proposed relator was the owner of the rights so acquired. It was also alleged in substance that the corporation made application to the Commissioner of the General Land Office to purchase the sections, and among other things made affidavit required as a general rule of such purchasers, except that the affidavit did not state that they desired to purchase the land and in good faith settle thereon. The Commissioner of the General Land Office rejected its applications to purchase, and the Supreme Court in an opinion by Chief Justice Gaines, in overruling motion to file petition for mandamus, among other

"Besides, we think it may be said broadly that it was never intended that any land subject to classification as agricultural or grazing land should ever be sold to a corporation, either directly or indirectly."

Just what the Supreme Court means by "directly or indirectly" is not very clear. No effort has been made by the lumber company to purchase the lands in question except on its direct application to the Commissioner of the General Land Office therefor; nor do I understand that they could have purchased from some one who had theretofore purchased direct from the State and had become the vendee of such original purchaser under the provisions of Article 4218k. Revised Statutes.

Chapter 18, Title XXI, Revised Statutes of 1895 is wholly on the subject of perpetuities. Article 749a of said Chapter provides:
be permitted to acquire any land within this State by purchase, lease or created, whose main purpose or business is the acquisition or ownership of land by purchase, lease or otherwise, shall hereafter or otherwise."

Article 749b provides that all private corporations whose main purpose or business is the acquisition and ownership of lands should within 15 years from the time said law took effect, make an actual bona fide sale of all lands or interest therein acquired before said law became effective. Article 749c, among other things, provides as follows:

"All private corporations authorized by the laws of Texas, as provided in Article 642, to do business in this State, whose main purpose is not the acquisition or ownership of lands, as mentioned in the preceding Articles, which have, heretofore, or may, hereafter, acquire by lease, purchase or otherwise, more land than is necessary to enable them to carry on their business, shall, within 15 years from the time this law takes effect, or the date said land may hereafter be acquired in good faith, sell and convey in fee simple all lands so acquired and which are not necessary for the transaction of their business."

When the provisions of the statute last referred to are taken in connection with the strict provisions noted in connection with the purchase of the lands of the State, it can hardly be doubted that the Legislatures of this State from the year of 1887 down to the present time have evinced an intention in keeping with the language of Chief Justice Gaines in Lufkin Land & Lumber Co vs. Terrell, *supra,* wherein he states that it may be said broadly that it was never intended that any lands subject to classification as agricultural or grazing lands should ever be sold to corporations either directly or indirectly.

In the case of Mound Oil Co vs. Terrell, 92 S. W. Rep., 451, the oil company, as relator, sought by mandamus proceedings to require the Commissioner of the General Land Office to reinstate the purchase of Hoskins and Hunter of certain lands described in its petition, which lands had been transferred to it but which had been cancelled for non-payment of interest. It will be noted, by careful reading of the opinion delivered by Associate Justice Brown in this case, that the oil company, upon the refusal of the Commissioner of the General Land Office to re-instate the sale of Hoskins and Hunter, applied to purchase the lands on original applications as a purchase direct from the State. Judge Brown holding that the lands being detached lands and situated in a county organized prior to the date mentioned in Article 4218y, Revised Statutes of 1895, and the relator being a corporation coming clearly within the inhibition mentioned in said article, the Commissioner of the General Land Office had no power to sell the oil company on such applications. The writ of mandamus was awarded, however, requiring the Commissioner to permit the Mound Oil Company to re-instate the purchase of Hoskins and Hunter. The oil company did not ask in its petition to be substituted in the General Land Office as the vendee of Hoskins and Hunter; but had they done so and the Supreme Court had awarded the writ on such a request the court would have gone to the extent of holding that a corporation, although not permitted to buy direct from the State, may do so indirectly and may be substituted as a vendee of an original purchaser under the provisions of Article 4218k, Revised Statutes. The exact question involved as to whether or not you, as the Commisisoner of the Getneral Land Office, may accept transfers from original purchasers of school lands when made to corporations, and file same in your office and give such corporations the benefit of such standing in your office as you give to any vendee under the provisions of the said article has never been passed upon by the courts of this State.

If a corporation is authorized to purchase land for certain purposes and no other, a deed executed to it by one having capacity to convey will invest title in it, which title can be assailed, on the ground that the purchase is ultra vires, only by the State or by a shareholder, but not by the grantor. It is also a well established rule of law that the inhibition against corporations purchasing lands operate in such a way that, although the State might in a direct proceeding for that purpose have overthrown the title of the corporation and escheated the title to its own use, yet not having done so, the corporation may in the meantime, convey an indefeasible title

to another, of whatever estate in the lands had been conveyed to or acquired by it. Our statutes permit a corporation to take land for debts, and it sometimes becomes very necessary that corporations avail themselves of such privilege. In many instances in this State national banks chartered under the National Bank Act have taken lands for debt, and it may be reasonably assumed that this will be true also as to State banks. In fact, this may become necessary with every corporation doing business in this State. This being so, it may become necessary for corporations to acquire school lands; that is, in order to collect debts it may become necessary for corporations to acquire these lands from one who had heretofore purchased direct from the State. The acquisition of such lands in this manner, while apparently a contravention of the statutes of the State prohibiting a corporation from purchasing school lands, is, nevertheless, in my opinion, a lawful acquisition. While this is true, however, it does not necessarily follow that a corporation acquiring lands in such manner will have the right to be substituted on the books of the Land Office under the provisions of Article 4218k, Revised Statutes.

The Texas Land & Livestock Company being a corporation it is my opinion that you should refuse to file the transfers referred to, and you are so advised.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

CONSTRUCTION OF LAWS—SCHOOL LAND LAW.

Where original purchaser lives upon home tract only one year, and transfers it to another, both original and substitute purchasers having lived upon it the required length of time, additional land may be patented at any time.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 21, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Your letter of the 6th inst., addresesd to this Department, has been received: You state:

"October 18, 1897, J. T. Bryant purchased the S. ½ of Section 174, Certificate 37, Jno. H. Gibson, in King County, as a home, and on November 27, 1897, he purchased all of Section 152 as additional thereto. As shown by deed filed in this office January 28, 1898, he sold his home tract on January 22nd to M. T. Gardner and the latter was duly substituted in this office.

"According to affidavits on file, and the admitted facts are, Bryant lived on the S. ½ of Section 174 from the date of its purchase until he sold it to said Gardner, and at the date of his sale he moved to his additional land (Section 152) and resided thereon until August 16, 1901.

"Will you kindly advise this Department whether the sale of the home section in this case would operate as a forfeiture of the additional tract,—Section 152?"

In reply will say that it is the opinion of this Department that your question should be answered in the negative. Article 4218f, Sayles' Texas Civil Statutes of 1897, among other things, provides:

"And if he or his vendor has resided upon his *home section* for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time."

Article 4218k provides that purchasers may sell their lands or a part of the same in quantities of 40 acres or multiples thereof, at any time, after the sale is effected under this chapter, etc. There is no provision of law authorizing the cancellation of the home tract for failure on the part of the original purchaser thereof to occupy same, if he has sold said home tract to another, and the new purchaser immediately moves on the land and takes up his residence thereon, in good faith, as required by law.

You are further advised, therefore, that in our opinion you should not cancel the home tract in question, because of the sale of same since the same was occupied for the full three years, as is contemplated by law.

Yours truly,

L. A. DALE,
Assistant Attorney General.

PUBLIC SCHOOL LAND—NAVIGABLE STREAMS—MINERALS.

A survey across a navigable stream is illegal; State has reserved title to channels and beds of all streams averaging thirty feet in width, and the Commissioner of the General Land Office hasn't power to sell same to individual for the purpose of taking minerals therefrom, or any other purpose.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 3, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office Austin, Texas.

DEAR SIR: We are in receipt of yours of January 28th, from which I quote the following:

"An individual has filed application for mineral land, claiming he has discovered silver and gold on the land. His application for the survey and field notes are in this office that is to cover the channel of the Colorado river somewhere near the dam above this city and Mt. Bonnell. I would thank you to advise me whether or not the channel of the river is subject to such files, and if I would have authority to make a sale of the land as mineral land."

We presume the applicant claims his right to purchase under the provisions of Title 71 of the Revised Statutes of 1895, contending

that the bed of the river is "public land" within the meaning of the statute.

Our Supreme Court has decided a similar question in the case of De Meritt vs. Robison, 116 S. W. Rep., 796. In that case the relator sought to purchase two tracts of land under the shallow waters of San Jacinto bay, every portion of which was within the tide water limits and under the ebb and flow of the tides from the high seas of the Gulf of Mexico; that at high tide the land is covered to a depth of 18 inches but when the tide ebbs the land is uncovered. The Supreme Court held that the relator had no right to purchase, nor had the Commissioner power to sell the soil lying below the line of ordinary tide; that "in contemplation of law it was not land, but water".

It has been a settled policy established during the days of the Republic of Texas, and adhered to by the Legislatures since, to reserve for common use the waters of the Gulf of Mexico within the territorial jurisdiction of the State, all the lagoons, arms, inlets and bays thereof, as well as all the public rivers, bayous and lakes of this State.

By the terms of the act of February 23, 1900, appropriating for the public school fund the residue of the public domain of the State it was expressly declared that "this act shall not have the effect to transfer to the school fund any of the lakes, bays and islands of the Gulf of Mexico within the tide water limits, whether surveyed or unsurveyed".

Article 4147, Revised Statutes, prohibits the surveys of public lands from crossing navigable streams within this State, and defines a navigable stream to be all streams retaining an average width of 30 feet.

The Supreme Court has held that a survey extending across a navigable stream is illegal.

N. Y. & Texas Land Co. vs. Thompson, 83 Texas, 169.

Therefore it will be seen that the State has reserved title to the channels and beds of all streams averaging 30 feet in width. Undoubtedly the effect of this litigation was to set apart the waters of the gulf and of navigable streams to be specially dealt with in a way differing from the course prescribed for the appropriation of the great mass of the public domain.

It has been held in this State that general laws authorizing locations or entries upon and surveys of public lands or public domain, or vacant lands, do not apply to lands that have previously been so appropriated, reserved, set aside or withdrawn.

Roberts vs. Terrell, 110 S. W. Rep., 735.

Gammage vs. Powell, 61 Texas, 629.

Day Land & Cattle Co. vs. State, 68 Texas, 526.

26 Amer. & Eng. Ency. Law, 222, 224.

We may find a concrete example of the exercise of such special control in Article 2513, Chapter 90, Acts of the Twenty-ninth Legislature, page 128.

Said article provides as follows:

"All of the public rivers, bayous, lagoons, lakes, bays and inlets in this State, and all that part of the Gulf of Mexico within the juris-

diction of this State, together with *their beds and bottoms,* and *all the products thereof* shall be, continue and remain the property of the State of Texas, except so far as their use shall be permitted by the laws of this State."

The Legislature has exercised special control over such streams in the past.

By examination of the special laws passed by the Twenty-second Legislature, page 112, we find that the Legislature had under consideration the granting of certain rights affecting the identical river and bed thereof at the precise spot where the applicant in the case now under consideration desires to locate his claim. In the special act referred to the Legislature conferred upon the city of Austin through a special charter the power to construct and maintain a reservoir of water in and about the channel of the Colorado river, within and without the city limits, "by erecting a dam across same."

The Thirty-first Legislature granted a new charter to the city of Austin containing substantially the same provision, carrying with it the right to overflow and submerge the entire channel of the river.

In view of the foregoing it logically follows that it is our opinion that the applicant has no right to purchase the river bed, nor has the Commissioner of the Land Office any power to sell same. The Legislature alone has the power to authorize such a sale and until such authority is granted, all such applications should be refused.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

COUNTY SCHOOL LANDS, ROADWAY ACROSS, ETC.—COMMISSIONERS COURT—LIMITATION.

Where road across county school land has been in constant use under the authority of the commissioners court for a period of ten years, being regularly worked by its authority, having hands apportioned to it, held under open adverse claim in possession for that length of time, it becomes a public road by prescription.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 10, 1910.

Hon. W. F. Fokes, County Judge, Irion County, Sherwood, Texas.

DEAR SIR: Your letter of the 1st has been received. You state:

"Two leagues of the Tom Green County school lands are located in Irion County, Texas. Since the organization of Irion County, it has been using a road across this school land, and has been working and controlling such road as a first or second class public road. There was never any condemnation of the road nor any grant of land occupied by the road from Tom Green County, and Irion County's right to the road arises only from limitation, prescription, or long continued use thereof without contest or objection on the part of Tom

Green County. Recently Tom Green County made an absolute lease of its school lands to a certain party, and that party now claims the right to ignore the road through the land and fence up the entire tract upon the ground that Irion County has no legal right to any road through it. In order that the commisisoners court may intelligently pass upon the question, will you kindly answer the following questions and get your answer to me by the 14th inst:

"1. Can a right to a road over school lands of a county be acquired by limitation or prescription?

"2. If the foregoing question is answered in the negative (affirmative?), can an absolute lessee of the land from the county owning it, fence up the road without rendering himself liable to conviction in a prosecution for obstructing a public road?

"3. The land being under absolute lease, if this county now purchases a right of way for a road from Tom Green County, would this county have any right to open up the road without acquiring the lessee's consent, or acquire his leasehold interest in the proposed road bed?

"Our court has been advised by local attorneys that the principles of limitation or prescription do not apply to county school lands while owned by the county to which granted, and that the only way in which we can legally acquire a road across the school lands is by purchase of the road bed from Tom Green County, and obtaining at the same time the consent or leasehold rights to the land covered by the road bed from the absolute lessee, but the court would appreciate the advice directly from your Department."

We answer your first question in the affirmative. In the case of Ward vs. The State, 60 S. W. Rep., 757, Ward was convicted of obstructing a public road. The road obstructed was known as the "Anson and Roby road", was laid out in 1883, by order of the commissioners court, and worked since 1884 as a public road. The road ran across what is known as the Harrison County school lands. The order establishing the road failed to show that Harrison County had been allowed or paid damages for the land taken, or appeared before the jury of view or had consented that the land should be so taken. The majority of the court held that the road was legally established. Judge Henderson, in a very able dissenting opinion, holds that the order of the commissioners court was insufficient to establish the road in that the owner of the land across which the road was projected had no notice, nor did said owner, in anywise, give its consent to the establishment of the road in question. Judge Henderson cites many authorities tending to support him in his contention, and in order to legally condemn land for a public road the owners or their agents must be notified in accordance with the statute, which notice is claimed to be jurisdictional.

Judge Henderson, however, said:

"It does not occur to me that the questions heretofore discussed control the result of this case, inasmuch as, in my view, the public has gained a prescriptive right to the road in question by having laid it out and worked it from time to time, and having used and occupied it as a public road for a sufficient time to gain a prescriptive right thereto. The question then presents itself, what is a sufficient

time to give the public a prescriptive right to a highway? In Cunningham vs. San Saba County, (Texas Civil Appeals), 20 S. W. Rep., 941, on this subject the court uses the following language: 'As a general rule, before a highway can be established by prescription, it must appear that the general public have a claim of right, and not by mere permission of the owner, under some definite way, without interruption or substantial change for at least the longest period of limitation prescribed by statute against an action for the land; and many authorities hold that such use must be for at least twenty years.' This use, it appears, must be so adverse as to put the owner upon notice that an adverse right was asserted. See Franklin Co. vs. Brooks, 68 Texas, 679; 5 S. W. Rep., 819. The exercise of this right must not be merely permissive, but must be in some easement or highway. * * * I think a sound doctrine on this proposition is in consonance with our statute of ten years' limitation as to real estate which gives a right to the land by mere adverse occupancy."

See Cunningham vs. San Saba County, 20 S. W. Rep., 941.

Franklin County vs. Brooks, 68 Texas, 679; 53 S. W. Rep., 819.

Smith vs. State, 40 S. W. Rep., 736.

It is true that Judge Henderson's dissenting opinion is not the opinion of the court in this case, and it is not cited as having any judicial weight, but for the purpose of giving expression to the views of this Department as to what, in our opinion, is the proper construction of the law of prescriptive rights. I do not wish to be understood, however, in holding as the opinion of this Department that a period of ten years is sufficient. On this matter the authorities are at variance. In order for the ten years' statute of limitation to apply, the road claimed by prescription must have been recognized by the commissioners court for the full ten years, which road must have had overseers appointed by the court for the purpose of regularly working the same, hands must have been apportioned to it and the use and occupancy of the same must have been so adverse to that of the ownership of the fee that it became an adverse claim in possession.

All roads which have been laid out and established by authority of the commissioners court are public roads. Revised Statutes, Article 4359; Worthington vs. Wade, et al., 17 S. W. Rep., 520. A road not originally established under the statute may become public by long continued use and adoption as such by the county commissioners with the consent of the owner or by subscription. In this State the mere acquiescense of the owner of uninclosed land in use by the public of a road over it is not sufficient evidence of dedication. Cunningham vs. San Saba County, 20 S. W. Rep., 941; Ramthum vs. Halfman, 58 Texas, 551. See, also, Gilder vs. City of Brenham, 67 Texas, 346; 3 S. W. Rep., 309.

So that if the road in question has been in constant use under the authority of the commissioners court for a period of ten years, having been for that period of time under the supervision of the court being regularly worked by its authority, having hands apportioned to it, and been so held under an open and adverse claim in posses-

sion for that length of time, it would seem to be a public road by prescription.

On the other hand, if, without the express authority of the commissioners court, its use began by the people through necessity and came gradually into use and was thereafter recognized by the court, but such open and adverse recognition has been for a less period than ten years, it is our opinion that the doctrine of prescription does not apply. See Race vs. State, 66 S. W. Rep., 560. It is also well esablished that the public does not acquire right to road by prescription where a road established by the commisisoners court is different from a road formerly used, since possession does not conform with the claim of right. Hamilton County vs. Garrett, 62 Texas, 602. And that where no claim has been made by the county or public to the exclusive use of land used as a road, and it does not appear that such use was otherwise than permissive, no prescriptive right, as a public road is acquired. See Cunnignham vs. San Saba County, *supra*. It also appears that a public road can not be established by prescription where the land over which the road runs is unimproved or unoccupied prairie land; nor can long use of a second-class road apply as prescription to a road of first class. See Llano County vs. Scott, 2 Texas Civil Appeals, 412, 21 S. W. Rep., 177. It is also well established that such use must be continuous and uninterrupted on the part of the county to avail under the doctrine of prescription.

Answering your second question, will say that the establishment of the road in question must depend upon the facts in this particular case, all of which not being before us, we are not prepared to say as to whether or not the lessee of the land in question has the right to fence same.

Answering your third question, will say that the damages caused by laying out a public road belonging primarily to the owners of the land over which it passes, and a subsepuent lessee of the land enclosing it between the order of establishing and the order of opening up can not recover damages for injury to his enclosure or for improvements rendered necessary to the use of the land occasioned by the opening up of the road.

Dulaney vs. Nolan County, 85 Texas, 225; 20 S. W. Rep., 70.

But if the lessee's rights attached prior to the order establishing the road, and he having in good faith enclosed the land before such order had been issued, would be entitled to damages for injury to his enclosure.

Not having all the facts before us, we have attempted simply to give you some general rules by which your court may determine its rights in the premises, and you will, of course, apply the rules so given to the facts as they exist.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

PUBLIC SCHOOL LANDS—PURCHASER—ACTUAL SETTLER.

Where party applies for land as actual settler and it is awarded to him and he fails to settle and file in the General Land Office his affidavit as required by law, this purchase or award should be counted against him when he applies to buy other lands; he is not a qualified purchaser of lands that will come on the market in future.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 16, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office Austin, Texas.

DEAR SIR: Your letter of the 14th inst., has been received. You state:

"This Department is confronted with the following facts, and will ask your interpretation of the law thereon:

"One applies for land as an actual settler; he is the highest bidder; it is awarded to him; he fails to settle and file his affidavit in this office as required by law.

"Question: Should the land so awarded to the applicant be counted against him when he applies to buy other land?

"To put it differently: A has four or eight sections of land—according to county—awarded to him, and he fails to settle on it and file his affidavit in this Department as required by law. Is he a qualified purchaser for other lands that will come on the market in the future?"

Section 3 of the act of April 19, 1901, (See Laws of 1901, page 294), among other things, provides as follows:

"The Commissioner of the General Land Office is hereby prohibited from selling to the same party more than four sections of land, and all applications to purchase land shall also disclose the prior lands purchased by the application from the State, if any, since the taking effect of this act, and the residence of the applicant at said time, and if it appears therefrom or from the records in the Land Office that said applicant has already purchased land aggregating four sections since the taking effect of this act, his application shall be rejected; provided, this shall not apply to sales made to a purchaser and afterwards cancelled as invalid for some reason other than abandonment and where the purchaser himself was not at fault."

This provision was enlarged by act approved April 15, 1905, by the following language in Section 6 of that act. (See acts of 1905, page 167):

"In the counties of Bandera, Brewster, Crockett, El Paso, Jeff Davis, Loving, Pecos, Presirio, Sutton and Val Verde, one who has not purchased one complement of land under this act or former law prior to the filing of his application or applications may buy not to exceed eight sections, of 640 acres each, more or less, or such part thereof as will complete his complement under this act, including the former purchase since April 19, 1901; * * * "

This section is amended by the act effective August 10, 1907, and as amended reads as follows:

"One who has not purchased any land since April 19, 1901, may purchase on condition of settlement, in the counties of Brewster, Crockett, Edwards, El Paso, Jeff Davis, Kinney, Pecos Presidio, Sutton, Terrell and Val Verde not to exceed eight sections of 640 acres each, more or less, which are wholly within said counties. One who has heretofore or may hereafter purchase a complement as aforesaid, shall not purchase any more. One who has purchased or may hereton, Terrell and Val Verde not to exceed eight sections of 640 acres each, more or less, wholly or partly within any county other than those hereinabove named since said date, shall not purchase any more on condition of settlement. One who has purchased less than a complement as aforesaid may hereafter purchase in any county, such number of sections as his lack of complement in the county of the former purchase bears to a complement in the county of such purchase. One who has heretofore purchased land on condition of settlement, which lies partly within an eight section county and partly within a four section county, shall be considered for the purpose of future purchase by him as having purchased in a four section county. Every additoinal survey applied for shall be situated within five miles of the designated home tract, except the survey on which the lessee, who may apply to buy out of his lease, may have placed permanent and immovable improvements of the value of $500, need not be within such radius. No survey shall be sold in any county except as a whole, notwithstanding it may be leased in two or more parts."

The purposes of these provisions seem to us to have been mainly to prevent one who had previously purchased a complement of land from making a new settlement and purchasing again. (See Hazelwood vs. Rogan, 95 Texas, 295.) By the express provisions of Section 3 of the act of April 19, 1901, there is excepted out of the operation of this statute all sales made to purchasers and afterwards cancelled as invalid for some reason other than abondonment and where the purchasers themselves were not at fault. We understand this to be a very strong implication—in fact as strong as the English language is capable of expressing an idea—that the Legislature intended that one who had purchased four sections from the State since April 19, 1901, the purchase being valid, but who permitted same to forfeit through abandonment or from any fault of his, that such purchase should be counted against him in any attempt afterwards made by him to purchase other land. Section 6e of the act of August 10, 1907, among other things, provides as follows:

"One who has heretofore or who may hereafter purchase land out of a lease or otherwise, on condition of settlement in the counties named in section 6a of this act and fails to settle thereon within the required time, or fails to file in the required time, or fails to comply with the law as to residence on the land, or executes a transfer contrary to the provisions of this act, except those stated in this act as not being void, he shall forfeit the lands and all payments made thereon to the fund to which the land belongs, and when the Commissioner shall be sufficiently informed of the facts which operate

as a forfeiture, he shall cancel the award or sale by noting the act of forfeiture on the obligation and mail notice of that fact to the proper county clerk. Such land shall not be subject to sale again at a less price than the former sale price unless the Commissioner shall have re-appraised the land at a less price after noting the act of forfeiture."

It will be observed from the provisions quoted that there are four grounds of forfeiture named therein: first, the failure on the part of the purchaser to settle on the land purchased within the time required by law; or, second, his failure to file in the Land Office his affidavit of settlement within the time required by law; or, third, failure on his part to comply with the law as to residence on land; or, fourth, a transfer by him of lands so purchased contrary to the provisions of the act of 1907, except those stated therein as not being void.

It will hardly be contended that if the purchaser should settle on his land within the time allowed him by law for that purpose and should file the required affidavit of settlement in the time and manner required by law, and should reside upon the land as contemplated by the statute, but should execute a transfer contrary to the provisions of said act, that he would have the right to purchase another full complement of land. Yet these four grounds of forfeiture are expressly placed on the same footing, and are given the same degree of force and dignity. Besides, it is expressly stated in the provisions quoted that when either of said grounds of forfeiture exist and the same has been called to the attention of the Commissioner, he shall cancel the award or sale by noting the act of forfeiture on the obligation, and that when so cancelled the land so purchased, together with all payments made thereon shall be forfeited to the fund to which the land belongs. Again, it will be noted that the Legislature expressly provided that such land, when forfeited, shall not be subject to sale again at a less price than the former sale price unless the Commissioner shall have re-appraised the land at a less price after noting the act of forfeiture.

We answer your first question in the affirmative; that is, that the land so awarded to the applicant should be counted against him when he applies for other land; and your second question in the negative; that is, he is not a qualified purchaser for land that will come on the market in the future.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

PUBLIC SCHOOL LAND—SETTLEMENT.

Law requires settlement to be made within ninety days, and a failure to do so forfeits rights of purchaser to land.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 17, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Your letter of the 5th inst. has been received. You state:

"Application to purchase Section 32, Block 59, public school land in Reeves County, was filed in this office on May 14, 1909, by Herbert W. Aspin. Award was made May 29th same year. On the 30th day of August, 1909, Mr. Aspin made an affidavit to the fact that on the 25th day of August he intended to leave Fort Worth to go and become a settler upon this land, he stating that he thought his term of residence should begin on the 29th of August, when in fact it should have been 90 days after the 29th of May. However, he states in his affidavit that a few days prior to the 25th of August he got sick, and grew worse, and on the 25th he called in a physician, which resulted in his being placed in a sanitarium, and on the 26th an operation for appendicitis was performed on him. It further appears from other affidavits filed here, that Mr. Aspin remained unable to leave the care of the doctor until about the 1st of November, and after he did get able to leave he proceeded to Reeves County, and according to an affidavit filed in this office, he made settlement on the land in good faith November 3rd, and so far as the information we have goes, he is now living on the land.

"The question arises as to whether or not the illness of Mr. Aspin would, under a proper interpretation of the law, excuse his failure to settle earlier or within the time required by law, and now permit the sale to him of land."

It is our opinion that your question should be answered in the negative. There appears two grounds for forfeiture in this case: first, the failure to settle in the time required by law; and, second, a consequent failure to file the affidavit of settlement. Section 6e of the act of August 10, 1907, among other things, provides that if one purchasing land on condition of settlement fails to settle upon the same within the time required or shall fail to file his affidavit of settlement within the time and manner required by law, that the Commissioner of the General Land Office shall concel the sale so made and place the land again on the market. Cases may arise in which such requirements will work a hardship on purchasers of school land, yet there are 90 days given in which to make settlement, and sickness at the last moment will hardly excuse a lack of compliance with the plain provision of the statute.

Yours truly,

L. A. DALE,
Assistant Attorney General.

CONSTRUCTION OF LAWS—SCHOOL LAND LAW —PURCHASER.

Purchaser of school land, upon condition of settlement, may sell same after expiration of one year. Award dated January 27, 1909, and sale made January 27, 1910, not within inhibition of law.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 14, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office Austin, Texas.

DEAR SIR: Your letter of the 1st inst., has been received. You state:

"A question regarding the computation of time under the provisions of Section 6d, acts of 1907, providing for the sale and lease of school lands, has arisen in this Department and I would thank you to render this Department an opinion upon the subject. The statute reads:

" 'One who hereafter buys land on condition of settlement shall not sell any part of such purchase prior to one year after date of award * * * ;' and the question is, whether the date of award is to be included in computing the time. To get the question clearly before you, I will state that a tract was awarded to a purchaser on January 27, 1909, and that a deed executed by such purchaser on the 27th day of January, 1910, has been filed in this office by the assignee, together with the latter's substitute application and obligation.

"A rigid construction of the statute seems to bring this transfer within its inhibition, but as such construction would bring about the forfeiture of sale and as rights would be divested I would appreciate your advice in the matter. Several such cases are pending in the Department."

Forfeitures are not favored and a statute under the operation of which a forfeiture is claimed will be most strictly construed against the one claiming the forfeiture.

The best authorities hold that the word "after" may be construed to include or exclude the day of the act as will best serve to carry out the intent of the Legislature, subserve public policy, avoid forfeiture and validate a proceeding rather than annul same.

It will be noted that the statutory inhibition is against the sale of such lands prior to a year after the date of award, so that if a tract of land was awarded to a purchaser on January 27, 1909, a deed executed by such purchaser on the 27th day of January, 1910, would not be *prior* to one year after the date of award, but was executed *at* one year after date of award. To illustrate: A gives his promissory note to B dated January 1, 1909, in which it is stated "One year after date I promise to pay to the order of B $1000." If he paid this note on January 1, 1910, he would not pay it *prior* to one year after date but *at* one year after date. See Vorwerk vs. Nolte, 24 Pac. Reporter, 840.

We conclude, therefore, that the party making the transfer on

January 27, 1910, of lands awarded to him on January 27, 1909, had a right to do so under the statute in question and that such land should not be forfeited.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

COUNTY SCHOOL LANDS—COMMISSIONERS COURT—SALE OF BY AGENT.

Commissioners court hasn't the authority to contract to pay an agent for the sale of its school lands out of the proceeds of sale, etc. May contract to pay him out of general revenue of county.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 21, 1910.

Hon. Wm. Lackey, County Commisisoner, Irion County, Sherwood, Texas.

DEAR SIR: This Department is in receipt of your letter dated Austin, Texas, May 20, 1910, in which you state:

"As one of the county commissioners of Irion County, Texas, I respectfully ask whether the commissioners court can contract with an agent to sell the school lands of the county by agreeing to give such agent *all over a specified figure* that he may be able to sell said lands for and allow him to retain such excess as his compensation for effecting such sale."

In reply, beg to say that it is the opinion of this Department that this question should be answered in the negative. The school lands patented to the several counties of this State for county school purposes constitute a sacred trust fund, none of the proceeds of which can be lawfully diverted from such fund. It is probably within the power of the commissioners court to pay an agent a reasonable compensation for effecting a sale of such lands, provided, however, such compensation is provided for and paid out of the general revenue of the county. The county is the trustee for its county school lands in the manner and for the purposes declared in the Constitution. (Palo Pinto County vs. Gano, 60 Texas, 251).

The county commissioners have no power to convey part of school lands in consideration for their location. (Pulliam vs. Runnels Co., 79 Texas, 369; 15 S. W. Rep., 277).

Under Constitution, Article 7, Section 6, and Revised Statutes of 1895, Sections 3902, 3905 and 4271, counties held to hold school lands and *proceeds thereof in trust and liable for any diversion thereof.* (Board of School Trustees vs. Webb County, 64 S. W. Rep., 486).

Where county commissioners convey school lands for services in subdividing whole tract in suit to recover from subsequent grantee, it is not incumbent on county to pay defendant value of such services. (Dallas County vs. Club Land, etc., Company, 66 S. W. Rep., 294).

Yours very truly,

L. A. DALE,
Assistant Attorney General.

CORPORATIONS—IRRIGATION COMPANY—PUBLIC SCHOOL LANDS

Commissioner not authorized to accept corporation as substitute purchaser, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 18, 1910.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: We have your letter of the 12th inst., inclosing copy of letter from Mr. W. W. Hubbard of Barstow, Texas, relative to the request of the Barstow Irrigation Company to have transferred to it certain school lands not yet patented. We note from Mr. Hubbard's letter that he calls attention to Article 3131, Revised Statutes of 1895, which provides among other things that incorporated irrigation companies have the power to acquire lands by voluntary donation or purchase or in payment of stock or water rights. We do not think this article authorizes your Department to accept the Barstow irrigation Company as a substitute purchaser for school lands.

It will be remembered that railroad corporations have had given to them for many years all necessary right of way over State lands, yet in 1900 the Legislature thought it necessary to enact a law by which the Commissioner of the General Land Office could sell to railroads school lands for depot and terminal purposes. Under our present laws an irrigation company has the right-of-way over State lands. In this respect it stands on an equal footing with railroads chartered under the laws of Texas, and if it was deemed necessary by the Legislature to enact a statute to authorize the *sale* of school lands to such railroads, surely it can hardly be contended that corporations for irrigation purposes can have the same right without legislative enactment.

It appears from Mr. Hubbard's letter that the particular tract of land desired to be transferred to the irrigation company is not needed by the company either for right of way or storage purposes; consequently Article 3131, Revised Statutes of 1895, authorizing irrigation companies to purchase lands under certain conditions, can hardly be said to authorize a transfer of school lands to such corporation. This Department must, therefore, hold that you should not make the transfer requested by the Barstow Irrigation Company.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

PUBLIC SCHOOL LANDS.

Where applicant, under law of 1901, is awarded two sections of land in a four-section county and two sections in an eight-section county, would these purchases under the circumstances stated be a bar from further purchase from the State?

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 18, 1910.

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

DEAR SIR: Your letter of the 14th inst., has been received and carefully considered. You say:

"It appears from the records of this office that Durer Alston purchased under the act of 1901 two sections of land in Reeves County and two in Pecos County, all of which he transferred before making the purchases herein after mentioned. On the 9th day of September, 1907, he purchased from Seth Alston Sections 11, 3 and 15 in Block 53, Reeves County and was substituted on the records of this office on the 14th of the same month and year. These three sections were purchased by Seth Alston May 2, 1907, on condition of occupancy, Section 11 being the base section. On the 30th of September 1907, Durer Alston filed his application in this office to purchase as additional to said No. 11 the S ½ and N. W. ¼ of Section 2, same block, and this tract awarded to him on the 8th of November following.

"It appears that Ewart Alston on the 2nd of May, 1907, purchased Sections 32 and 29, Block 53, Public School, El Paso County, taking Section 32 as a home and that he transferred these lands to Durer Alston December 24, 1907. Durer Alston filed the deed and his applications and obligations taking the land on the same terms and conditions as his vendor; that is to say, taking Section 32 as a home and Section 29 as additional thereto and making affidavit that he was a settler in good faith on Section 32 on date of transfer to him.

The said Durer Alston has filed in this office his proof of occupancy naming Section 11 as his home tract and the other lands above described as additional thereto, setting up that he had taken 29 and 32 over as additional under the provisions of Section 6d of the act of 1907. From his statement of the facts I am confident that an error was made in drawing the papers pertaining to his substitution as the assignee of Ewart Alston and the practice of the Department has been to permit correction in such cases.

"The question upon which I desire you particularly to pass arises under Section 6d of the act of 1907; would Durer Alston's former purchase be a bar to the purchase of Sections 29 and 32 from Ewart Alston as additional to his home on No. 11 under the provisions of Section 6d, act of 1907, or any other law, if correction of his papers can be made?"

From this statement it appears that Durer Alston had purchased two sections of land in a four section county and two sections in an eight section county, all prior to the taking effect of the act of

April 15, 1905. Said act as amended by the act effective August 10, 1907 entitled Mr. Alston to buy one section more in a four section county or two sections more in an eight section county. On the 30th of September, 1907, he filed his application in the General Land Office to purchase as additional to Section 11, formerly purchased by him from Seth Alston, three-fourths of Section 2 Block 53, Reeves County, which being a four section county exhausted his complement less one-fourth of a section for a four section county or one-half section for an eight section county.

As to whether Mr. Alston is a qualified purchaser as the assignee of Ewart Alston of Sections 32 and 29, Block 53, El Paso County, depends upon whether he took said sections in compliance with Section 6d of the act of 1907; that is to say, if he took same under the conditions of the original purchase they would not be counted against him, but if he took as the assignee of Ewart Alston as additional to his own designated home tract. (Section 11 purchased from Seth Alston), then he would not be a qualified purchaser thereof, said act providing that the total tracts so purchased by assignee prior to the completion of residence of vendor, together with former purchase of assignee shall not exceed one complement of sections. It appears by the proof of occupancy filed that Sections 29 and 32 were merely taken as additional to Section 11 and not on the same terms and conditions incident to the purchase of Ewart Alston. This being true he is not entitled to purchase said sections, and the transfer thereof having been made to him contrary to law, they are subject to forfeiture, and you are so advised.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

OPINIONS WHICH HAVE TO DO WITH RAILROADS.

(See also Anti-Pass Law.)

GALVESTON CAUSEWAY—CONTRACT FOR CONSTRUCTION OF—LONG-TIME LEASE.

Lease does not suspend power of alienation, therefore leases for long terms are not in violation of law against perpetuities.
Contract must be ratified by Legislature; must be approved by Railroad Commission in order to insure validity of lease.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 6, 1909.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: I am in receipt of your letter of the 31st ultimo, enclosing copy of letter from Hon. George E. Mann, county judge of Galveston County, and also copy of "Proposed Causeway Contract" between the county of Galveston and the railway companies entering therein. You request my opinion as to whether or not this contract is in accordance with the laws of this State, and especially an Act of the Thirtieth Legislature, Chapter 26, Special Laws of the Regular Session, pages 303-306; and if in accordance with the laws of this State, whether or not it is incumbent upon the Railroad Commission to approve the same in order to insure the validity of the lease.

Answering your first inquiry, I beg to advise that I have carefully examined the Act of the Legislature above referred to, together with the terms and provisions of the contract, and have reached the conclusion that the contract referred to is not in conflict with said act. My attention has been specially directed to those provisions in the contract leasing to the steam railway companies and to the interurban electric railway company the right of way over and upon said causeway for the term of nine hundred and ninty-nine years, and the question has been raised as to whether such lease does not in effect amount to a grant of the fee simple title to the steam and electric railway companies, which the commissioners court have no authority to grant under the act of the Legislature above referred to. My opinion is that the contract under consideration is not open to such objection. The act of the Legislature under consideration does not contain any limitation upon the time for which the leases authorized therein may be granted. Neither is there any such limitation found in the Constitution or the statutes of this State, and it is well settled by the authorities that in the absence of special statutory or constitutional provisions a lease may be made for any number of years. In volume 18, American and English Encyclopaedia of Law, (2nd Edition), at page 611, it is said that "Lord Coke states that 'by the ancient law of England for many respects a man could not have made a lease above forty years at the most, for then it was said that by long leases many were prejudiced and many times men disinherited, but that ancient law is antiquated'. (Coke upon Littleton, 46a). Blackstone states that this ancient law, if it ever existed, was not antiquated, and that terms for three hundred or one thousand years were certainly in use in the time of Edward

III, and probably of Edward I, (2 Bl. Com. 142), and at present, except by special statutory or constitutional provisions, there is certainly no limitation upon the time for which leases may be granted. (Theobalds vs. Duffy, 9 Mod., 102; Denn vs. Barnard, 2 Cowp., 595). A lease does not suspend the power of alienation, and therefore leases for long terms are not in violation of the law against perpetuities."

Taylor, in his valuable work on Landlord and Tenant, announces the same rule as follows:

"Terms are originally of short duration, and Lord Coke states that, by the ancient law of England, they could not exceed an ordinary generation of forty years, for the reason that, if leases could be made for a longer period, men might be disinherited. This doctrine of common law, however, had become antiquated even in his day, and soon after abolished altogether. There is now no limitation to the extent of a term of years, either in England or the United States." (See Taylor's Landlord and Tenant, 8th Ed., Section 73.)

In the case of Timothy Gay, Administrator, 5 Mass., 419, the Supreme Court of Massachusetts holds that lands held under a lease for nine hundred and ninty-nine years is but a chattel interest.

In the case of Brewster vs. Hill, 1 New Hampshire, 350, it was held that a leasehold interest in real estate for nine hundred and ninety-nine years was personal property.

The two cases last above cited are not directly in point upon the question involved herein. They do, however, contradict the theory that a lease of real estate for a term of nine hundred and ninety-nine years amounts to a conveyance in fee and not a lease. (See also 4 Kent's Commentaries, 12th Edition, page 86; 2 Blackstone's Commentaries, pages 143, 270 and 386).

It may be doubted whether all of the minor provisions of the above contract are in strict accordance with the laws of this State. However, the contract by its twenty-seventh article provides that it shall be subject to the ratification and approval of the Legislature of the State of Texas, and my opinion is that when the Legislature has ratified the contract that it will be in all respects valid.

Answering your second inquiry, I am of the opinion that the contract in question must be approved by the Railroad Commission in order to insure the validity of the lease.

Section 2 of the act of the Legislature authorizing the construction of the causeway is not entirely clear on this point, nor free from ambiguity, but when read in connection with Section 3 of the same act all obscurity is removed and the intention of the Legislature becomes manifest. Section 2, after authorizing the commissioners court of Galveston County to lease the right of way over said causeway to the city of Galveston for public utilities owned and operated by the said city, and also to corporations for the construction by such corporations of a railroad track or tracks, contains the following provision:

"The said grant or lease of such right of way to be for such time and on such terms and conditions as may be prescribed by said court by the Railroad Commission of Texas."

Upon reading the clause of the section above quoted it becomes evident that there is something left out of it, and taken by itself it is meaningless, but as above stated the meaning becomes clear when read in connection with Section 3 of the same act which is, in part, as follows:

"Any corporation or corporations contracting as provided in Section 2 of this act with said commissioners court for the right of way over any part of said structure shall have the right to make and enter into any contract or contracts with said commissioners court, subject to the approval of the *Railroad Commission of Texas* for the payment to the said county of Galveston, in said county, of all sums of money thereunder * * *."

This section clearly provides that the lease contract to be entered into between the county of Galveston and the steam and electric railway companies must be approved by the Railroad Commission.

Yours very truly,

R. V. DAVIDSON,
Attorney General.

RAILROAD COMMISSION—FREIGHT RATES.

Effect of decision of higher courts in case of Galveston Chamber of Commerce vs. Railroad Commission of Texas (115 S. W. Rep., 94), known as Galveston-Houston differential, upon rates between points on line of St. L., B. & M. Ry. and Galveston; and the effect of said decision upon the making of rates by Railroad Commission between other points in Texas and over other railroads.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 21, 1909.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: We are in receipt of your inquiry of recent date concerning the case of Galveston Chamber of Commerce, et al. vs. the Railroad Commission of Texas. Opinion delivered June 24, 1908, by Court of Civil Appeals at Austin: Writ of error denied by Supreme Court.

You desire to know:

First: Whether the judgment of the court in that case leaves any rates in effect between points along the St. Louis, Brownsville & Mexico Railway Company and the city of Galveston; and,

Second: The effect of said decision upon the making of rates by the Railroad Commission between other points in Texas and over other railroads.

As to your first inquiry, the decision of the court leaves it doubtful whether the existing tariffs on freight between Galveston and points on the St. Louis, Brownsville & Mexico Railroad Company and between points on said road and Galveston are annulled; but I am inclined to think that they are and that it will be necessary for the

Commission to promulgate new tariffs upon all classes of freight moving between said points over said road.

The order of the court as to "Commodity Tariff No. 10-A" is as follows:

"It is further ordered and adjudged by the court that the order made and promulgated by the said Railroad Commission of Texas, on to wit: March 10, 1899, known as "Commodity Tariff No. 10-A", whereby it fixed and established the freight rate which should be charged by railroad companies for transporting wood between points situated in the State of Texas, and whereby it provided the freight rate on wool between any point in Texas and Galveston should be 7 cents per hundred pounds in excess of the freight rate applying between Houston and such point, is as to plaintiffs and all persons engaged, or who may be engaged, in shipping wool between any point on the line of the said St. Louis, Brownsville & Mexico Railway Company and Galveston, unjust and unreasonable in so far as the said order requires that a freight rate between any such point and Galveston shall be charged in excess by 7 cents per hundred pounds over the freight rate applying between Houston and such point, and that the said order of the Railroad Commission of Texas to the extent that the same is hereby adjudged to be unjust and unreasonable, is hereby set aside, vacated and held for naught."

The same order is made as to each of the other tariffs involved in the suit, and the Commission is enjoined from enforcing any such rates in so far as they are adjudged to be unjust and unreasonable, with the proviso that the Commission shall not be precluded from enforcing such rates as were in force at the time of the judgment, or might thereafter be adopted, whereby a less freight rate might be required to be charged between Houston and any point on the line of the St. Louis, Brownsville & Mexico Railway Company, which is connected with Houston by a single line of railway or by two or more connecting lines of railway under the same management and control. That part of the judgment is as follows:

"It is further ordered, adjudged and decreed by the court that the said Railroad Commission of Texas and said members thereof, viz: the said Allison Mayfield, Leonidas J. Story and Oscar B. Colquitt, and their successors in office be and they are hereby enjoined from in the future in any manner enforcing or attempting to enforce either of the said orders of the said Railroad Commission of Texas, in the respect in which the same is hereinbefore adjudged to be unjust and unreasonable, and that the said Railroad Commission of Texas, and the said members thereof, and their sucessors in office be and they are hereby enjoined from in the future making, promulgating, enforcing or attempting to enforce any orders, rules, regulations or rates whereby the said Gulf, Colorado & Santa Fe Railway Company and the said St. Louis, Brownsville & Mexico Railway Company shall be required to charge any greater freight rate fixed by either of the said orders of the said Railroad Commission of fixed by either of the said orders of the said Railroad Commission Texas between Galveston and any point on the line of said St. Louis, Brownsville & Mexico Railway Company (with exception of points along the line of said St. Louis, Brownsville & Mexico Railway

Company from which a single line of railway extends to the city of Houston or from which any two or more lines of connecting railways *under the same management and control* extend to the city of Houston) then said railway companies shall be required to charge for transporting the same article or thing between Houston and the same point on the line of the said St. Louis, Brownsville & Mexico Railway Company.

"It is expressly provided that nothing in this decree is intended to or shall preclude or prohibit the Railroad Commission of Texas, or the said members thereof, or their successors in office, from enforcing such rules, regulations and rates as may be now in force or may be hereafter adopted or promulgated by the said Railroad Commission of Texas, whereby a less freight rate is, or may be, required to be charged by railroads transporting any article of freight between two points connected by a single line of railway or by two or more lines of railway under the same management and control, than is required to be charged for transporting the same article or thing between two other points equally distant and in other respects similarly situated, but not connected by a single line of railway or by two or more lines of railway under the same management and control."

The freight rate between Galveston and points on the St. Louis, Brownsville & Mexico Railway Company was made by adding to the rate between Houston and said points a certain arbitrary or differential, and the court has held that the application of said arbitrary or differential is unjust, unreasonable and void upon the ground that the service rendered in transporting freight between Houston and any point on said railroad (with exception of points along the line of said road connected with Houston by a single line of railway or by two or more lines of railway under the same management and control) is in all respects a like service to the service rendered in transporting the same articles between Galveston and the same points on the said St. Louis, Brownsville & Mexico Railway and the Commission is enjoined from enforcing a higher rate between Galveston and those points than between Houston and the same points, except as to those points connected with Houston by a single line of railway or by two or more lines of railway under the same management and control.

Answering your second inquiry, I beg to advise that the judgment of the court in the case above referred to does not directly affect any freight rates or tariffs in force, except those involved in that suit. The Court of Civil Appeals, however, lays down some broad propositions concerning rate making and the use of arbitrary and differentials, and as the decision indicates what the court would hold in other cases coming within the rules announced, it may be well to examine the opinion for the purpose of ascertaining its scope. This, I understand, is what you ask for in your second question.

The Court of Civil Appeals holds:

1. That the Railroad Commission is without power to fix any rate or make any order which gives any undue or unreasonable preference or advantage to any person, company, firm, corporation or

locality, and is without power to fix a different rate or charge for like and contemporaneous services.

2. That the Commission is without power in the regulating and fixing of rates to make discriminations for the purpose of offsetting natural and other advantages possessed by localities and individuals.

3. That in the application of freight rates, each locality is entitled to its natural advantages.

The decision of the court in this case does not require that the same rates shall be charged for transporting freight between points having water transportation as between other points in the State equally distant but not having water transportation. On the contrary, however, the power to fix a less rate between such points is expressly recognized. Consequently, what is known as the Houston-Galveston Differentials, and which is nothing more or less than the water rate between Houston and Galveston, is not condemned in all cases, but I think under said decision it should be applied to all shipments between those two points and also from all other points in Texas to Galveston where a combination of such water rate and the mileage rate is less than a through mileage rate would be. The rule is practically universal, however, in rate making, that, after a certain distance is reached—varying with different commodities—no greater freight rate is charged, whatever the distance may be, and in such cases, the differential or water rate should not be added to the miximum mileage rate so as to make a higher rate between two points having water transportation for a part of the distance than between two other points equally distant, but without water transportation. In other words, the water rate, or differential, should be used when it is benefit to shippers but not when it is a burden. To illustrate the point that I am making, let us take the tariff known as the General Tariff of Class Rates 3-A involved in the Galveston Chamber of Commerce case above referred to. Under said tariff (the analysis being with reference to point in Texas where the distance from Galveston to Houston forms a part of the distance traversed) we find, taking articles of the first class for an illustration, that the freight rate between Galveston and any point under 261 miles from Galveston (211 miles from Houston) is less than the mileage rate for the same distance between other points in common-point territory; at 261 miles the rate is the same as between other points equally distant, and for all distances over 261 miles the rate is in excess of the rate for the same distance between any other points equally distant in common-point territory. Take a point 200 miles from Galveston, which would be 150 miles from Houston. The rate to Houston, (150 miles) is found from the table to be 58 cents. Add to this the differential of 7 cents and we have 65 cents as the rate to Galveston, which is less than the mileage rate for 200 miles, which is found to be 70 cents. This is on account of water competition for the 50 miles of the distance between Galveston and Houston and the rate is therefore unobjectionable. But take a point 261 miles from Galveston, which would be 211 miles from Houston, and the rate for the 211 miles to Houston is found to be 75 cents, and add-

ing to this the 7 cents differential, we have 80 cents for 261 miles, which is exactly the same as any other 261 miles, between other points and common-point territory. Here the effect of water competition has disappeared. This rate, I think, in the light of the decision in the Galveston Chamber of Commerce case, and other authorities, can not be sustained.

Now take a place 300 miles from Galveston, which is 250 miles from Houston, and we find the rate to Houston to be 80 cents, and, adding the 7 cents differential, we have 87 cents as the rate to Galveston, which is 7 cents per hundred pounds in excess of the rate between other points 300 miles apart in common-point territory. Here water competition for 50 miles over the bayou has lost all beneficial effect and has actually become a burden to commerce. This, rate is, I think, also invalid.

The illustrations above given hold good with the other tariffs where the differential is applied—the distance within which water competition reduces rates, the point at which its effect becomes mutualized, and the distance at which it becomes a burden varying with the different tariffs.

Having given you what I think is the effect of the decision in the Galveston Chamber of Commerce case, I will now refer briefly to a few statutes and other authorities in line with said decision.

The second paragraph of Article 4574 of the Revised Statutes, relating to preferences and discriminations, reads as follows:

"It shall also be unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, firm, corporation or locality, or to subject any particular description of tariff to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"This section was modeled after the first paragraph of Section 3 of the Interstate Commerce Act, which reads as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular discription of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation or locality, or any description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Fed. Stat. Ann. Col. 3, p. 816.

The above section of the Interstate Commerce Act was modeled after Section 2 of the English act of 1854, which, so far as it is necessary to quote, reads as follows:

" * * * And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever; * * *" Judson Int. Com. Section 173, p. 212.

"It will be noted that the provisions of the three statutes above quoted are practically identical in effect, and almost identical in terms, the only difference in the language worthy of note being that

the act of Congress and the Texas act *in express terms* prohibit the giving of any undue or unreasonable preference or advantage to any *locality,* while the English act, although having the same effect, does not make such prohibition in the express terms embodied in the American act.

In the case of Interstate Commerce Commission vs. B. & O. R. R. Co., 144 U. S., 300 (36 L. Edition, 706) the court, in an opinion by Mr. Justice Brown, calls attention to the fact that Section 3, of the Interstate Commerce Commission act was modeled after the English act above quoted, and after calling attention to some differences in the acts, says: "But so far as related to the question of undue preference, it may be presumed that Congress in adopting the language of the English act had in mind the construction given to those words by the English courts, and intended to incorporate them into the statute," citing McDonald vs. Hovey, 110 U. S.. 619 (28 L. Edition, 269.)

On the second page of the opinion of this case, the court says: "We agree, however, that the plaintiff in its contention that a charge may be perfectly reasonable under Section 1 (of the Interstate Commerce act) and yet may create an unjust and unreasonable preference under Sections 2 and 3. As was said by Mr. Justice Blackburn, in Great Western Railroad Company vs. Sutton, L. R., 4 H. L., 226-239, when it is sought to show that the charge is extortionate as being contrary to the statutory application to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

On the question of undue preferences and advantages, see also Ranson vs. Eastern Counties R. Co., 1 C. B., N. S., 437, and Oxdale, vs. N. E. R. Co., 1 C. B., N. S., 454.

In American and English Encyclopedia of Law, Volume 17, page 143, it is stated that "a carrier has no right to make rates so as to overcome the natural advantages of one place over another, or so as to build up one place or section at the expense of another."

In Judson on Interstate Commerce, Section 184, page 226, the writer says:

"The Commissioner has repeatedly held that a town favorably situated for trade, possessing natural advantages therefor, is entitled to the benefits in rates naturally arising from such location," and also says: "The law requires the regulation of railroad charges according to the ascertained rights of persons and places, and it is not an agency for the regulation of trade by enabling shippers or communities to do business by putting them on even terms with rivals more remote from competitive territory," citing Eau Claire Board of Trade vs. Chicago, M. & S. P. Ry. Co., 5 1-C, Rep., 293. See also Moore on Carriers, page 923.

Yours very truly,

JAMES D. WALTHAL,
Assistant Attorney General.

CORPORATIONS—RAILROAD COMPANY.

Texas & Pacific Coal Company would not have the right to guarantee the bonds, nor the right to acquire the stock of a railroad company. A corporation without express statutory authority has no power to enter into a contract as surety or guarantor and lend its credit to another corporation. The charter of a corporation is the measure of its powers.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 6, 1909.

Hon. Allison Mayfield, Chairman of the Railroad Commission, Building.

DEAR SIR: We are in receipt of yours of the 30th ult., enclosing a letter addressed to you by Edgar S. Marston, of New York, and you ask us to give you an opinion upon the question submitted by Mr. Marston. The question is as follows:

"Is there any State law or a ruling by the Commission, which would prevent the formation of a railroad company with a capital of $..... and bonded indebtedness of $..... and in consideration of the guarantee of the principal and interest of the bonds by the Texas & Pacific Coal Company the stock of the railroad to be issued to the coal company? If this is legal, I believe I will submit the proposition to the stockholders of the coal company. I understand the road would cost about $500.000 and as to the division of the stock, as to the amount of bonds and stock, I understand the Commission would agree as long as the securities issued are not in excess of what would be recommended by the engineer of the Commission."

There are several questions of law involved in the above inquiry.

At the outset I desire to call your attention to the statutes governing the incorporation of railroad companies.

Article 4351 of the Revised Statutes provides:

"No railroad corporation shall be formed until stock to the amount of $1000 for every mile of said road so intended to be built shall be in good faith subscribed, and 5 per cent of the amount subscribed paid in to the directors of such proposed company."

Article 4350 of the Revised Statutes prohibits the formation of railroad corporations with less than ten incorporators who are required to be subscribers to its capital stock.

The other legal questions involved in the inquiry are:

1. Whether the Texas & Pacific Coal Company would have the right to guarantee the bonds of a railroad company; and,

2. Whether the said Texas & Pacific Coal Company would have the right to acquire the stock of a railroad company?

Both of these questions must be answered in the negative.

Article 665 of the Revised Statutes provides:

"No corporation created under the provisions of this title shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation."

In Railway Company vs. Gentry, 69 Texas, 632, the Supreme Court held that the provision of the statute just quoted is merely declaratory of the common law by which corporations are strictly confined in their powers to the limits and purposes for which created.

Even if conceded that the statute above quoted is no more than a reiteration of the common law upon the subject, nevertheless the fact that it was incorporated into the statute is evidence of an intense legislative purpose to restrict corporations to the objects for which they are created.

First. As to the Power of a Corporation to Guarantee the Bonds of Another:

It is no part of the ordinary business of the Texas & Pacific Coal Company to undertake the payment of the debts of others, and therefore without legislative authority in this behalf it would have no power to enter into the engagement of a guarantee or endorsement of the bonds of a railway company.

See:

Bank of Genesee vs. Patchin Bank, 13 N. Y., 309.

Smead vs. Ry. Co., 11 Ind., 104.

Central Trust Co. vs. Ry. Co., 98 Federal, 666.

Jones on Corporate Bonds & Mortgages, Section 280, and authorities there cited.

In the case of Northside Ry. Co. vs. Northington, 88 Texas, 562, the Supreme Court of this State held that a corporation formed for the purpose, among others, of the purchase, subdivision and sale of lands in cities, towns and villages, was without authority to extend its credit to foster the interests of a street railway company.

In the above case the court says:

"Viewed in the light of the peculiar facts of the case it is apparent that the building up and settlement of the suburb tended to increase the business of the street railway which connected that suburb with the city of which it was the outgrowth. On the other hand it is equally clear that the establishment of the street railway tended to promote the enterprise of the other corporation. It is also clear that the establishment and maintenance of the street railway is not an object which was expressed in the articles of incorporation of the city company, and that the building up of an addition to a city is not a purpose expressed in the charter of the other corporation. That the success of the one enterprise tended to promote the success of the other was not itself sufficient to authorize the one corporation to aid the other, for the reason that the benefit which was to accrue was not the direct result of the means employed * * *.

"The general law in force at the time this corporation was created provided that a private corporation might be formed for the purpose, among others, of 'the purchase, subdivision and sale of lands in cities, towns and villages'. Laws of 1885, p. 59 Ch. 61. We construe this to give the power to purchase lands, and to lay them off into streets, blocks and lots, and to sell them in subdivisions for the purpose of profit. Many enterprises suggest themselves which might be entered into by such a corporation, which would tend to promote the success of the undertaking. As a general rule, there is probably none that would be better calculated to produce that effect than the construction and maintenance of an ordinary railroad. But can it be said that such a corporation has the power to embark its capital in such an enterprise? A limit must be laid down as to the implied powers of a corporation: and, with reference to a company char-

tered for a business purpose, we think the proper line of demarcation is between those powers which are reasonably necessary to the business, or which are usually incident to its prosecution, and those which are not."

Clark and Marshall on Corporations lay down the rule to be, that in the absence of express statutory authority a corporation has no power to enter into a contract as surety or guarantor, and thus lend its credit to another corporation or person. The objection to such contract, said Judge Taff, "is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors and the State have the right from its charter to expect".

The rule that a corporation has such power only as is conferred by its charter, is based upon the ground that a corporation derives its powers as well as its existence from the State and not on the ground that the exercise of the powers not so conferred is injurious to the corporation or its members. It follows, therefore, that a corporation has no power to make contracts or engage in transactions which are foreign to the objects for which it was created, merely because such contracts or transactions will be beneficial to it.

In Plymouth Ry. vs. Caldwell, 80 Amer. Decisions, 526, it was decided that a railway company was not authorized by its charter to maintain a canal.

In the case of Deaton Grocery Co. vs. International Harvester Company, 105 S. W. Rep., 556, the Court of Civil Appeals of this State quoted with approval the case of Timkinson vs. Railway, Law Reports, 35 Chancery Division, 675, wherein it was held that a proposed subscription by the company to an institution known as the Imperial Institute was not prevented from being ultra vires by the facts that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line.

The charter of a corporation is the measure of its powers. It can exercise only such powers as are conferred upon it, either in express terms or by necessary implication in the law of its creation. (See Noyes on Inter-Corporate Relations, 2 Edition, page 473.)

Second. As to the Right of a Corporation to Acquire the Stock of Another:

In the above work the author says:

"A purchase of stock in another corporation involves a participation in a new and distinct enterprise. A corporation can make such a purchase only when expressly authorized to do so by statute or when the power can be implied as incidental to the powers specifically granted."

(See opinion of Chief Justice Marshall in Dartmouth College case, 4 Wheat. 636.)

In the case of De La Vergne Co. vs. German Savings Institute, 175 U. S. 54, the Supreme court of the United States, says:

"But as the powers of corporations created by legislative act are limited to such as the act expressly confers, and the enumeration of these implies the exclusion of all others, it follows that, unless express permission be given to do so, it is not within the general powers

of a corporation to purchase the stock of other corporations for the purpose of controlling their management."

See also:

First National Bank vs. National Exchange Bank, 92 U. S., 122.

Morawetz on Corporations, Section 431.

Thompson on corporations, Section 1102.

People vs. Chicago Gas Trust Co., 130 Ill., 268.

Cal. Bank vs. Kennedy, 167 U. S., 362.

It follows from the foregoing that the Texas & Pacific Coal Company would neither have the authority to guarantee the bonds of a railroad compnay to be built, nor to acquire the stock of such railroad company.

I am returning you herewith the letter from Mr. Marston to you.

Yours very truly,

JAMES D. WALTHAL,
Assistant Attorney General.

CORPORATIONS—FOREIGN.

It is not a violation of the laws of this State for agents to solicit subscriptions to capital stock of foreign corporations which have not a permit to do business in Texas.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 9, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of the 7th inst., you ask whether or not the sale of stock in a fire and life insurance company which is not authorized to transact business within the State, through soliciting agents, is in violation of the laws of this State, and also, whether the sale of such stock, accepting the notes of purchasers in payment therefor, is in violation of the laws of this State.

We answer this question in the negative. Section 155 of Chapter 16 of the acts of 1874 makes it unlawful for any person to act as the agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this State or out of it without first procuring a certificate of authority, etc.

Section 156 of the act of 1875 provides a penalty against any person transacting a business of any kind of insurance, either as agent, solicitor or broker, without obtaining a certificate of authority therefor.

Section 158 of the act of 1879 defines who are agents and there is no provision in said act defining an agent as one who solicits subscriptions for stock in any insurance company.

Unless the terms "transacting business" shall cover the sale of such stock, then it would not be a violation of law, even if the law itself did not define who are insurance agents and merely provided that such agents should be forbidden to transact business in the

State of Texas in behalf of said companies, such prohibition would be held to refer to the doing of some act or the performance of some work for which the corporation was created.

In the case of Baird vs. Union Publishing Company, 71 Alabama, 62, the court, in construing what is meant by the terms "doing business", said:

"Receiving subscriptions to a newspaper or collecting the money therefor, although the paper is published in another State and by a corporation, is not doing business in this State within the meaning of said Constitution. There must be a doing of some work or an exercise of some function for which the corporation was created to bring the case within that clause. The doing of business means the performance of acts which fall directly within the purview of their corporate powers."

In a case decided by the Supreme Court of Kansas, 18 Kansas, 369, the identical question here submitted was passed upon by that court. The statute of that State provided that "no insurance company, created by or under the laws of any other State or Territory, shall directly or indirectly take risks or *transact any business of insurance* without obtaining a certificate of authority from the Auditor of the State." It was admitted in this case that the plaintiff had never taken out such certificate and that it was a foreign corporation. The court in passing upon the question of whether or not a subscription of stock taken by an agent of the company was transacting business of insurance, said:

"The plaintiff in error subscribed for stock in this company, paying part cash and gave his notes for the balance. The whole transaction took place in this State. Was the plaintiff in error liable on these notes? Clearly so. The only prohibition of the statutes is on 'risks' and 'business of insurance', but stock subscriptions are neither, at least not in legal parlance, though when taken in some corporations there is a sense in which they may well be called 'risks', (this observation of the court may well apply in the subscription of stock mentioned by you), but in legal phraseology they are as distinct as any transaction known to the law."

In the case of Payson vs. Withers, United States Circuit court, 5 Bliss (U. S.), 299 was a case similar to the facts in the Kansas case, except the law of Indiana, where the stock subscription was taken, provided with reference to foreign corporations that the agents, before entering upon their duties of agency, should deposit a power of attorney or authority under which they acted with the county clerk and also file authority of its board of directors authorizing citizens of the State to maintain actions against them and authorizing service of process, and the section further provided that foreign corporations *should not enforce any contract* made by its agents before a compliance was made with these provisions. In this case the defendant was a foreign corporation and had not complied with the provisions of this act and sought to enforce a contract made by its agent for the subscription of stock. In passing upon the question the court uses this language:

"Now it is a question which lies at the threshold of the examination of this part of the case whether the act which was done by the

agent of this corporation and the agreement which was entered into by the defendant with that agent was such an act or agreement as was contemplated by this law and which it intended to render inoperative unless the agent had complied with its conditions. I am clearly of the opinion that it was not. Concede that a State would have the power to prevent any of its citizens from subscribing within its own limits to the stock of a corporation of another State, it would require a clear and explicit declaration that such a subscription should be null and void except upon the compliance with certain terms. This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscriptions to its stock. The ordinary business done by the corporation in question here was an insurance business."

You are, therefore, respectfully advised that it is not a violation of any of the laws of this State for agents to solicit subscriptions to the capital stock of foreign corporations which have not a permit to do business in Texas.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General.

RAILROADS—DISCRIMINATORY RATES—MAY GRANT REDUCED RATES TO STATE, COUNTY, CITY OR TOWN GOVERNMENTS.

Railroad Commission is without authority to grant special rate to T. & P. Ry. and connecting lines on cement from Dallas to Eagle Ford, Texas, for the purpose of being used only in the construction of Galveston causeway. Such rate should extend to all shipments of such commodity, to whomsoever made, over the same lines of road. Railroads may grant reduced rates to State, county, city and town governments.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, August 26, 1909.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: The following letter to the Railroad Commission has been referred to this Department with the request that we give you an opinion thereon.

THE TEXAS & PACIFIC RAILWAY CO.

DALLAS, TEXAS, August 18, 1909.

To the Honorable The Railroad Commission of Texas.

GENTLEMEN: With the permission of the Commission, we wuld like to protect rate of 8 cents per 100 pounds on cement, carloads, minimum weight 60,000 pounds per car, from Harry's and Eagle Ford, Texas, on the T. & P. Ry., to Galveston, via Dallas and the T. & B. V. Ry. This rate is for cement going into the construction of the Causeway and is to apply only on shipments for that construc-

tion work. Kindly make the authority, if granted, expire December 31, 1909.

Please consider the matter and advise as early as convenient.

Yours truly,

(Signed) E. L. SARGENT,

General Freight Agent, T. & P. Ry. Co.

The question involved is whether the railroad companies concerned can, with the sanction of the Railroad Commission, legally put into effect a special reduced rate on cement from Harry's and Eagle Ford, Texas, to Galveston, to be used in the construction of the Galveston Causeway. It is our opinion that such a rate would be clearly discriminatory and in violation of Chapter XLII of the the acts of 1907. Section 4 of this act provides:

"No company subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device or exchange, demand charge or collect or receive from any person, firm, association of persons or corporation, a greater or less or different compensation for any service rendered or to be rendered, in the transportation of passengers, property or messages than it charges, demands, collects or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions."

It was the purpose of the above section to enforce equality between shippers, and it prohibits any special rate or rebate or other device by which two shippers shipping over the same line the same distance under the same circumstances of carriage are compelled to pay different prices therefor.

It is difficult to perceive that there would be any dissimilarity between the transportation of cement from Harry's and Eagle Ford to Galveston to be used in the construction of the Causeway, and that to be used for other purposes. See Wight vs. United States, 167 U. S., 512.

To grant a special rate on cement to the contractors engaged in constructing the Galveston Causeway would clearly be a discrimination between persons—a preferential rate—and is unlawful. The value, cost and risk of the same service is the same without regard to the person for whom it is rendered. It might be that a carload of cement from Harry's or Eagle Ford to Galveston would be consigned partly to the contractors constructing the Causeway and partly to other contractors in Galveston engaged in other work, and it would certainly be a discrimination against the latter to charge them a higher rate than the former.

In the case of "*In Re* Alleged Unlawful Charges for Transportation of Coal," decided by the Interstate Commerce Commission and reported in 4th I. C. R., 157, the railroads entering Nashville attempted to give to the manufacturing industries at that place a lower rate on coal than they charged the public generally. But the Interstate Commerce Commission held the rate unlawful as being

a discrimination in favor of the manufacturers and against the consuming public. The above case is very similar to the one we are now considering.

It is true that Section 2 of the act of 1907, from which we have already quoted, provides that nothing therein shall be construed as to prohibit railroad companies from making special rates under special conditions when authority is first obtained from the Railroad Commission. We do not think, however, that this section has any bearing upon the question under consideration. It can not be so construed as to make a special condition the fact that the cement is for the use of the contractors constructing the Causeway. What the Legislature meant was that railway companies might, with the sanction of the Commission, put in a special rate under special conditions, but to be open to the public generally or that portion of it desiring to take advantage of such rate.

There is another provision of the statute which would have a bearing upon the question under consideration were the county of Galveston or the city of Galveston constructing the causeway. Section 5 of Article 4574 provides that railroad companies may grant reduced rates for handling freight for the State or any county, city or town government. We do not understand, however, that Galveston County in constructing the Causeway or that it would derive a benefit from reduced rates on material going into its construction. As we understand it, the Causeway is being built under contract by private contractor.

Yours very truly,

JAS. D. WALTHAL,
Assistant Attorney General.

COMMISSIONERS COURT—RAILROAD RIGHT-OF-WAY—UNINCORPORATED TOWNS, RIGHT TO THE USE OF STREETS AND ALLEYS OF, ETC.

Commissioners court can not deny railway right to construct track along the streets of an unincorporated town, but railway is liable to abutting owners for damages. Legislature has fixed right of railway companies to construct track along the streets, highways, water courses, turnpikes, etc.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, February 17, 1910.

Hon. C. J. Hinson, County Judge, Groveton, Texas.

DEAR SIR: We are in receipt of yours of the 15th in which you state that by the unanimous request of the commissioners court, they desire the opinion of this Department upon the following question:

"Has the commissioners court of a county in this State the power under the law to grant to a railroad company the right to build and

operate a railroad along a street in an incorporated town when the abutting property owners strenuously object thereto?''

You are respectfully advised that Article 4426, Revised Statutes, confers upon railroad companies the right ''to construct its road across, *along or upon* any stream of water, watercourse, *strect, highway,* plank road, turnpike or canal which the route of said railway company shall intersect or touch,'' etc.

It, therefore, seems that the Legislature has fixed the rights of railroad companies.

The law-making power has in specific terms granted the right to such companies to construct their lines upon the streets, highways or public roads of this State. But the company will be liable for any damages to the abutting property owners, caused by the exercise of the right.

There is no statute, of which we are aware, that gives to the commissioners court the specific authority to grant to a railroad company a right-of-way over public roads. The Legislature has granted the authority directly, but the commissioners court has been given authority to lay out, establish, change and discontinue public roads and highways. (Section 3, Article 1537, Revised Statutes.)

By virtue of the general control over public roads given by law to the commissioners court, we think the court would have the power to direct the company, as to the place upon the road it should construct its line and further direct the method of construction so as not to render the road unfit for public use as a highway. They can direct the company as to repairs to the road and exercise general supervision and control over such road as may be provided by law.

If the railroad company files an application with the court indicating its desire to use any portion of any public road for a right-of-way for its line, it would be proper for the court to enter such orders as may be necessary, in the exercise of its general powers of managemnt or control, as hereinfore stated but the court should not undertake by any order to affect the rights or remedies of any abutting property owners, as to any damage which he may suffer by reason of such use.

It has been the uniform construction of this Department that the commissioners court has the same control over the streets and alleys of unincorporated cities or towns as it has over public roads in rural districts. but in the matter of allowing the use of such highways to railroad companies, the Legislature has dealt directly upon that subject in the act above quoted from, and the control of the court does not extend to the right to refuse or grant a power which the Legislature has granted. To hold otherwise would be to declare that the commissioners court, a creature of the Legislature, would be clothed with a power to deny a right which its creator had granted.

It, therefore, follows that it is our opinion that it is unnecessary that the court enter any order *granting* the company any right to use any such street or road; but it should enter such orders as it

may deem necessary to safeguard the public from all the inconveniences possible and use all its lawful powers to minimize the damage to property owners if such highways are so used.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

RAILROADS—SWITCHES—TRES PALACIOS SPUR.

Railway company required to furnish freight and passenger service on its lines, but not on spur track. When railway company constructs switch for accommodation of freighters, required to furnish sufficient number of cars for transportation of freight therefrom when requested to do so.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 30, 1910.

Hon. William D. Williams, Railroad Commissioner, Building.

DEAR SIR: You have submitted to the Attorney General the question as to whether or not the Railroad Commission has authority under the law to require the St. Louis, Brownsville & Mexico Railway Company to furnish to the public freight and passenger service over the line constructed by it between Buckeye, a station on its main line of railway, and the plant of the Tres Palacios Rice and Irrigation Company, a distance of about nine miles, said tract being known as the Tres Palacios Spur.

In answering your inquiry the question to be determined is, whether the track under consideration is a "branch line" within the meaning of the statutes, or merely a spur or switch track. If it is a "branch line" then the railway company is clearly required under the statutes to furnish freight and passenger service to the public without discrimination; but, if on the other hand the track in question can only be regarded as a spur or switch, then we think the railway company can not be required to operate passenger trains over said track, nor freight trains, except for switching purposes.

The track in question was constructed under a contract between the railway company and the rice company and in said contract it is designated as a "private spur track". Under the contract the rice company was required to do all necessary clearing, grubbing and grading of the right-of-way and to construct its own warehouse and store rooms for the accommodation of its freight at its own cost. The railway company was required to furnish all necessary material, including rails, ties, trestling, switching fixtures, etc., and construct said spur at its own cost, the track to become the property of the railway company upon completion. The rice company obligated itself to deliver for transportation all freight and tonnage owned and controlled by it and originating on its plantations to the railway company at its ware house and to pay to the railway company a switching charge of $10 per loaded car. It was provided in said contract that no regular freight service was contemplated or agreed to and that no passenger service of any kind was to be furnished. It also contains this further provision:

"It is expressly understood and agreed that the said railway company only agrees to run its regular main line freight trains over said private spur track for the purpose of handling the freight business contemplated and to do necessary switching."

The contract above referred to only provided for the construction of four and one-half miles of track and subsequently it was extended four and one-half miles under an agreement substantially like the one which we have been considering.

In March 1907, the rice company and the railway company applied to the Commission to have it approve the above contract. The Commission refused to approve this contract on the ground, as it appears from the endorsements made on the papers, that the railway company could not own and operate a swith and limit its service to one party only, and upon the further ground that the proposed rate for service was excessive.

Afterward in April 1907, the railway company made application to the Railroad Commission showing that it then had in course of construction the switch or spur track mentioned extending from Buckeye four and one-half miles to the pumping station of the rice company and asking that a switching charge of $10 per car for transporting freight over said spur be authorized by the Commission, which spur track it was stated was being constructed for the purpose of handling freight to and from the plant and between said plant and the main line of the railway company at Buckeye. In said application it was further stated that the railway company did not contemplate the operation of regular trains, or to carry passengers over the switch or spur track and that the only service contemplated to be rendered was the transportation of freight for said rice company between Buckeye and the company's plant, which transportation was alleged not to be a part of the carriage of freight by the railway company as a common carrier. Acting upon this application the Railroad Commission on April 9, 1907, issued its circular No. 2577, authorizing a charge of $10 per car for carload shipments of freight between Buckeye and the plant of the rice company.

Again in September, 1908, the railway company applied to the Commission, stating that it had constructed the switch or spur track above described and that it proposed to extend said spur track for a distance of approximately five miles from the pumping station in order to more efficiently handle the tonnage of the Tres Palacios Rice and Irrigation Company, and asking the Commission to modify its former order so as to authorize a switching charge of $15 per car on such freight as might be transported over such swith or spur track. Acting upon this application the Commission issued on September 17, 1908, its circular No. 2896, granting authority for the charge of $15 per car for the transportation of carload shipments of freight between Buckeye and the plant of the rice company.

The track in question was not built under any amendment of the charter of the railway company, authorizing the construction of a branch line, nor was it built under any order of the Railroad Commission passed in pursuance of Chapter 68, Acts of the Twenty-eighth Legislature, giving the Railroad Commission authority to re-

quire railroads to build sidings and spur tracks. In this connection we call your attention to the case of Railroad Commission vs. St. Louis Southwestern Railway Company of Texas, 80 S. W. Rep., 103; same case, decision by Supreme Court, 98 Texas, 67. In this case the Supreme Court held that the act of 1903 above referred to was not intended to require railway companies to build switches and spur tracks away from their lines to accommodate individual interests. There are no stations on said spur track. None have been designated by the railway company and filed with the Railway Commission.

We do not believe that Article 4494 of the Revised Statutes, as amended by the First Called Session of the Twenty-eighth Legislature, has any application. This article imposes upon railway companies the duty to start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice and to furnish sufficient accommodations for the transportation of all passengers and property. Neither do we believe that the provisions of Article 4580 of the Revised Statutes, as amended by the Act of the Twenty-eighth Legislature, page 183, have any application. Under this act it is made the duty of the Commissioners to see that upon every railroad and branch of same carrying passengers for hire in this State shall be run at least one train a day upon which passengers shall be hauled. My opinion is that the track in question is not a branch line within the meaning of the statute, but merely a switch or spur track and that the Commission is without authority to require the railway company to furnish to the public regular freight and passenger service.

I call your attention, however, to Article 4522 of the Revised Statutes, which provides that when a railroad company constructs a switch on its road for the accommodation of freighters, it shall be bound to furnsh a sufficient number of cars for the transportation of freight therefrom when requested to do so. I think this statute applies to the line of road in question and that the Commission has authority to require compliance therewith.

Yours very truly,

JAMES D. WALTHAL,
Assistant Attorney General.

LABOR—RAILROADS—CARSHEDS.

Railroads required to erect and maintain car sheds for the protection of employes in inclement weather.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 8, 1910.

Hon. Joseph S. Myers, Commissioner of Labor, Capitol.

DEAR SIR: We have your letter of March 12, 1910, which is as follows:

"Chapter 53 of the Acts of the Thirty-first Legislature, known as the Carshed Law, provides as follows:

" 'Railroads—Requiring Sheds to Protect Employes From Inclement weather.

" 'Section 1. It shall be unlawful for any railroad company, corporation, association, or receiver or other person, owning, controlling or operating any line of railroad in the State of Texas, to build, construct or repair railroad cars equipment in the State without first erecting and maintaining at every division terminal or other point where five men or more, not including car inspectors, are regularly employed on such repair work, a shed over a sufficient portion of its tracks used for such repair work, so as to provide that all men regularly employed in the construction and repair of the cars, trucks or other railroad equipment shall be sheltered from rain and other inclement weather.

" 'The provisions of this act shall not apply at points where less than five men, not including car inspectors, are regularly employed in the repair service, nor at division terminals, or other points where it is necessary to make light repairs on cars, nor to cars loaded with time or perishable freight, nor to cars when trains are being held for the movement of such cars.

" 'Section 2. Any railroad company or officer or agent thereof, or any other person, who shall violate the provisions of this act, by failing or refusing to comply with its provisions, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $50 nor more than $100, and each days' failure or refusal to comply with the provisions of this act shall be considered a separate offense.

" 'Section 3. This act shall take effect and be in force on and after December 1, 1909.'

"I am submitting herewith a photograph of the carshed constructed with the view of complying with the requirements of this statute by the Fort Worth & Denver Railroad Company at Fort Worth, Texas, and I respectfully request your opinion in writing as to whether or not the same complies with the requirements of the statute referred to."

The photograph submitted by you with said letter shows the shed in question to be covered on the top, but entirely open at each end and open on each side from the ground to within a short distance of the roof. We are informed that the shed is about 18 feet high, about 200 feet long, and about 25 feet wide, and that the distance on the sides from the ground to the side coverings is more than 10 feet.

You are advised that such a shed is not in compliance with the law quoted by you. It is apparent that it will not be sufficient to shelter and protect men working thereunder from drifting rain, from drifting sleet, from snow or from blizzards, and all these come within the meaning of the term "inclement weather", as used in said act. The word "inclement" is defined by Webster's International Dictionary as follows:

"Physically severe or harsh (generally restricted to the elements or weather); rough; boisterous; stormy; rigorously cold, etc.; as, *inclement* weather."

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

RAILROADS—RAILROAD COMMISSION—DISCRIMINATIONS —ADVANCING FREIGHT CHARGES, DRAWBACKS, ETC.

Railroad Commission has power to prevent advancement of freight charges, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 9, 1910.

Hon. William D. Williams, Railroad Commissioner, Capitol.

DEAR SIR: We have your recent letter in which you say:

"There prevails in some of the trade centers of Texas a practice in the transportation of freight, the legality of which I am inclined to question, which I wish to submit to you for your opinion.

"For the sake of illustrating this practice, we will suppose a car loaded with agricultural implements to have been shipped from Chicago, Ill., to Dallas, Texas, or to any other city in the State. The car arrived at its destination and is delivered to the consignee, who unloads the contents into his warehouse and pays all freight charges. Later, it may be only a day, or it may be weeks, or even months, the consignee sells certain of these implements to a merchant, say at Ennis, and ships the same to this merchant by the H. & T. C. Ry. He weighs the implements sold to the Ennis merchant and calculates what portion of the freight he paid on the entire original car ought to be borne by the implements which he is now re-shipping to Ennis, and the sum so determined is paid to him by the railway company, which intends to and ordinarily does collect this sum, with freight added, from the Ennis merchant.

"This practice is called 'advancing charges,' but it differs obviously from advancements ordinarily made upon interchanged business between connecting lines of railway, where the advances made are of charges which have accrued in the course of the very movement then in progress and still uncompleted, and where payments are made not to the owner or consignor of the commodity, but to the first in order of several lines of railway over which the shipment must move to its destination.

"It may be assumed that the advancing of these proportions of charges earned in former and completed movements is of value to the second shipper, since it is stated in communications to this Commission that the effect of the practice is to take away business from localities and shippers which are not favored and to give the same to more fortunate cities and individuals.

"The advancement is not made in the course of transportation,

but before transportation begins. It is not warranted by necessity, but is a loan made without interest by the railroad to the shipper. and an understanding on the part of the railroad that it will collect the amount of the loan from the consignee at destination. The freight rate is fixed by the Commission for transportation only, but for this rate the railroad undertakes not merely the transportation, but the collection also and advances the money without interest. The amount of the loan is fixed at such a sum as the shipper can convince the railroad agent that the former has already paid in the way of transportation charges on the thing which is being shipped. Advances can be given or denied, or made large or small, at the discretion of the agent. I have doubted if such a transaction may not be a rebate or a drawback, and if it will not result in preferences to individuals and localities.

"The question submitted is whether the practice is prohibited by law."

We have not sooner replied to your letter for the reason that it has been with great difficulty that we have reached a satisfactory opinion in reference to the questions above stated.

An exhaustive investigation has failed to reveal any authority, deciding the precise question submitted.

The same question was submitted to Hon. Martin A. Knapps, Chairman of the Interstate Commerce Commission, and while he did not undertake to decide the question for the Commission, he expressed it as his individual views that the practice was obviously improper because of the opportunity it affords to discriminate between shippers.

We have a statute in this State prohibiting discrimination between shippers. Article 4574, Revised Statutes, provides in part as follows:

"If any railroad subject hereto, directly or indirectly, or by any special rate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any services rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited.

"It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever."

Unless the railroad companies extended the privileges of advancing charges to all shippers at every point within this State, covering every character of commodities, it would result in such undue and unreasonable preference or advantage to the favored shippers as to make the transaction an unjust discrimination within the meaning of the above quoted statute.

The Railroad Commission of Texas is vested with power, and the law makes it the duty of the Commission "to adopt all necessary rates, charges and *regulations* to govern and regulate railroad freight and passenger traffic, the power to correct abuses and prevent unjust discrimination."

I am advised that the Railroad Commission has issued its order prohibiting the practice by the railroads of advancing these charges. We are of the opinion that the law clearly vests such power in the Commission and should the railroads indulge in such practice in violation of such order, their act in so doing would be unlawful.

If the Commission is of the opinion that the practice of advancing freight charges may result in discrimination, or become an abuse, it clearly has the power to prohibit it by its order, and the law makes it its duty to do so.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

OPINIONS ON THE VARIOUS SUBJECTS OF TAXATION.

OCCUPATION TAXES—CANVASSER FOR, AND DEALER IN LIGHTNING RODS.

Where orders solicited and given by parties within this State for lightning rods, and such orders sent direct to factory outside of the State and by the factory furnished direct to the consumer, it is interstate business, and not subject to occupation tax.
"Dealer" and "canvasser" discussed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 12, 1909.

Hon. J. W. McDonald, State Revenue Agent, Capitol.

DEAR SIR: Your letter of the 9th inst., seeks a construction by this Department on Subdivision 35 of Article 5049 Revised Statutes, which reads as follows:

"*Subdivision 35, Lightning Rods*:

"From every person, firm or association of persons dealing in lightning rods, an annual tax of $36 to the State and $18 as county tax to the county in which such business is carried on; upon every person canvassing for the sale of lightning rods, an annual tax of $100 and $50 as county tax in each county in which such canvassing is done."

The question as to when the canvasser for the sale of lightning rods is protected by the Interstate Commerce clause of the United States Constitution can be better presented by quoting a portion of the opinion of the Court of Criminal Appeals in the case of Tolbutt vs. State, 44 Southwestern 1091, wherein the court says:

"The evidence shows that the appellant was representing Cole Bros., who reside in Greencastle, Putnam County, Indiana, and who carried on their business at that place. Cole Bros., have not and never have had a place of business within the limits of the State of Texas, and appellant is their agent or representative soliciting orders for the placing of lightning rods on houses in Grayson County; and when the orders are secured they are sent to the place of business of Cole Bros., at Greencastle, Indiana. Lightning rods were then made in obedience to said orders, shipped to Texas, and when required to do so, appellant assisted in placing these rods at places desired by purchasers. For this he collected the money for the sale or took notes as the case might be. Without going into any discussion of the matter further than heretofore, we hold that the conviction was erroneous. This seems under the decisions of the Supreme Court of the United States, to be a tax upon Interstate Commerce."

This quotation is a complete answer to the first paragraph of your letter. If, however, a foreign corporation establishes a warehouse in this State in which it carries in stock lightning rods, and when their solicitors or canvassers take orders for such lightning rods, the orders being forwarded to the warehouse within this State and filled from there, then and in that event such canvassers would not be protected by the Interstate Commerce clause of the Constitution

and would be subject to pay the tax provided in the subdivision above quoted.

A "person canvassing" within the meaning of this act is one who travels from place to place to solicit for and receive orders for lightning rods.

A "dealer" within the meaning of the foregoing article is one who buys to sell again the articles in which he deals. If the party who manages and keeps a warehouse within this State for a foreign manufacturing concern buys the lightning rods located in such warehouse from the factory and then sells them in this State either directly from his warehouse or through canvassers, he would be a dealer within the meaning of the statutes. But if he is merely acting as the agent of the manufacturing concern in managing this warehouse and delivers and fills orders in behalf of such concern, either directly or through canvassers, he would not be a dealer within the sense that would render him liable for the tax provided in the above section.

The Court of Criminal Appeals, in the case of Egan vs. State, reported in 68 S. W. Rep., 273, in passing upon the question as to what constitutes a dealer, says:

"Mr. Bouvier, in his Law Dictionary, says: 'A dealer in the common acceptation and, therefore, the legal meaning of the word, is not one who buys to keep or makes to sell but one who buys to sell again.' Our Legislature does not undertake to define the term 'dealer', therefore, we are relegated to our statutes which says that where words and terms are used without being specially defined they shall be taken in their ordinary acceptation—in other words, in the meaning commonly understood.

"The Waco Ice & Refrigerating Company was a manufacturer of ice and sold its product in wholesale and retail quantities. This, it seems to us, comprehended the entire scope of its business. We do not believe that under Subdivision 52 of Article 5049, under which this indictment was brought, appellant was liable as a dealer."

You are further advised that where a person is liable for the tax as a dealer or as a person canvassing that he must pay the State and county taxes in each county in which he engages as a dealer or a canvasser.

I believe this fully answers the question submitted by you.

Yours very truly,

C. A. LEDDY.
Assistant Attorney General.

GROSS RECEIPTS OCCUPATION TAX—CONSTUCTION OF LAWS—WHOLESALE LIQUOR DEALER.

Occupation taxes prescribed are applicable to only the business of wholesale dealer in or wholesale distributor of spirituous, vinous or malt liquors, taxes to be measured by gross receipts from such wholesale business only; required to report and pay tax on both cash and credit sales; not required to pay tax on sales made to another wholesale dealer.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 20, 1909.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: We are in receipt of your letter, in which you request of this Department an opinion upon the following questions which arise under Chapter 18, page 479 et seq., of the General Laws of the Thirtieth Legislature First Special Session, prescribing occupation taxes measured by gross receipts, which questions we answer, seriatim, as shown below, namely:

First: "Is a wholesale liquor dealer, who also sells by retail, subject to the gross receipt taxes on all his sales, wholesale and retail?"

The caption of said statute declares it to be "An Act providing for the levy and collection of an occupation tax upon individuals, companies, corporations and associations pursuing any of the occupations, viz: * * * wholesale distributors and wholesale dealers in spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, and defining wholesale distributors and dealers; * * * the business of owning, controlling, managing or operating any terminal railway company or terminal railway * * *," etc.

Section 11 of said act is as follows:

"Each and every individual company, corporation or association created by the laws of this State or any other State, who shall engage in his own name or in the name of others, or in the name of its representatives or agents in this State in the business of a wholesale dealer or wholesale distributor of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall on or before the first day of July, 1907, and quarterly thereafter, make a report to the Comptroller of Public Accounts, under oath of the individual, or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this State of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report shall pay to the Treasurer of the State of Texas, an occupation tax for the quarter beginning on said date, equal to one half of one per cent of said gross receipts from said sale as shown by said report.

"A wholesale dealer or distributor, within the meaning of this section, is any individual, company, association or corporation selling any of the articles hereinbefore mentioned either in his own or in the name of others or in the name of its representatives or agents to retail dealers, or who deliver on consignment to their agents for retail."

From the foregoing it is evident that the occupation taxes so prescribed are applicable to only the business of a wholesale dealer in or a wholesale distributor of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, and that such taxes are to be measured by the gross receipts from such wholesale business only, and that such taxes are not applicable to the occupa-

tion of a retail dealer, and that gross receipts from such retail business can not legally be considered in estimating the amount of such occupation taxes to be paid by such wholesale dealer or wholesale distributor. In other words, the statute refers to receipts from such wholesale business, but does not include receipts from any retail business which may be done by such wholesaler.

Second: "Is a wholesale liquor dealer required to report and pay gross receipt taxes on both cash and credit sales?"

Your attention is called to the fact that said statute requires of such wholesaler a quarterly report, under oath, "showing the gross amount collected and uncollected *from any and all sales made within this State* of any of said articles during the quarter next preceding", and expressly requires that the occupation tax to be paid to the State shall be "equal to one half of one per cent of said gross receipts from said sales *as shown by said report.*"

Inasmuch as the report must cover the amounts of all sales "collected and uncollected", and the tax prescribed must be estimated upon the total amount of sales shown by such report, your second question must be answered affirmatively.

Third: "Is a wholesale dealer subject to gross receipt tax on sales made to another wholesale dealer?"

It will be noted that the above quoted statute defines the meaning of the words "wholesale dealer or distributor" as those words are used in said Section 11, expressly restricting their meaning to any individual, company, association or corporation selling such articles "to retail dealers" or who deliver such articles on consignments to "to their agents for retail." This definition does not embrace the business of selling or distributing at wholesale to another wholesale dealer, and, consequently, such business is not subject to the taxes prescribed by Section 11.

I answer your third question negatively.

Fourth: "Are wholesale dealers subject to gross receipt tax on sales made to consumers?"

For the reasons stated in reply to your third question, I answer the fourth question negatively. The tax prescribed by said Section 11 is substantially therein declared to be upon the business of supplying the articles mentioned to retailers of such articles.

Fifth: "Are wholesale dealers subject to gross receipt tax on sales made to parties outside the State?"

Said Section 11 requires merely that the prescribed report shall show, that the prescribed occupation taxes shall be measured by the gross receipts from "any and all sales made within this State."

Whether any particular sale is or is not made within the State of Texas is a question to be determined upon a full statement of the facts of that particular case. If in a given instance it be found that, as a matter of law, the sale of any of the articles mentioned in said Section 11 was made within this State, the amount of such sale must be included in the quarterly report and must enter into and form a part of the basis of collection of the amount of such prescribed occupation tax; but, if it be found that such sale was, in fact, made outside of the State of Texas, it is not within the terms of this

statute and should not be included within the quarterly report, and should not be considered in calculating the amount of the prescribed tax.

Sixth: "I would also like to know if terminal or traction companies are not required to pay gross receipt tax, as some of them claim the law is unconstitutional."

Section 16 of said statute is as follows:

"Each and every individual, company corporation or association, whether incorporated under the laws of this or any other State or Territory or of the United States, or any foreign country, which owns, controls, manages or leases any terminal companies, or any railroad doing a terminal business within this State, shall, on or before the first day of April, 1907, and quarterly thereafter, make a report to the Comptroller of Public Accounts, under oath of the individual, or of the president, treasurer or superintendent of such company, corporation or association showing the total amount of its gross receipts from all sources whatever within this State during the quarter next preceding, and the average market value thereof during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date equal to one per cent of the total amount of its gross receipts from all sources whatever as shown by said report."

Under the terms and provisions of said Section 16 any and all terminal companies, and any and all railroad companies, doing a terminal business within this State, are clearly liable to the taxes therein prescribed.

This Department holds that said Section 16 is constitutional. As we understand it, the contention that said Section 16 is unconstitutional is based upon the decision of the Supreme Court of the United States in the Galveston, Harrisburg & San Antonio Railway Company vs. The State of Texas, involving the railway gross receipt tax act of the Twenty-ninth Legislature (1905), in which the Supreme Court of the United States overruled the unanimous decision of the Supreme Court of Texas, and by a vote of five to four held that statute repugnant to the commerce clause of the Constitution of the United States in that a portion of the gross receipts of the railway companies affected by that act were derived from interstate business.

If any terminal company or any railroad doing a terminal business within this State is in a position to claim under that decision exemption from the operation of said Section 16, we are not aware of the fact.

As to traction companies:

Section 10 of said statute is as follows:

"Each and every individual, company, corporation or association owning, operating or controlling any interurban, trolley, traction or electric street railway in this State and charging for transportation on said railway shall, on or before the first day of July, 1907, and quarterly thereafter make a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from said charges for transportation

on said railway paid to or uncollected by said individuals, company, corporation or association for the quarter next preceding. Said individual, company, corporation or association, at the time of making said report if in or if connecting any town or city of less than 20,000 inhabitants, shall pay to the Treasurer of the State as an occupation tax for the quarter beginning on said date equal to one half of one per cent of said gross receipts as shown by said report; if in a city of more than 20,000 inhabitants, said individual, company or corporation or association, at the time of making said report, shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date equal to three fourths of one per cent of said gross receipts as shown by said report. Provided that in ascertaining the population of any city or town, the same shall be ascertained by the last United States census, and provided further that where any interurban railroad shall connect any town having a population of more than 20,000 with another of less population, that it shall be liable for the taxes measured by the population of the largest town. Provided, further, that the provision of this act shall not apply to any street railway or traction company wholly within any town of less than 10,000 inhabitants."

The traction companies referred to in said Section 10 are clearly liable for the occupation taxes therein prescribed.

Section 22 of said statute is as follows:

"Except as herein stated all taxes levied by this act shall be *in addition to all other taxes now levied by law*, provided that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this act."

Article 5049 of Sayles' Revised Statutes of Texas provides:

"There shall be levied on and collected from every person, firm, company or association of persons pursuing any of the following named occupations an annual occupation tax, except when herein otherwise provided, on every such occupation or separate establishments, as follows: * * *.

"Subdivision 54. Street Car Companies. From every street car company in this State two dollars per mile on each mile of track owned by such company or corporation."

This Department has heretofore held that the two statutes above mentioned should be construed together and that, consequently, street car companies are subject to both of the occupation taxes aforesaid.

The correctness of that conclusion was questioned by the attorneys for the Dallas Consolidated Electric Street Railway Company of Dallas, and in order to test out the question involved, this Department, in conjunction with county attorney, Lewelling of Dallas County, and special tax attorney, Goggans, representing Dallas County, brought suit against said corporation and said suit is now pending in the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas, the decision of the trial court having been in favor of the State. An early decision is expected.

Please prepare and submit to this Department at your earliest con-

venience a full detailed statement covering any and all violations of the statute here under consideration, as above construed, which may be within your knowledge.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney œeneral.

TAXATION—ABSTRACT BOOKS.

Abstract books and records compiled by an abstractor for his personal use and benefit are personal property and subject to taxation.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 17, 1909.

Hon. Horton B. Porter, County Judge, Hillsboro, Texas.

DEAR SIR: Your letter of the 15th inst., inquires of this Department whether abstract books belonging to an abstractor which have been compiled by him for his own use and convenience in making abstracts and carrying on a general abstract business are subject to taxation.

You are advised that Article 5061 of the Revised Statutes provides:

"All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 5063 describes personal property as follows:

"Personal property shall, for the purpose of taxation, be construed to include all goods, chattels and effects, etc."

The character of property referred to by you in your inquiry is not exempted by any law of this State and the question for determination is whether these books, under the circumstances, are "property" within the meaning of the statute. If so and it has a value it is subject to taxation. These character of books are in general used by abstractors and are used by them in carrying on an abstract business and are generally made up for purposes of convenience in preparing abstracts of titles to lands. They thus have a commercial value and use, and having such use it necessarily follows that under any construction of the statute they would be regarded as personal property. The mere fact that the individual owning the abstract business has compiled these records for his own convenience does not deprive them of any value or of being property in a general sense. The uses for which they are applied determine their value and being applied as instruments in carrying on a business they must be regarded as property. Individuals by their own labors may create many things; when they create anything having a commercial use and value it becomes property and subject to taxation, if not especially exempted by the statute. It would be an unjust rule to exempt books and records compiled by a party by reason of his personal labor which had a value of several thousand dollars and require of another party owning a like amount of personal property acquired in another man-

ner to render it for full value. The method of acquiring property whether by purchase or by individual labor is wholly immaterial in considering whether the property is subject to taxation. The only question is: "Is it property having a value?"

I am not aware that there has ever been a determination of this question by the higher courts of this State, but the courts of last resort of other States have passed upon this identical question.

In the case of Leon Loan Company vs. Board of Equalization, 86 Iowa, 127; 41 Amer. State Reps., 486, was a case where an abstractor sought to enjoin the collection of a tax upon his abstract books and records which he had compiled for use in carrying on his abstract business, claiming that they were not subject to taxation, and the court in passing upon that question says:

"When the author places it upon the marts of the world for use or profit a commercial value attaches, and it becomes 'property' in the general sense. Before the publication, or the granting of a right to publish, the author's work is incomplete. These abstract books answer the original design, are complete, and placed before the public for use and profit. They were not made for publication, in the general sense. Such a publication would defeat the very purpose of their production. Their value consists, chiefly, in their contents being kept from the public. They are the means—in a sense—the instruments for carrying on a business; as much so as are the tools or machinery by which the artisan plies his calling."

Further on in said opinion the court says:

"It would, in our minds, be a strange perversion of the law to hold that these books, that are transferable from hand to hand of the value of six thousand dollars, and usable by any person of ordinary intelligence and ability, as a means of profit, should be exempt from taxation, merely because their contents are written, and not printed, when, in either case, their use would be the same; or because they are only valuable for the information they contain, and that information is conveyed by consultation; but for such abstract reasons they are none the less property subject to the operation of the revenue laws of the State."

In the case of Booth vs. Phelps, 8 Washington, 549; Amer. State Reps., 921, the proof showed that the information contained in the abstract books was largely in the form of abbreviations and cipher peculiar to that particular set of books and only five persons understood them * * * that no information could be derived from the books, except by an expert in that line of business and that it would be necessary for him to understand such abbreviations and cipher. The appelllant in that case claimed that the books because they were not intelligible to the general public had no value and were not subject to taxation. The court, in passing upon this question uses this language:

"We are of the opinion that this property is subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value in the general sense, but would not deprive them of all taxable values."

You are, therefore, respectfully advised that this character of books are subject to taxation.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

TAXATION—CORPORATIONS, FOREIGN.

Goods, wares and merchandise stored in warehouse in Texas for distribution, and which are owned by foreign corporations, are subject to taxation.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 28, 1909.

Hon. L. T. Dashiell, Tax Commissioner, Capitol.

DEAR SIR: Some time since you submitted to our Department for a ruling the question of whether goods, wares and merchandise stored in warehouses in Texas towns which are owned by foreign corporations are subject to taxation under the laws of this State. It is further stated that such merchandise is stored in such warehouses for the purpose of convenience in distributing same and is sold by agents of such foreign corporations who take orders for these goods within the State and these orders, instead of being sent to the office of the foreign corporation in another State, are sent to these warehouses to be filled and the goods shipped from there to the purchasers in different parts of the State.

It seems from the correspondence in connection with this matter that it is claimed that such merchandise is not subject to taxation by the State of Texas because it is interstate commerce. This property being within the State on the first day of January is clearly subject to taxation as other personal property unless protected by some provision of the Constitution of the United States. There are but two provisions of such Constitution that would have any application to the question at issue, and these are Article 1, Section 8, Clause 3 and Article 1, Section 10, Clause 2. These clauses are as follows:

"2. Congress shall have the power to regulate commerce with foreign nations and within the several States and with the Indian Tribes."

"3. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

In the case of Woodruff vs. Parham, 8 Wall., 475, the Supreme Court of the United States held that the term "imports", as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States. To the same effect is the decision of this court in the case of Brown vs. Maryland, 12 Wheat. 419.

It is, therefore, clear that this section of the Constitution has no application to goods of this character, and the only question remaining is whether the assessment and collection of taxes by the State on this character of merchandise would amount to a regulation of or a restriction upon commerce among the States. If so, no tax could be legally levied and collected thereon. The object of the commerce clause of the Constitution is to give all lawful products of every State free introduction into the markets of the Union. As long as such products are in transit to such markets they are under the protection of this clause of the Constitution; but whenever they reach their final destination and are brought into the markets they are divested of their interstate character and become subject to the same burdens as other property of the State. This property, not having been consigned to a purchaser, but being stored for the purpose of re-shipment upon orders being taken therefor, its situs is fixed within this State as much so as any other personal tangible property. The rule in this and many other States is to tax personal property wherever same is situated and to hold that property brought into this State and stored for the purpose of sale is not subject to taxation by the taxing authorities of this State on account of it being interstate commerce would enable the owner thereof to escape taxation altogeher upon such property, as it would not be situated in the State where produced and therefore not subject to taxation in this State. Such property having reached its final destination and having come in competition in the markets with like property in this State, must be held subject to the same restrictions as other property generally.

This view has been upheld by the decision of the Supreme Court of the United States in a case where the facts were similar to the facts submitted by you. The case of Brown vs. Houston, reported in 114 U. S. Reports, was a case where coal mined in Pennsylvania was shipped by water to New Orleans to be sold in open market and the vessel containing this coal had arrived at the port of New Orleans, which was its final destination, and was to be sold from the ship upon which it was loaded. While there it was assessed for taxes by the officers of Louisiana. The owner of said coal, who resided in Pennsylvania, resisted the payment of such tax on the ground that it was an interference with interstate commerce by the State of Louisiana, and the Supreme Court, in passing upon the question as to whether or not it was liable for taxation, used this language:

"The coal had come to its place of rest for final disposal or use and was a commodity in the markets of New Orleans. It might continue in that condition for a year or two years or only for one day. It had become a part of the general mass of property in the State and as such was taxed for the same reason that all other property in the city of New Orleans. It was subject to no discrimination in favor of goods which were the products of Louisiana or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. * * * If after the arrival of such goods within the State, that being the place of destination for use or trade, they are subject to a general tax laid

alike on property within the city, we fail to see how such a tax can be deemed a regulation of commerce which would have the objectional effect referred to."

This doctrine was afterwards re-affirmed by the same court in the case of Pittsburg Coal Co. vs. Bates, 156 U. S., 577, which involved almost the identical facts as the Brown case, and the court in disposing of the contention made that the property involved was protected by the interstate commerce clause of the Constitution, says:

"The decision of the Court in Brown vs. Houston seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owner in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for the purpose of sale, and is subject to taxation and sale as any other property of citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

A very large portion of the merchandise which is sold in every community is brought from other States and is put into competition with merchandise produced within this State. To hold that such merchandise is exempt from taxation as long as it is in possession of a non-resident owner in original packages, would give foreign goods an exemption from burdens that is not accorded to domestic goods; whereas, the payment of a tax by the owner of such goods does not in any sense interfere with the transactions of commerce between the States, as such property is not discriminated against, but is only made to bear the burden borne by other property generally.

We can see no reason why the owners of these goods so stored should not bear the same burdens as the merchants of this State, who, having goods of like character for the purpose of sale, are compelled to pay a tax thereon.

You are, therefore, advised that the property described by you is subject to taxation under the laws of this State.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—FRATERNAL BENEFICIARY ASSOCIATIONS ACT—FRANCHISE TAX—REPEAL OF FORMER LAWS—EXEMPTIONS, ETC.

Franchise tax is fixed by reference to amount of capital stock of the corporation.

Corporations chartered under Subdivision 2, Revised Statutes, Article 642, and having no capital stock, are not required to pay a franchise tax.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, August 27, 1909.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: Careful consideration has been given your letter of the 25th inst., in which you say:

"Please advise this Department on the following questions: Does the act of 1909—Chapter 36, First Called Session of the Thirty-first Legislature—repeal all provisions of Chapter 115, Acts of the Twenty-sixth Legislature and all subsequent amendments to this act?

"If said act repeals the acts above referred to, under what provision of the statute can fraternal beneficiary associations that are excepted from the provisions of Chapter 36, above referred to, be incorporated? And what fee should this Department charge in case they are incorporated?

"Furthermore, would this Department be authorized to charge a franchise tax on such companies that are included in the exception above referred to when incorporated?"

I beg to answer your questions, in their order, as follows:

First: Chapter 36 of the General Laws of the First Called Session of the Thirty-first Legislature, (acts of 1909), pages 357 *et seq.* repeals all provisions of Chapter 115 of the General Laws of the Twenty-sixth Legislature and all amendments thereof, the same constituting what is known as the "Fraternal Beneficiary Association Law" in force prior to the taking effect of said Chapter 36. Section 37 of said Chapter 36 purports to repeal Chapter 108 of the General Laws of the Twenty-ninth Legislature, whereas the caption of the act of 1909, (Chapter 36), refers to Chapter 106 instead of said Chapter 108. But the new law repeals the old law, by necessary implication, if not otherwise.

Second: Inasmuch as certain associations, lodges, etc., are, by the terms of Section 30 thereof, exempted from the operation of said Chapter 36, they can not be chartered under its provisions.

But such exempted associations, lodges, etc., as come within the scope and legal effect of the provisions of the general incorporation laws, Revised Statutes, Article 642 and amendments thereof, as, for instance, Subdivision 2, which authorizes the formation of private corporations for "the spport of any benevolent, charitable, educational or missionary undertaking", but none other, so exempted, may legally be incorporated under said general incorporation law.

Revised Statutes, Article 2439, was amended by Chapter 4 of the General Laws of the First Called Session of the Thirty-first Legislature (acts 1909, page 266), prescribes charter fees to be charged by you, or charter fee to be paid by corporations organized for benevolent or charitable undertakings being therein fixed at $10.

Third: Chapter 23 of the General Laws of the First Called Session of the Thirtieth Legislature (acts 1907, pages 502, et seq.) fixes by reference to the amount of the capital stock of a corporation the franchise tax which it is required to pay.

Coporations chartered under said Subdivision 2 of Revised Statutes, Article 642 and having no capital stock are not required to pay a franchise tax.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

PUBLIC SCHOOL LANDS—TAXATION.

School lands purchased from the State become subject to taxation on January 1st, next, after filing in General Land Office of applications to purchase such school lands. Where such sales are forfeited such forfeiture terminates all liens which may have attached prior thereto, but does not relieve taxpayer from personal liability for such taxes.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 31, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your letter of recent date, which is as follows:

"The question has arisen under Chapter 15 of the General Laws of the Second Called Session of the Thirty-first Legislature, as to whether or not a State bank would be authorized to transact business, after it had filed its charter with the Secretary of State, and the same had been delivered to the Commissioner, and after it had designated, at a meeting of its stockholders, which of the two features of the law it will accept to guarantee its deposits; but before it had applied to the State Banking Board for admission, and before it had received a certificate of authority to transact business from the Commissioner of Insurance and Banking, as required by Section 25 of said law.

"Please give me your opinion on this question."

I am directed by the Attorney General to advise you in reply that in his opinion a State bank would not be authorized to transact business under the conditions set forth in your letter; but that he is of the opinion that the statute to which you refer should be construed as permitting a State bank filing articles of incorporation after midnight of August 9th, when said act became effective, to begin doing business before January 1, 1910, and at any time upon receipt from you of its charter and your certificate of authority, the latter to embody after the subject matter prescribed by Section 25 of said act the recitation "Effective only on and after January 1, 1910."

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

OCCUPATION TAX—GROSS RECEIPT TAX ACT

Dealers in text books not required to pay tax when acting herely as local agent. Dealers maintaining State agency required to pay, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, October 7, 1909.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: A few days since there was an opinion given by me to your Department construing Section 13, Chapter 18, of the acts of the Thirtieth Legislature, in which the construction was placed upon this section that required dealers selling text books to make quarterly reports and pay the gross receipts tax levied by said section.

This ruling, of course, did not apply to any dealer who was merely acting as an agent of a State agency and who sold upon consignment. It applied only to those who purchased their books as dealers and re-sold them on their own account.

Upon further investigation of the matter, I find that this section of the gross receipts tax act as printed in the acts of the Thirtieth Legislature, and also the enrolled bill, on file in the office of the Secretary of State, differs materially from the bill as originally passed by the Legislature, as shown by the Journals thereof, in that the Journal of the House shows that this section levies a gross receipts tax against each and every individual, company, corporation or association engaged in publishing, printing *and* selling text books to be used in the public schools who maintains a State agency within this State. The printed acts of the Legislature show that it levies such tax against every individual, company, corporation or association egaged in publishing, printing *or* selleing such text books and who maintains a State agency in this State.

This variance between the bill printed in the acts of the Legislature and the bill as really passed by the Legislature has called for a further consideration of the matter, and upon a more mature reflection, I am of the opinion that the language "and who maintains a State agency within this State," is of controlling effect and applies to all the classes enumerated in this Section. Therefore, unless such persons, companies, corporations or associations who are engaged in publishing, printing or selling text books to be used in the schools of this State *maintain a State agency within the State*, they are not compelled to make a report and pay a gross receipts tax. Mere local dealers, or those acting as local agents, and who do not maintain a State agency, are exempt from the provisions of the act. I am,

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

OCCUPATION TAX—CIRCUSES—TAX COLLECTOR.

Where two classes of tickets are sold, one good only for afternoon performance and the other good only for night performance, required to pay occupation tax for two performances. If any tickets are sold for $1, circus required to pay $250 for each performance. Tax collector has no right to accept a less amount than the tax due by circus.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, October 11, 1909.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: Your favor of the 9th inst., submits the following questions to this Department for a ruling, namely:

1. If a circus sells two classes of tickets, one good only for the afternoon performance and the other good only for the night performances, are they required to pay an occupation tax for two performances?

2. Can such circuses escape the payment of an occupation tax for two performances by giving a pretended continuous performance, that is to say, by giving one show in the afternoon, at the end of which the crowd is compelled to leave the tent or purchase tickets for a concert which is given after the main performance, and when tickets are sold again at night for another performance?

3. In many instances, circus peaople represent to the tax collector that they are selling their tickets for 99 cents and therefore pay a less tax than if they sold at $1.00. Suppose in truth and in fact they sell some of their tickets at $1.00, would they be liable for the tax levied by Subdivision 23 of Article 5049, Revised Statutes, for circuses charging $1.00 admission?

4. Has a tax collector of any county the right, under the law, to accept a less sum from a circus as an occupation tax than that prescribed by law? In other words, can the tax collector remit any part of the taxes fixed by statute?

5. In the event a circus gives a performance without having paid the occupation tax required by law, who is liable for criminal prosecution under the law for failing to pay such tax?

Answering these questions in the order in which they are submitted, I beg to advise as follows:

1. If two classes of tickets are sold by a circus, one good only for the afternoon performance and the other good only for the night performance, it would render them liable for the tax for each performance.

2. If tickets are sold for an afternoon performance and when the same is over if the parties who have witnessed the show are required to leave the tent or purchase concert tickets and after the concert in the afternoon another performnace is held, they would be required to pay the tax for two performances. In order to constitute a show a continuous performance, every individual who buys a ticket in the afternoon would be entitled to remain from the opening of the show until the end at night. A performance could not be regarded as one performance unless they allowed those purchasing tickets for such performance to remain from the beginning to the end thereof.

You are further advised that even if parties are permitted to remain from the beginning of the performance in the afternoon to the close at night, that in order to constitute it one performance there must be in good faith a bona fide performance and not merely some insignificant feature of the show being given in order to evade the payment of the occupation tax. The material facts to be taken into consideration in determining whether a circus is one or two performances are:

(a) How many performances does such circus advertise

(b) For how many performances do they sell tickets?

(c) Is a person entitled to remain from the beginning to the end of the performance?

(d) From the beginning to the end of the performance is there an effort in good faith to give a bona fide performance, or is the interim between any of the acts of the show filled in in such a way as to make it a sham and subterfuge in order to evade the payment of taxes?

3. If any tickets are sold for $1.00 the circus would be required to pay $250 for each performance, notwithstanding the fact that some tickets were sold for 99 cents.

4. No tax collector has a right, under the law, to accept anything less than the full amount of the occupation taxes due by a circus, and such official has no more right to remit any portion of an occupation tax due than he has to remit any portion of an ad valorem tax.

5. In event a circus gives a performance without having paid the occupation taxes required by law, the owner of such show is subject to criminal prosecution for failure to pay such taxes, and if the owner does not accompany such show and the same is in charge of a manager or superintendent, then such person would be subject to criminal prosecution under such circumstances.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

GROSS RECEIPTS TAX LAW—LIQUOR DEALERS, WHOLESALE.

Required to pay tax based upon report of any and all sales made within State, whether shipped to points within or without State.

ATTORNEY GENERAL'S DEPARTMENT,

STATE OF TEXAS.

AUSTIN, TEXAS, November 20, 1909.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: We are in receipt of your favor of the 17th inst., in which you submit the following questions to this Department for a ruling:

1. "Is a wholesale liquor or malt dealer who makes sales of spirituous, vinous or malt liquors or medicated bitters in quantities of one gallon or more to retail dealers and others (consumers) re-

quired under Section 11 of Chapter 18, acts of the First Called Session of the Thirtieth Legislature of the State of Texas, to report and pay a gross receipt tax of one half of one per cent on the 'amount collected and uncollected from any and all sales made within this State of any of said articles,' as the language of the statute implies, or is he merely required to report and pay tax on the sale made to the retail dealer only?

2. "Is he required to pay gross receipt tax 'on sales made within this State' to be shipped to Oklahoma?"

Section 11 of the act in question requires each and every individual, company, corporation or association of persons who shall engage in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquor or medicated bitters capable of producing intoxication to make a report quarterly to the Comptroller of Public Accounts showing the gross amount collected and uncollected "from any and all sales made within this State of any of said articles during the quarter next preceding."

The act further provides that the said individual or corporation at the time of making said report shall pay to the State Treasurer an occupation tax for the quarter beginning on said date "equal to one half of one per cent of said gross receipts from said sales as shown by said report."

This section also provides that a wholesale liquor dealer or distributor within the meaning of the act is any individual, company or corporation which sells said articles to retail dealers or who delivers on consignment to their agents for retail.

It must be borne in mind that the tax levied by the Legislature under this act is not a tax on property but a tax upon the pursuit of an occupation, and wherein the Legislature defines what constitutes a wholesale dealer is for the purpose of classification; that is to say, it was evidently intended that all wholesale dealers in such articles who sold to retail dealers should come within the class against whom the Legislature would levy an occupation tax.

The report required of such companies showing the amount of their sales is for the purpose of fixing a standard by which the Legislature fixes the amount of the tax to be levied against such occupation. It is our opinion that the language of this section requiring wholesale dealers to make a report of the gross amount collected and uncollected "from any and all sales made within this State of any of said articles" means that such dealers must report all sales made by them as wholesale dealers; that is to say, all sales made within this State which are authorized to be made under their license as a wholesale dealer. If it had been the intention of the Legislature to require such dealers to pay an occupation tax upon their sales to retail dealers only, in requiring them to make reports they would have used language apt and appropriate to convey that intention by requiring them in such reports to report only the sales made to retail dealers. But the language is broader than this and provides that the tax is based upon a report which requires them to show the gross receipts from any and all sales of said articles.

This question has been practically decided by the Supreme Court of this State in the case of State of Texas vs. G. H. & S. A. Ry. Co., 97 S. W. Rep., 71, which involved the constitutionality of what is known as the Love Gross Receipts Bill, enacted by the Twenty-ninth Legislature. The language of that act provided that "every railroad corporation or the receiver thereof and every other person, firm or association of persons owning, operating, managing or controlling any line of railway in this State *for the transportation of passengers, freight and baggage or either*, shall pay to the State an annual tax," etc. The act further provides that said company should make a report showing the gross receipts of such lines of railway "from every source whatever." The contention was made by the railroad company in that the case that the railroad company was only required to pay a tax based upon its gross receipts for the transportation of passengers, freight and baggage, and that all receipts earned from other sources were not to be taken into consideration in fixing the amount of tax.

The Supreme Court denied this contention and in passing upon the question said:

"This language of the act, 'every railway corporation or the receiver thereof, etc. * * * shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter equal to one per cent of the gross receipts,' is without qualification and broad enough to include everything derived from the operation of railroads within this State. By the second section of the act this language makes clear the meaning of that quoted from the first section. 'for the purpose of determining the amount of such tax the president, vice president, general manager, treasurer or superintendent of such railroad corporation or the receiver thereof, shall on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts the gross receipts of such lines of railway from every source whatever for the year ending on the 30th of June last preceding.' The declared purpose of this language is to fix the standard by which the amount of the tax should be determined, and it unequivocally expresses that to be the gross receipts of every source whatever from the line of railway. This can mean nothing more or less than all the receipts derived from the operation of the railroad in Texas from whatever source are to constitute the fund upon which the one per cent is to be assessed as an occupation tax for the operation of the railroad in carrying local freight, etc., which can not by fair construction include any sum which the railroad company may derive from any source other than the operation of its lines of railway and the supposed complications can not possibly arise."

This decision, it seems to us, practically settles the construction which should be placed upon this act. In that case the occupation tax was levied only against companies operating a line of railway *for the transportation of passengers, freight and baggage*, yet the court held that the plain language of the act required the gross receipts to be reported from other sources than those received from the passenger, freight and baggage service.

We believe that the definition given of a wholesale dealer in the

act under consideration is merely for the purpose of specifying the particular class that is required to report at all thereunder, and whenever any person, firm or corporation brings itself within this class by selling to retail dealers or to their agents for retail they are engaged in pursuing a business for which they must pay an occupation tax. The amount of this tax is fixed by requiring all who come under this definition of a wholesale dealer to make a report showing the gross receipts from any and all sales made within this State of any of said articles. This language is broad enough to and does cover all sales made by wholesale to any person, without regard to whether such person is a retail dealer.

With reference to your second question as to whether or not such dealers should report sales made to parties in other States, beg to say that this would depend upon the question as to where the sale took place. If the sale occured within this State it would be immaterial whether the goods were shipped to another State. They would be required under such circumstances to report such sales.

I am,

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

OCCUPATION TAXES—CANNON CRACKERS.

Dealer in Roman candles, toy pistols, etc., not subject to tax. Vendor of cannon crackers liable for tax.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 3, 1909.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: Yours of the 1st inst., submits to this Department for a ruling the question as to whether Chapter 95 of the acts of the Thirty-first Legislature, which imposes an occupation tax puon the occupation of selling cannon crackers or toy pistols can be held to impose a tax upon persons engaged in the business of selling Roman candles, sky rockets, and other fire works.

Section 1 of this act provides:

"There shall be levied upon every person, firm or corporation engaged in the occupation of selling cannon crackers or toy pistols used for shooting or exploding cartridges within this State, an annual tax of $500", etc.

Section 2 of this act defines the meaning of cannon crackers as follows:

"By the term 'cannon cracker' is meant any fire cracker or other combustible package more than two inches in length and more than one inch in circumference commonly sold and exploded for purposes of amusement."

An answer to your inquiry depends upon a proper construction of the language "or other combustible package, more than two inches in length and more than one inch in circumference commonly sold and exploded for the purposes of amusement."

I am of the opinion that it was the intention of the Legislature by the enactment of this law to restrict the sale of cannon crackers or other combustible packages of a similar nature, and that Roman candles, sky rockets and this class of fire works were not intended to be included within the purview of the law. It can hardly be contended that Roman candles, sky rockets, pin wheels, and similar classes of fire works are "exploded for the purpose of amusement" within the meaning of the act.

In other words, this act covers all combustible packages more than two inches in length and one inch in circumference, wherein amusement is strictly furnished by the explosion alone. Some of the definitions given of the word explode are "to burst with force and a loud report", "to detonate, as a shell full of powder or like material, or as a boiler from too great a pressure of steam", "to burst forth with sudden violence and noise", "to become suddenly expanded into a great volume of gas or vapor", "to burst violently into flame".

Roman candles, sky rockets and other display fire works are used and discharged for the purpose of amusement, but unlike cannon crackers and other explosives of a similar nature they are not "exploded for the purpose of amusement". The only amusement furnished by cannon crackers and other high explosives of a similar nature is the noise of the explosion, whereas any other class of fire works, such as Roman candles, sky rockets, etc., the amusement furnished does not consist in the noise produced by the explosion. Under any of the definitions given above of the word "explode" it can not be said that such fire works are exploded.

I believe that the definition given by the Legislature of the term "cannon cracker" was for the purpose of preventing the sale of any device of a similar nature which might be manufactured and sold under some other name in order to evade the law. If the Legislature had intended to levy this tax against the sale of other fire works, it would evidently have used the terms "Roman candles", "sky rockets", etc., for the reason that this character of fire works have been sold for years under these names.

A reference to the caption of this act confims this construction, as it provides that it is "an act to levy an occupation tax upon the occupation of *selling cannon crackers,*" etc.

You are, therefore, advised that this tax only applies to the sale of cannon crackers or any other combustible package similar in its nature, of the dimensions specified, wherein the only purpose of amusement it can afford is the explosion of the article.

It has been called to my attention that a contrary opinion to the above has been given by this Department sometime since and this is intended to overrule that opinion.

Yours very truly,

R. V. DAVIDSON,
Attorney General.

CORPORATIONS, DOMESTIC—FRANCHISE TAX—PENALTY FOR FAILURE TO PAY—REINSTATEMENT, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, December 8, 1909.

Hon. W. B. Townsend, Secretary of State, Austin, Texas.

DEAR SIR: You have submitted to this Department the following question:

"Where a domestic corporation fails to pay its franchise taxes on May 1st of any given year and its right to do business is forfeited by the Secretary of State on the first day of July, next following, and such corporation subsequently desires to pay the amount of its franchise taxes and penalties due the State and effect dissolution under the act of 1907, what amount of franchise taxes and penalties is the Secretary of State authorized by law to collect and receive of such corporation?"

In reply to your inquiry, I beg to say:

Assuming that the corporation owes no franchise taxes or penalties for a period of time prior to May 1st, of the given year, the demand of the State against it after such forfeiture is for the amount of its annual franchise taxes as prescribed by Chapter 23 of the General Laws of the First Called Session of the Thirtieth Legislature, pages 502, et seq., together with the penalty of 25 per cent of the amount of such franchise taxes, as prescribed by Section 8 of said act, and the aggregate of such amounts is what the Secretary of State is authorized to demand and collect from such corporation under the circumstances set forth in your inquiry.

Of course, if such corporation owes any back franchise taxes or penalties, the amount thereof should be added.

If instead of going into dissolution, such corporation should desire to have its right to do business reinstated within six months after such forfeiture it should be required to pay to the Secretary of State the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax for each month or fractional part of a month, which shall have elapsed after such forfeiture, provided that such additional amount shall in no case be less than $5, all as set forth in Section 9 of said act.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

TAXATION—PLACES OF RELIGIOUS WORSHIP.

Tabernacle and such ground as is reasonably necessary for use of building used by religious association is exempt from taxation; land used in connection therewith, and owned by such association, for convenience of campers is not so exempt.

ATTORNEY GENERAL'S DEPARTMENT

STATE OF TEXAS.

AUSTIN, TEXAS, February 8, 1910.

Hon. E. T. Jordan, Tax Assessor, Lampasas, Texas.

DEAR SIR: We are in receipt of yours of the 7th ult., in which you submit for our decision whether or not 78 acres of land in Lampasas County, owned by the Texas Baptist Encampment Association, a private association organized solely for religious purposes, is exempt from taxation.

The purpose clause of the charter of this corporation is as follows:

"The purposes for which this corporation is formed is for the furtherance of the gospel of Jesus Christ, the promotion of Christian education without the right to maintain a college, university, academy or seminary; the encouragement of Sunday school work, the development of Christian workers, and to provide a place of meeting in encampment by its members annually or oftener for the promotion of the purposes aforesaid."

It seems that this corporation owns a tract of 199 acres and it is stated that 78 acres in question are imperatively necessary for the purposes of the association; that there is situated in this 78 acres the tabernacle, springs, bathhouses and camp meeting grounds. The association does not contend that the 121 acres is exempt from taxation, but only asks that the 78 acres so used be exempted. This association charges a small sum for each person bathing and also requests a voluntary contribution of a small amount for each family camping on the grounds during the encampment for religious purposes, the proceeds being applied to the expense of the annual meeting and keeping the grounds in sanitary condition. There are some pecan trees situated on this tract. These pecans are gathered and sold and the money applied to keeping up the grounds. There is also a cottage situated on this ground which is permitted to be occupied by a person who is charged with the duty of looking after the grounds. No members of the association receive any money by way of profit.

Article 8, Section 2 of the Constitution of the State of Texas bearing upon this question, provides:

"But the Legislature may, by general laws, exempt from taxation * * * actual places of religious worship * * * and all laws exempting property from taxation other than the property above mentioned shall be void."

In 1905 the Legislature, in obedience to this constitutional provision, enacted a statute providing:

"The following property shall be exempt from taxation, to wit: * * * houses used exclusively for public worship, the books and furniture therein and the grounds attached to each building necessary for the proper occupancy, use and enjoyment of same and not leased or otherwise used with a view of profit."

The question arises whether this 78 acres of land is "an actual place of religious worship" within the meaning of the constitutional provision before quoted. The statute enacted under and by virtue

of this constitutional provision could not have the effect of enlarging upon the constitutional provision, because it is specifically provided in said instrument that "all laws exempting property from taxation other than the property above mentioned shall be void." Therefore, if the statute enacted by the Legislature enlarges the exemptions of "actual places of religious worship" contained in the Constitution, such act would be wholly ineffectual and void.

Section 2, Article 8 also contains the following provision:

"All buildings used exclusively and owned by persons or associations of persons, for school purposes, (and the necessary furniture of all schools)."

This provision has been construed by the Supreme Court of this State to include lots upon which church buildings are placed, but same does not include ground used as a farm in connection with the building, even though such lands were used exclusively for the raising of vegetables and other farm products to supply the tables of the students. St. Edwards College vs. Morris, 82 Texas, 1; 17 S. W. Rep., 512.

It is the policy of our law that all property in this State should contribute in fair and just proportion to the public burdens. Some exceptions have been made to this rule; but the burden of proof is upon every party claiming exemption from taxation to show that his case comes clearly within some of these exceptions. If any doubt arises as to the exemption claimed it must operate most strongly against the party claiming the exemption. Provident Bank vs. Billings, 4 Peters, 814; Charles Riverbridge vs. Warren Riverbridge, 11 Peters, 420.

The Constitution of Ohio contains a provision similar to the Constitution of this State with reference to property used for religious purposes. The provision is:

"Houses used exclusively for public worship may, by general laws, be exempted from taxation."

The Legislature of that State, by virtue of this constitutional provision, enacted a statute which is absolutely identical with the Texas statute. It reads:

"All public school houses and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of same and not leased or otherwise used with a view to profit, shall be exempt from taxation."

The Supreme Court of that State, in the case of Gerke vs. Purcell, 23 Ohio State Reports, 246, had before it the question as to whether a parsonage erected on the lot adjoining the church was exempt from taxation. The court held that such property was not exempt from taxation, and in the course of its opinion said:

"The express authority given in the Constitution to exempt buildings of the description named carries with it, impliedly, authority to exempt such ground as may be reasonably necessary for their use. The ground in such case becomes annexed to the building as an incident; but the ground so annexed *must serve the same exclusive use* to which the building is required to be devoted. It is not required that the grounds should be indispensable to the use of the

building as a place of worship. If the ground is not more than is reasonably appropriate to the purpose and is used for no other, it comes within the limits prescribed by the Constitution and the statutes."

In the course of its opinion the court further says:

"Although the lot might have been exempt before the parsonage was built as bieng reasonably necessary for the use of the lot as church property, but a pasonage, although built on grounds that might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of its being used exclusively for public worship it becomes a place of private residence; nor does it make any difference that by the usages of the church the residence of a priest or pastor is essential to the conduct of public services. Other persons are necessary to carry on public worship as well as a minister to conduct the services. There must be a laiety or congregation as well as a minister or preacher; and it is equally necessary that they should have a place of abode. Yet it would not be claimed that their private residence could be exempted."

We believe this language of the court is particularly applicable to the question under consideration. While it may be essential that a camp meeting association have sufficient ground to furnish a temporary place of residence of those attending such meeting, yet it cannot be said that this ground so used for temporary residences of the congregation is used as "an actual place of religious worship," or is used "exclusively for public worship." It is in fact used as a place of private residence.

A statute of Louisiana exempted from taxation "churches, chapels, convents and other public buildings for religious worship, with the furniture and equipment and lots of ground thereto appertenant and used therewith, so long as the same shall be actually used for that purpose only."

In the case of First Presbyterian Church vs. City of New Orleans, 31 American Reports, page 224, the question at issue was whether a lot immediately adjoining the church which was used as a parsonage, occupied as a private residence by the minister of the church in question, was subject to taxation under this statute. The Supreme Court in that case, in passing upon this question, said:

"The council insists that not only churches but 'property actually used for purposes of churches' is exempt. They argue that the building is property used for the purpose of church, inasmuch as the church must have a parson and the parson must have a house. We do not understand the words 'for that purpose only' in the statute above quoted to have any such meaning. They refer to and are used to avoid repetition of the words 'for religious worship.' A building may be properly used for church purposes but it can not be said to be used for religious worship."

A statute of Illinois exempts from taxation "all church property actually and exclusively used for public worship when the land (to be of reasonable size for the location of the church building) is owned by the congregation." In the case of People vs. Camp Meeting Association, 160 Illinois, 578, the association owned 16 acres

which was used by them for holding religious camp meetings. The only witness who testified on the trial of the case said:

"This 16 acres is actually and exclusively used as a place of public worship, and that there is no more of it than is necessary for the use to which it is put."

The Supreme Court of that State held in this case that this camp meeting property was not exempt from taxation under this statute and in passing upon the question said:

"By the term 'church property' as used in the statute is plainly meant the church, defined by Webster to be a building set apart for Christian worship and a lot of reasonable size for its location. It is only by a liberal construction, if at all, that it can be made to include camp meeting grounds like those in question, and such a construction under elementary rules of interpretation is not permissible."

It was also held by the Supreme Court of Maine, in the case of Foxcraft vs. Piscatquis Camp Meeting Association that 10 acres of land, a part of which was used for an auditorium, where camp meetings were held was not exempt from taxation. In this case the association was organized to "furnish and maintain a camp meeting with its religious privileges to the people of the Piscatquis Valley and its vicinity to the glory of God and saving of souls." A portion of this 10 acres was let to members for the erection of cottages, a part for a stable where horses were stalled for members and a part was used for an eating house. The court held that the property so used was clearly not employed by the association for its own purpose, but that the part used for an auditorium or tabernacle where the meetings were held was used "for its own purposes" within the meaning of the statute and was exempt from taxation.

See also Connecticut Spiritualist Camp Meeting Association vs. East Lynn, 54 Conn., 152; People vs. Anderson, 117 Ill., 50; People vs. Y. M. C. A., 157 Ill., 403; First Church vs. Linn County, 70 Iowa, 396; All Saints Parish vs. Brookline, (Mass.), 59 N. E. 1003; Ramsey County vs. Church of the Good Shepherd, 44 Minn., 229.

In the following cases exemptions of church property was held not to include a parsonage or rectory: St. Mark's Church vs. Brunswick, 78 Ga., 571; State vs. Board of Assessors, 52 La. An., 223; Third Congregational Society vs. Springfield, 147 Mass., 396; Hennepin Co. vs. Grace, 27 Minn., 503; State vs. Lvon. 32 N. J. L., 360; People vs. Callison, 22 ABB. N. C. (N. Y.) 52; People vs. O'Brien, 53 Hun., 580.

We, therefore, respectfully advise that it is our opinion that the tabernacle used by your association to hold its religious meeting is exempt from taxation, together with the ground upon which it is situated, and such ground as is reasonably necessary and appropriate for the use of the buildings, and that that portion of the 78 acres used for the convenience of campers and other purposes is not exempt from taxation under the laws of this State.

Yours truly,

C. A. LEDDY,
Assistant Attorney General.

DELINQUENT TAXES.

City of Fort Worth has authority under its charter to employ assistant to assist city tax assessor to discover and list for taxes omitted personal property heretofore escaping taxation.

ATTORNEY GENERAL'S DEPARTMENT

AUSTIN, TEXAS, April 14, 1910.

Hon. W. D. Davis, Mayor, Fort Worth, Texas.

DEAR SIR: We have your letter of March 12th, from which we quote as follows:

"I send you by this mail, under separate cover, a form of contract of employment under contemplation by the city which contemplates the discovery and listing for taxes omitted personal property heretofore escaping taxation in this city.

"I also send you the quotation from our tax laws, our city charter and the Supreme Court decision, touching upon the question of this kind of an employment.

"Before entering upon this contract, I desire, both as mayor and personally, to have your legal opinion as to whether or not under the laws and our charter we have the power to make this employment."

In their proposal to the city Messrs. Workman and Higgs offer to search for and report all personal property legally taxable by the city of Fort Worth which has been omitted from the lists and is escaping taxation, and to receive from the city as full compensation for their services a sum equal to 25 per cent of the taxes that may be collected by the proper city officers, as a direct result of the efforts of said Workman and Higgs, the payment of such sums as may be earned by said parties under the contract to be made by the city only after the taxes have been collected by the city officers on the property brought to light and placed on the lists by reason of their efforts.

The provisions of the special charter for the city of Fort Worth of 1909, that are more or less pertinent to the question upon which you ask our opinion are the following:

Chapter 6, Section 27:

"It shall be the duty of the city assessor and collector of taxes, between the first day of January and the 30th day of May, of each year, to make and return to the board of commissioners, a full and complete list and assessment of *all property* both real and personal, held, owned or situated in said city on the 1st day of January of each year, and not by law exempt from municipal taxation, and also a list of all national banks and other corporations whose capital stock is liable to taxation, with the cash value of the shares of stock of each corporation, and the names of the owners thereof. * * * ."

Chapter 6, Section 30:

"The omission from the tax rolls of property, whether real or personal, by law subject to municipal taxation or the failure of the city for any cause to collect taxes for any year on any such property, shall have no effect to invalidate taxes on property listed on such rolls, nor shall any objection be made or considered to the title or right of any purchaser at a tax sale because of any omission or

failure, but if the city assessor and collector of taxes *shall discover* that any real or personal property subject to municipal taxation for any previous year was not assessed or for any cause escaped taxation for such year, it shall be his duty, in addition to the assessment for the ensuing year, to assess such property for the year or years in which the same was not taxed."

Chapter 6, Section 18:

"The board of commissioners shall have the power and they are hereby authorized to levy for general purposes an annual ad valorem tax on *all real, personal* and *mixed property* within the territorial limits of said city, not exempt from taxation by the Constitution and laws of the State of Texas; * * * ."

Chapter 6, Section 17:

"The board of commissioners shall have the general power to provide by ordinance for the prompt collection of all taxes and to regulate the manner, mode and form of tax lists or inventories and to prescribe the kind of oath that shall be taken thereto by the taxpayer or property owner, his agent or attorney; * * * ."

Chapter 6, Section 16:

"The board of commissioners shall have full authority over the financial affairs of the city, and shall provide for the collection of all revenues and other income, the auditing and settlement of all accounts, and in the exercise of a sound discretion make appropriation for the payment of all liabilities and expenses. * * * ."

Chapter 2, Section 33:

"The board of commissioners shall have the authority, whenever in its judgment it may seem proper, to engage or employ special assistants to aid or help any officer, elective or appointive, of the city government and to fix the compensation for such service. * * * ."

Chapter 6, Section 23:

"The board of commissioners shall have the power, should it deem fit to do so: to appoint a special attorney for the tax department of said city, to be known as the "tax attorney", whose duty it shall be, under the supervision of the corporation counsel, to press for collection and payment all unpaid and delinquent taxes due the city of Fort Worth and to prosecute suits thereon in courts of competent jurisdiction whenever instructed so to do; or the board of commissioners shall have the power to require the performance of such work by the corporation counsel, the prosecuting attorney, or other assistant to the corporation counsel."

Chapter 9, Section 5:

"To make and enter into all proper contracts, necessary and essential to carry out the purposes and exercise the powers of a municipal government, under the terms of this charter."

It seems to be generally conceded or assumed by the authorities that a city or county can not legally contract with some other persons to do that which one of its own officers is already bound to do under the law, unless there is some charter of statutory provision which, by fair intendment, gives such city or county the power to make such a contract. The fact that such a power was specially given was the determining factor in the Indiana cases of Garrigas vs.

Board of Commissioners of Howard County, 60 Northeastern, 948, 74 Northeastern 249, and Fleener vs. Litsey, 66 Northeastern 92, and the Iowa case of Disbrow vs. Cass County, 93 Northwestern, 585, and the Oregon case of Burnett vs. Markley, 31 Pacific, 1050, all of which cases upheld the validity of contracts similar to the one now offered the city of Fort Worth.

The fact that such a power was not given was the determining factor in the Illinois case of Stephens vs. Henry County, 75 Northeastern, 1024, 4 L. R. A., (N. S.), 339, which denied the authority of Henry County to make such a contract.

Possibly the courts would hold that the requirement contained in Chapter 6, Section 27, of the Fort Worth charter, that the city assessor and collector "shall make and return to the board of commissioners a full and complete list and assessment of *all property* both real and personal, held, owned or situated in said city on the 1st day of January," has the effect of imposing upon the assessor and collector the duty to hunt for secreted taxable property. Whether he is charged with the duty of hunting for *personal* property that has escaped taxation in *former years* may well be doubted, but in view of the conclusion we have reached, it is unnecessary to express an opinion on this point.

Supposing that the city assessor and collector is charged by law with the duty of actively searching for personal property secreted from taxation in former years, as well as for property so secreted in the current year, then the question is whether or not there are any provisions in the city charter which by a fair construction may be held to give the board of commissioners the power to employ some one to assist said city assessor in such search. We have reached the conclusion that there are such provisions in the Fort Worth charter, and hence that the board of commissioners may legally make the contract set out in the brief accompanying your letter. The charter provisions hereinbefore quoted show that the city is given the power to "make and enter into all proper contracts necessary and essential to carry out the purposes and exercise the powers of a municipal government under the terms of this charter;" that one of the powers of the municipality is to tax *all* property within the city that is not exempt; that the board of commissioners is given "full authority over the financial affairs of the city", and is directed to "provide for the collection of all revenues and other income"; that said board is given "the general power to provide by ordinance for the prompt collection of all taxes"; that it is empowered to appoint a "tax attorney" to aid in the collection of unpaid taxes; and that it has authority to "engage or employ special assistants to aid or help any officer, elective or appointive, of the city government and to fix the compensation for such services."

We think the powers conferred by these provisions are sufficiently broad to include the power to make the contract proposed. As a general proposition, a municipal corporation "has the power, unless in some way restricted by charter or statute, to enter into any contract and incur any debt necessary to enable it to carry out the particular powers expressly or impliedly conferred upon it, and it has the right to adopt all ordinary or usual means which may be

necessary to the full execution and enjoyment of such power." (28 Cyc, 635).

One of the purposes for which the city government of Fort Worth exists is to equalize the burdens of taxation within the city and compel every piece of taxable property to bear its just proportion of the load. May it not then, unless restricted by law as the manner of accomplishing this end, adopt all appropriate means?

We think the following language from the opinion in San Antonio vs. Raley, 32 Southwestern, at page 183, is significant in this connection:

"A motion was made by the appellee to require the attorney who brought this suit to show his authority for instituting it. The attorney, in answer to the motion, exhibited a resolution of the city council of San Antonio authorizing L. C. Brand to collect back taxes due the city; to bring all necessary suits to collect such taxes, and to foreclose liens on property therefor, in the name of the city; and to employ at his expense, such counsel as he might select to prosecute such suits. The attorney then showed that he was employed by Mr. Brand, under his contract with the city. The trial court held that the attorney's authority for bringing the suit was sufficient, in which holding we concur. We think that the city council may, when its officers to collect taxes have failed, make such special contracts for the collection of its back taxes as it may deem to the best interest of the city, and may invest the party with whom it contracts with the power to employ such means as may be necessary to perform his undertaking."

It was doubtless the duty of the assessor and collector of the city of San Antonio to collect its taxes and of its city attorney to bring and prosecute its litigation, still the contract of the city with Brand was held valid.

Whether a contract such as the one now offered to the city of Fort Worth is of evil or beneficial tendency is a question upon which the courts widely differ. In Kansas vs. Fry, 95 Pacific, 392, L. R. A., (N. S.), 476, the Supreme Court of Kansas, in effect, brands such a contract as an admonition. In Disbrow vs. Cass County, 93 Northeastern, at page 586, the Supreme Court of Iowa expresses its approval of such a contract in the following language:

"The purpose of the contract in question is commendable, to say the least. Its clearly expressed purpose is to aid the county in its search for property which has been omitted from taxation, and to assist in collecting the amount found due on account thereof. Surely, there can be no evil tendency in thus contracting, for the very purpose of the contract is the promotion of the public welfare."

In Burnett vs. Markley, 31 Pacific, 1050, the Supreme Court of Oregon also places the stamp of its approval on such a contract. Such being the state of judicial opinion, we do not think it can be said that there is any well defined public policy against the making of a contract of this character. If there were such policy, it could be changed by the Legislature, and if we are correct in our conclusion that in the charter of Fort Worth the Legislature has directly authorized the board of commissioners to employ help for the assessor and collector in the work of uncovering secreted property,

then it necessarily follows that any so-called public policy against such an employment must yield to the statutory mandate.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

OCCUPATION TAX—INTOXICATING LIQUORS—HARD CIDER.

Whether hard cider is an intoxicant is a question of fact. If an intoxicant, and it is sold in local option territory, the felony provisions of Chapter 35 or Chapter 15 of the Thirty-first Legislature will apply.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 16, 1910.

Capt. W. J. McDonald, State Revenue Agent, Austin, Texas.

DEAR SIR: We have your favor of the 18th inst., which is as follows:

"Complaint has been made to this Department that there is being sold over the State, under the name of 'hard cider', an intoxicating drink supposed to be made from cider, said to contain alcohol in large quantities.

"I desire an opinion from your Department today, if possible, construing the law affecting such sales; and also any other sales of cider and intoxicating drinks, whether made from cider or not. If intoxicating, are not those who make the sales subject to criminal prosecution in both local option territory and wet territory if they have not taken out the license prescribed by law?"

Replying to your inquiries, we beg to say that Chapter 17 of the General Laws of the Thirty-first Legislature is the latest act for the regulation generally for the sale and disposition of intoxicating liquors. Section 34 of said act defines "intoxicating liquors", as therein used, as "fermented, vinous or spirituous liquors or any composition of which fermented, vinous or spirituous liquors is a part." While this language is broad enough to include any character of fermented, vinous or spirituous liquors or composition containing the same, whether intoxicating or not, yet we are of the opinion that, taking said section in consideration with the various provisions of said law, it was the intention of the Legislature to tax, license and regulate the sale of intoxicating liquors only. Therefore, in order to determine whether the character of drinks referred to by you are within the provisions of said law it is necessary to decide the question of fact as to whether same are intoxicating or non-intoxicating.

Our Court of Criminal Appeals has approved the following definition of intoxicating liquors, viz:

"Any liquor intended for use as a beverage which is capable of being so used, and which contains alcohol, either obtained by fermentation or by the process of distillation, in such a proportion that it will induce intoxication when taken in such quantities as may

practically be drunk." Ex Parte Gray, 83 S. W. Rep., 828; James vs. State, 91 S. W. Rep., 227.

Chapter 19, General Laws of the Thirty-first Legislature, page 51, levies an occupation tax on all dealers in non-intoxicating *malt liquors;* and provides penalties for failure of a person subject to the act to procure a license and pay the tax prescribed. Malt liquor is usually understood, and we think is used in the statute to mean "an alcoholic liquor" as beer, ale or porter, prepared by fermenting and infusion of malt. See Words & Phrases, Vol. 5, page 4314.

Although we are not specially advised, we understand the drink known as "hard cider" is not a malt liquor; and if it is not, of course, it would not be within the purview of said law.

The two laws of the Thirty-first Legislature making it a felony to sell or engage in or pursue the occupation or business of selling intoxicating liquors except as permitted by law in local option territory, being Chapter 35, page 356, and Chapter 15, page 384, respectively, are clearly restricted to the sale and business of selling intoxicating liquors only.

In view of the provisions of the laws cited, we are of the opinion that before criminal prosecution could be successfully carried on for selling such drinks as you describe it will be necessary to establish that such drinks are in fact intoxicating under the test above suggested, whether the sales are made in local option territory or wet territory. If the intoxicating property of the liquor be shown, and the sales are made in local option territory, the felony provisions of Chapter 35, above cited, would apply. If the sales were made outside of local option territory the provisions of said Chapter 17, above cited would be applicable. If the drinks be "malt liquor", under the rule above stated, and these sales are made in local option territory, the occupation and license statute, viz: Chapter 15, above cited, would control, and prosecutions conducted under Section 4 thereof. You will readily see that in each case it is a question of fact which must be determined by the prosecuting officers before instituting criminal proceedings; and we can only call attention to the provisions of law and rules governing the question, which we trust has been sufficiently done in the foregoing statement.

If we can further serve you command us.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—INHERITANCE TAX LAW.

An estate of less value than $500 not subject to tax; in computing a tax due from an estate of greater value than $500, said amount of $500 should first be deducted from total value, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 29, 1910.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: We are in receipt of your favor of the 25th inst., in which you seek the opinion of this Department as to a proper construc-

tion of the Inheritance Tax Law enacted by the Thirtieth Legislature. You derise to know what would be the inheritance tax due the State of Texas on the following sums left to a party not related to testator: $1,000, $2,000, $3,000, $5,000, $10,000, $25,000 and $50,000.

An answer to your inquiry involves the construction of Subdivision 3, Section 1 of this act. This subdivison reads as follows:

"If passing to or for the use of any other person, natural or artificial, the tax shall be four per cent of any value in excess of $500, and not exceeding $10,000; five and one-half per cent on any value in excess of $10,000 and not exceeding $25,000; seven per cent on any value in excess of $25,000 and not exceeding $50,000; eight and one-half per cent on any value in excess of $50,000, and not exceeding $100,000; ten per cent of any value in excess of $100,000 and not exceeding $500,000, and twelve per cent on any value in excess of $500,000."

The language of this section will admit of two constructions—one, that the tax levied by such section is levied on the entire estate passing to such persons when the value of such estate is in excess of $500; that is to say, that such language describes the estate subject to the tax; the other is that the language, "four per cent of any value in excess of $500," only permits the tax to be levied upon the excess of this value and not upon the entire estate when it is above this amount in value.

There is a conflict of authority in the decisions of courts of other States upon similar language used in the inheritance tax statutes. The Supreme Court of Maine, in construing a statute couched in almost the identical language of our statute, holds that only the excess above a certain value is subject to taxation.

The Surpeme Court of Iowa, in the case of Herriott vs. Bacon, in construing a statute using the language "shall be subject to a tax of five per centum of its value above the sum of one thousand", held that the effect of such statute was to exempt all estates of less in value than $1.00 and when exceeding in value such sum, all property passing to the collateral heirs was subject to tax for the full amount thereof.

It is an accepted canon of construction that all laws levying a tax against the citizens, should be liberally construed in favor of the citizen. In view of this rule, we believe that a proper construction of this statute would be that the language "of any value in excess of $500" should be construed to mean that the sum of $500 is absolutely exempted from taxation, and that only the amount in excess of this sum would be subject to the tax levied by this subdivision. That is to say, that an estate which does not reach the sum of $500 would not be subject to any tax, and that an estate which exceeds the amount of $500 would be entitled to have the sum of $500 deducted in computing the amount of tax, and that in collecting the same, the tax should be graded as provided in Subdivision 3. Therefore, under this view the amount of inheritance tax due the State upon the amounts stated by you would be as follows:

$ 1,000.00	amount of tax due	$ 20.00
2,000.00	amount of tax due	60.00
3,000.00	amount of tax due	100.00

5,000.00	amount of tax due	180.00
10,000.00	amount of tax due	380.00
25,000.00	amount of tax due	1205.00
50,000.00	amount of tax due	2955.00

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

DELINQUENT TAXES—POLL TAXES.

All taxes, upon delinquency, become a lien upon real estate, except that the homestead is subject to lien only for taxes assessed against it. Vendor's lien prior to State's lien for poll tax.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 1, 1910.

Hon. T. A. Upshaw, City Secretary, Assessor and Collector, Stamford, Texas.

DEAR SIR: Replying to your letter of the 27th ult., in which you request the opinion of this Department as to which of three property owners will be required to pay the poll tax assessment against a man who having purchased a parcel of land from each of them, giving his vendors lien note in each instance therefor, and having made default in payment of said notes, the tracts of land are taken back, each by its respective owner; that one of said tracts was claimed, used and occupied by this party as a homestead; this party having failed to pay the taxes assessed against him:—you are advised that the delinquent tax act passed by the Twenty-fifth Legislature, Section 10, page 136, provides that after the 31st day of January the tax collector shall, by virtue of his tax rolls, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with the penalties, etc.; and if no personal property be found for seizure and sale the collector shall on the 31st day of March make up a list of the lands and lots upon which the taxes for the preceding year are delinquent, *charging against the same all taxes and penalties assessed against the owner thereof.*

Section 3 of the act provides that to each tract or lot of land there shall be apportioned its pro rata share of its entire tax, penalty and cost. Thus it appears that after the 31st day of March of each year, a lien attaches to the real estate of a party for all taxes due by him, including taxes upon his personal property and his poll tax. Section 15 of Article 8 of the Constitution of Texas provides that:

"The annual assessment made upon land and property shall be a special lien thereon, and that all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent; and such property may be sold for the payment of taxes and penalties due by such delinquent under such regulations as the Legislature may provide."

All of the taxes assessed against a taxpayer upon delinquency become a lien upon his real estate except that his homestead is subject to a lien only for the taxes assessed against it.

Section 50, Article 16, Constitution of Texas.

Article 5232j, Sayles' Civil Statutes.

Masterson vs. State, 42 S. W. Rep., 1003.

Guergin vs. City of San Antonio, 5 S. W. Rep., 140.

Turner vs. City of Houston, 52 S. W. Rep., 642.

Thus it appears that the poll tax of a property taxpayer becomes a lien upon his real estate if not paid within the time prescribed by law, and the tax collector is not authorized to do anything to impair or affect this lien.

Each of the three persons is represented by you as lien holders and owning the superior title to his respective property, and the fact that he had sold such property to the party who became delinquent would not deprive him of the title to the property as he still held the legal, while his vendee held the equitable, title to the property in question. As the senior lienholder he would have the right to collect his debt and if necessary to that end, recover the property by suit in trespass to try title. The State also had a lien on the property in question for the poll tax of the vendee; still the State stood in the attitude of a junior lienholder and was not entitled to any greater rights than would any other lienholder of the same class. In other words, in order for the State to recover the taxes in question there must be an excess of value to the extent that the senior lienholder must first be paid and then if there be sufficient property left to satisfy the claim of the State, such may be done. So, if there should even now appear to be such excess of value the State, in our opinion, would be entitled to collect the tax under consideration out of the two tracts of land not the homestead of the delinquent. It is very clear that the State can not make this debt out of the homestead property.

Yours very truly,

L. A. DALE,
Assistant Attorney General.

OCCUPATION TAX—SEWING MACHINES.

Party engaged in sale of sewing machines, working upon salary paid him by factory not subject to occupation tax: dealers or middle-men subject thereto, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 31, 1910.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: We are in receipt of yours of the 19th and 27th instants, enclosing letters from Hon. Arthur W. Taber, Tax Collector of Milam County. Mr. Taber desires our opinion as to whether Mr. G. C. Flint, manager of the A. G. Mason Manufacturing Company

of Cleveland, Ohio, or any of the employes under him or the said company, is liable for the occupation tax imposed by law upon persons, firms, agencies or associations of persons dealing in sewing machines. Mr. Taber states that Mr. Flint is in Cameron, Texas, at this time with nine other men, six of said men being salesmen and three being delivery men for the said company, and being under the direction and management of the said G. C. Flint; that Mr. Flint informs him that he is on a salary for the company and has full power to approve or disapprove all contracts made by the men under him for the sale of sewing machines. Further, that Mr. Flint has no interest in the said company save as a salaried manager in Texas; that none of the machines shipped to him from Cleveland, Ohio, are his property, and that he owns no interest in said machines, but that they are the exclusive property of the aforsaid company. It is further made to appear that the machines are shipped in this manner: They are crated at the factory, each machine separate, and loaded in carload lots and then shipped to the said G. C. Flint, manager of the company, at any place in Texas designated by him; that they are not charged to Flint's account, but remain at all times the property of the company at Cleveland, Ohio. That said machines are kept in a warehouse in Texas, and sold therefrom upon orders taken by the employes under Mr. Flint and approved by him; that in event the carload should be shipped to him at Cameron and he should fail to sell all of the machines in Milam County, the remainder would be reshipped by freight to any station where he would see fit to go after leaving Cameron. It seems that the six salesmen take orders after the car of machines has arrived upon sample machines carried by them, and if the orders are approved the machines are then delivered by the delivery men, who collect part in cash and take notes for the balance.

Mr. Taber further states that Mr. Flint claims that this business is protected by the commerce clause of the Federal Constitution as being interstate commerce, and, therefore, not subject to the levy of an occupation tax by the State Legislature. Mr. Taber calls your attention to the case of Potts vs. State, 74 Southwestern Reporter, as bearing upon the quetison.

An examination of the Potts case discloses that the Court of Criminal Appeals did not pass upon the question of interstate commerce, but did hold that the defendant was not a peddler within the meaning of our occupation tax statute. The facts are substantially the same as here presented, and we regard the Potts decision as authority for the proposition that Mr. Flint would not be subject to any occupation tax as a peddler, nor would the employes of the sewing machine company under him be subject thereto. Upon the question of interstate commerce we are inclined to the opinion that the manner of doing business pursued by Mr. Flint and the employes under him constitutes business done within the State, and is not interstate commerce.

However, a more serious question arises by virtue of the language employed in Subdivision 39 of Article 5049, imposing the sewing

machine occupation tax. Said statute provides for an occupation tax of $15.00 to the State and $7.00 as a county tax in every county where the business may be carried on from every person, firm, agency or association of persons *dealing* in sewing machines. It is clear that Mr. Flint is conducting a sewing machine agency and is engaged in the sale of sewing machines, but it appears that he does not buy the machines which he sells, but is employed as a salaried agent by the Mason Manufacturing Company of Cleveland, Ohio, and it reasonably appears from said letters of Mr. Taber that the machines so sold by Mr. Flint are manufactured by said company. It is uniformly held by the authorities that a dealer in commodities can not be construed to mean a manufacturer who sells articles manufactured by him, but that a dealer is a middle man between the manufacturer or the producer and the consumer. In other words, a dealer is one who buys to sell again, and not one who buys to keep or makes to sell. This proposition has been sanctioned and clearly laid down by our Court of Criminal Appeals in the case of Eagan vs. The State, 68 S. W. Rep., page 273. See also Taylor vs. Vinson, 80 Tenn. (12 Lea), 282, 47 Amer. Reps., 338; Commonwealth vs. Campbell, 33 Pa. (9 Casey), 380; Kansas City vs. Ferd Heim Brewing Co. (Mo.), 73 S. W. Rep., 302.

Therefore, if the Mason Manufacturing Company in fact manufactures all the machines sold by Mr. Flint, neither the company nor Flint can be held to be dealing in sewing machines. The statute does not impose upon the agent of any person, firm or association of persons an occupation tax for selling sewing machines, but the tax is imposed for dealing therein, and under the above authorities we are constrained to hold that the business so pursued by Mr. Flint is not within the purview of said occupation tax statute.

We return herewith for your files the letters of Mr. Taber.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

OPINIONS ON MISCELLANEOUS VIEWS.

COUNTY ATTORNEY—COUNTY SURVEYOR.

Section 40 of Article 16 of Constituion of Texas prohibits one person holding offices of deputy county surveyor and deputy county attorney.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 28, 1908.

James K. Little, Esq., Assistant County Attorney Ward County, Barstow, Texas.

DEAR SIR: Under date of September 26, 1908, you say:

"I am the duly qualified deputy surveyor of Reeves County land district, which includes Ward County. I am also the duly qualified assistant county attorney of Ward County. Is there such a conflict in the office of County Attorney or County or District Surveyor as will preclude me from continuing the office of Deputy Surveyor?"

Replying to your inquiry, I beg to call your attention to Section 40, of Article 16, of the Constitution of Texas, which is as follows:

"No person shall hold or exercise, at the same time, more than one civil office of emolument except that of justice of the peace, county commissioner, notary public and postmaster unless otherwise especially provided herein."

I am of the opinion that the word "office" as used in this section of our Constitution includes both an assistant county attorney and a deputy district surveyor, and that one person can not hold both such offices at the same time.

I am also of the opinon that when a deputy district surveyor qualifies as assistant county attorney, or when an assistant county attorney qualifies as deputy district surveyor, such subsequent qualification operates, *ipso facto*, as a resignation of such former office.

State vs. Brinkerhoff, 66 Texas, 45.
Alsup vs. Jordan, 69 Texas, 300.
Viencort vs. Parker, 27 Texas, 558.
Ex Parte Call, 2 Criminal Appeals, 497.

Respectfully,
WM. E. HAWKINS.
Assistant Attorney General.

TEXT BOOK LAW—EXCHANGE OF BOOKS.

Privilege held to extend to book dealers having on hand books used in schools prior to adoption of 1908.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 14, 1908.

Messrs. Richardson & Sanders, Sherman, Texas.

GENTLEMEN: In your letter of the 13th instant you make the foling statement:

"We are book dealers at this place and last week sent to Texas

School Book Depository some school books left on our shelves at the last adoption for exchange on the new adoptions. The books sent were only such as were used in our city and county public schools during the year 1907-'08, all of which were displaced by the new adoptions."

You desire to know whether or not the school book depositories for the publishing companies which procured the contracts with the State are required under the Text Book Law enacted by the 30th Legislature to take back from dealers stocks or parts of stocks, such as are described in your letter.

In reply thereto, I wish to call your attention to a part of Section 4, of the Text Book Law:

"The Board shall stipulate in the contract that where a change shall have been made from the books now in use the contractor or contractors shall take in exchange the respective books at present adopted by the State * * * in part payment for the new books and all bidders under this Act shall state what allowance they will make for the said respective books adopted by the State * * * now *in the hands of the patrons of the public schools* when offered in exchange for the new books adopted under this Act: provided that said allowance and condition for the exchange of old books shall be in force during the scholastic year beginning September 1, 1908, provided also that no book shall be taken in exchange that was not in use in the public schools during 1907-1908; or which was not purchased by book dealers for the session of 1907-1908."

It would appear from the general provision of the Act quoted that books could only be taken in exchange for new books when presented by the patrons of the public schools, and to this language and this provision of the Act we have been heretofore giving full force and effect, both by letter and telegram. However, on a further and more thorough consideration of the question and of the proviso following the general provision above quoted, we are constrained to believe that we have been giving this Act the wrong construction in this particular. There are two provisos above quoted limiting the general provisions of the Act, one of which requires that books only shall be taken in exchange which were in use in the public schools in 1907-1908, and the other proviso by inference requires the receiving in exchange from dealers the books purchased for the session of 1907-1908, which evidently contemplates the receiving in exchange from dealers in stock left on hand purchased by such dealers for use in the public schools during the session of 1907-1908.

We are, therefore, of the opinion that the proviso limiting the general provisions of the Act should be given a different construction from that heretofore given by this Department and that book dealers who have purchased school books for the schools for the session of 1907-1908 should have the exchange privileges as well as the patrons of the schools. In other words, that both dealers with such stock on hand and the patrons of the schools with such books in their possession should each enjoy the exchange privileges with those who have contracts with the State and that the depositories or agencies

of these contractors should receive in exchange such books at the contract price.

We are of the opinion that this construction is thoroughly authorized when both the general provision and the proviso of the Act are considered together and construed as a whole. Sutherland on Statutory Construction, Section 222, reads in part as follows:

"A proviso is something engrafted upon a preceding enactment and is originally used for the purpose of taking special cases out of a general class, or to guard against misinterpretation."

Savings Bank vs. U. S., 19 Wall., 227.

Minis vs. U. S., 15 Pet., 445.

Bank for Savings vs. the Collector, 3 Wall., 495.

"The general intent will be controlled by the particular intent subsequently expressed."

Ihnsem vs. Monongahela Nav. Co., 32 Pa. State, 132.

State vs. Goetze, 22 Wis., 363.

In other words, according to the Text Book Act referred to, the general rule seems to have been intended by the Legislature to allow the exchange privileges only to the patrons of the school, but the proviso engrafted upon this general provision limits that general provision and evidently authorizes and by plain construction of the same requires such agencies to allow the exchange privileges to the extent only, of course, of those books purchased by such dealers for the schools for the session of 1907-1908.

Yours very truly
J. T. SLUDER,
Assistant Attorney General.

MEMBERS OF LEGISLATURE—APPOINTMENTS TO NORMAL OF STATE.

Member of Legislature has authority to make appointment, notwithstanding he has tendered to Governor his resignation and same has been accepted, he being a member of Legislature until his successor has qualified.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 24, 1908.

Hon. Chester H. Terrell, Oppenheimer Building, San Antonio, Texas.

DEAR SIR: I am in receipt of yours of the 16th instant in which you say:

"Owing to the death of Senator Green and the resignation of Captain Cobbs, this county is only entitled, I believe, under the strict wording of the statutes, to appoint two students to the Prairie View Normal and Industrial College. There is now at this college a student from this county who wishes the appointment, because unless she receives it, she cannot stay at the school. If possible, I should like to get the appointment for her. I would like your opinion as to whether or not Captain Cobb could make the appointment and date it back to the time before he resigned, and if not, whether I could make the appointment as being representative elect."

It is our opinion that Captain Cobbs has authority to make the appointment above referred to, as still being a member of the Legislature, notwithstanding he has heretofore tendered to the Governor his resignation, who has accepted same. In an opinion to Lieutenant Governor A. B. Davidson, written on March 6, 1907, the Attorney General held that a State Senator remained a State Senator, notwithstanding his resignation, and the acceptance thereof by the Governor, and the order by the Governor of a special election, until his successor was duly qualified. This opinion is applicable to the question presented by you, and is amply sustained by the authorities.

Section 17 of Article 16 of the Constitution of this State is as follows:

"All officers within this State shall continue to perfom the duties of their offices until their successors shall be duly qualified."

The principle underlying the above constitutional provision is that there should be no vacancies in the public service, and the duty therefore is imposed upon the officer resigning to continue to discharge his duties until his successor shall qualify. Section 416 of Mecham on Public Officers is as follows:

"Where the law expressly provides, as it does in many States, that an officer shall continue to hold his place until his successor is chosen and qualified, he will, notwithstanding the aceptance of his resignation, continue in office and be charged with all its duties and responsibilities until his successor is chosen and qualified."

In the case of Badger vs. United States, 93, U. S., 599, the Supreme Court of the United States had under consideration a Section of the Constitution of Illinois, which provided that the officers "shall hold their office until their successors shall be qualified," and the court held in that case that Badger and others remained officers of the town of Amboy until their successors should qualify, notwithstanding they had resigned such offices and their resignations had been accepted by the proper authorities, and entered in the proper record books, no successor having been appointed and qualified.

The provisions in the Illinois Constitution is substantially the same as that contained in ours. In the case of Jones vs. the City of Jefferson, 66 Texas, 576, our Supreme Court held that an officer whose resignation has been tendered to the proper authority and accepted, continues in office, and is not released from his duties and responsibilities until his successor is appointed or chosen and qualified.

In the case of Keene vs. Featherstone, 29 Texas Civil Appeals, 563, the court, after quoting Section 17, Article 16, of the Constitution above referred to, say:

"This provision of our Constitution seems to be mandatory. It does not say nor does it mean that officers *may* perform the duties of their offices until their successors are qualified, but that they *shall* do it. Such is the contract between them and the State when they take the office, and there are many good reasons why the Constitution should be thus interpreted. Some of them are, that the functions of government must not cease, and the public records of the office must be preserved and handed over to a successor. In McGhee vs. Dickey,

4 Texas Civil Appeals, 104, Justice Stephens said in delivering the opinion of this Court in construing this provision of the Constitution: 'The public necessity for continuity of official tenure is not left to the caprice of the office holder. The contract for public service imposes a mutual obligation upon the officer and the public which can not be arbitrarily dispensed with by either party.' Citing Mechem on Pub. Off. 414; 19 Amer. and Eng. Enc. of Law, 562r; Edwards vs. United States, 103 U. S. 471; Thompson vs United States, Ind., 480; Badger vs. United States, 93 U.S. 599; Hoke vs. Henderson 4 Dve., 1; State vs. Clayton, 27 Kan. 442; Jones vs. City of Jefferson, 66 Texas, 476, 1 S. W. Rep. 903.".

In the case of United States vs. Green, 53 Federal Reporter, 769, it is held that the constitutional provision that all officers shall hold their offices until their successors are elected and qualified will prevent an officer from resigning so as to create a vacancy before the election of his successor See also People vs. Supervisors of Barnett Township, 100 Illionis, 332; United States vs Lawder, 10 Federal Reporter, 460.

Should the Governor see fit to call an extra session of the Thirtieth Legislature, it would be the duty of all those members whose resignations have been tendered and accepted, but whose successors have not been elected and qualified, to respond to such call and perform the duties of their offices.

Should a Senator or Representative, during the term of his office, remove from the district or county for which he was elected, his office thereby becomes vacant, but this is by virtue of another constitutional provision. (See Article 3, Section 23.) Mere resignation, however, by a member of the Legislature, does not vacate his office, but he is subject to the duties and responsibilities and is entitled to the rights and privileges thereof until his successor is elected and qualified.

Yours very truly,
JAS. D. WALTHALL,
Assistant Attorney General.

NURSERY STOCK—INSPECTION OF—FOREST TREES

Forest trees not required to be inspected before being offered for sale.
Certificate of inspection not required to be placed upon each bundle of nursery stock consigned, but only upon each box or bale.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 10, 1908.

Hon. Ed. R. Kone, Commissioner of Agriculture, Austin, Texas.

DEAR SIR: We are in receipt of yours of the 27th ult., enclosing letter from Sam H. Dixon, State Inspector of Orchards and Nurseries, and deputy of your office, wherin he requests the opinion of the Attorney General upon the following questions:

(1). As to whether or not forest trees offered for sale should be inspected before being so offered; and,

(2). As to whether the law requires a certificate of inspection to be attached to every bundle of nursery stock in a shipment, or only

upon the box containing many separate bundles or bales of such nursery stock.

We have given very careful consideration to the Act of the Legislature of 1905, regulating the inspection and sale of trees, shrubs, plants, etc., and have reached the conclusion that forest trees are not required to be inspected before being offered for sale.

Section 2 of the Act above referred to provides that when the Commissioner of Agriculture knows or has reason to believe that any of the contagious diseases mentioned in the Act exists in this State, he shall cause an examination to be made at least once a year prior to November 1st "of each and every nursery or place where trees, shrubs or plants commonly known as nursery stock are grown for sale for the purpose of ascertaining whether the trees, shrubs or plants therein kept or propagated for sale are infected with any such contagious disease or diseases or infested with such pest or pests."

It is further provided in the Act that if after such examination it is found that the said trees, shrubs or other plants so examined are free in all respects from such diseases or pests, the Commissioner or his agent or other person designated to make such examination, shall, upon the payment of the fees provided for, issue to the owner or proprietor of said stock so examined a certificate setting forth the fact that the stock so examined is apparently free from any and all such disease or diseases, pest or pests. The penalty clause of the Act referred to contains the following provision:

"Should any nursery agent or dealer or broker send out or deliver within the State trees, vines, shrubs, plants, buds or cuttings, *commonly known as nursery stock*, and which are subject to the attacks of insects and diseases above provided for, unless he has in his possession a copy of said certificate he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars."

It will be noted that the section of the statute providing for inspection and also that which provides a penalty for failure to have inspected, only refers to trees, vines, shrubs, plants, buds, cuttings, etc., which is commonly known as nursery stock. This, of course, does not include forest trees.

It is doubtless true that forest trees are in many cases, infected with contagious diseases and insect pests and such diseases may be disseminated through the sale of such trees the same as nursery stock or trees grown in nurseries for the purpose of sale, but the statute can not be construed so as to require their inspection, and to this extent it seems to be defective.

We call your attention, however, to Section 1 of the Act, which provides that no person shall keep any peach, plum, *or other tree* affected with certain diseases mentioned therein and declares that such diseased or infected trees shall be deemed a public nuisance, and as such, shall be abated: and further, that every person, when he becomes aware of the existence of any such diseases or insect pests in any tree owned by him, shall forthwith report the same to the Commissioner of Agriculture at Autsin, Texas. Under the Act the Commis-

sioner of Agriculture has authority to designate some person to inspect any such trees for the purpose of determining whether they should be destroyed and he is given full power and authority to destroy the same, provided the owner thereof does not do so upon notice from the Commissioner.

Answering your second question, it is our opinion that the statute does not require that nursery stock consigned for shipment, or shipped by freight, express or other means, should have a certificate of the inspector upon each bundle, but only upon each box or bale.

Yours very truly,
JAS. D. WALTHALL,
Assistant Attorney General.

LOTTERY—RAFFLE—GAME OF CHANCE, WHAT IS, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 4, 1909.

Hon. R. J. Williams, Clarksville, Texas.

DEAR SIR: Your letter of the 10th ult., received and contents noted.

The fact that the questions propounded in your letter required considerable research and examination of the authorities, and the great press of business in this Department, has caused a longer delay in answering same than would ordinarily occur.

You say you have in your place a game of chance operated by means of a card upon which there are blank numbers running all the way from one to fifty, that at the top of this card is a sealed number; that the players draw sealed numbers corresponding with the numbers upon the cards from envelopes containing said numbers, and that the player who draws the number corresponding with the sealed number upon the top of the card wins a prize; that all the numbers represented on the card are drawn before the sealed number at the top of the card is opened and it is determined who wins the prize. Upon this statement you ask the advice of this Department as to whether or not the game described is a raffle or a lottery.

A raffle was defined by Judge Roberts in the case of Stearnes vs. the State, 21 Tex., page 699, "to be a game of perfect chance, in which every participant is equal with every other in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances, in proportion to his risk. Whether they be developed with dice, or some other instrument, it is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keeper against the betters, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibiter."

The case of Risien vs. the State, 71 S. W., page 974, was the prosecution against the defendant for establishing a lottery. In that case a horse and buggy were disposed of by the defendant issuing tickets to the value of two hundred dollars. The tickets were numbered

from one to two hundred. These were drawn and the persons drawing them gave for each ticket the amount represented by its number; that is, if a person drew No. 5, he paid five cents for his ticket, and if a person drew No. 185, he paid $1.85 for his ticket. This common fund went to the seller of the horse and buggy; then each holder of the respective tickets at a time designated, threw dice, the one throwing the highest dice being entitled to the whole prize. The court held that the facts in this case come within the definition of a raffle.

In the case of State vs. Randle, 41 Texas, on page 297, the Supreme Court defines a lottery to be scheme for the distribution of prizes by chance.

The case of Long vs. the tSate. 2 S. W., page 541, was a prosecution charging the defendant with unlawfully betting and waging at a certain game with dice. The facts in this case showed a raffle, but the Court held that although a raffle it was a game and that it was played with dice and came within the statute making it an offense to play any game with dice.

In the case of Pendergast vs. the State, 57 S.W., page 850, the Court held that the operation of a slot machine was within the terms of the law establishing a lottery.

In the case of Barry vs. the State, 39 Crim. Reps., the Court held the operation of a "Cheap John Board" to come within the prohibition of the law against establishing lotteries. The facts in the case were that the defendant kept a stand so constructed that a spindle would be turned on a pivot horizontally. The circumference of the board was divided into spaces by nails driven on the edge, and between the nails different articles of value were placed, such as pocket knives, shaving mugs, and other articles. Prices were marked on some of the articles. The shaving mug was marked 50 cents, and other articles at different prices. Some of the spaces had collar buttons, worth about five cents per dozen.

The case of Dalton vs. the State, 74 S. W., page 25, was a prosecution against the defendant for exhibiting a gaming table and bank. The game run by the defendant was a turkey raffle and there was a wheel on a pivot so that the wheel stood upright. The face of the wheel was divided into forty-eight spaces and each space was numbered consecutively from one to forty-eight. Between each number a peg was riven, separating them from above. Pointing downward on the face of the wheel was a piece of leather so that when the wheel was turned this piece of leather would be knocked aside by the pegs so long as the wheel turned and when it stopped turning the leather would rest upon one of the numbered spaces between two of the pegs. In connection with the wheel were twelve paddles, each having on it fourteen numbers corresponding with the four numbers on the wheel and when the wheel was turned and the man holding the paddle which had upon it the number corresponding with the number on the wheel indicated by the piece of leather won, and the other eleven lost. The chances were sold for ten cents each. Upon the selling of a chance the buyer was handed out of the paddles. When the twelve chances were sold the wheel

was turned. When the wheel ceased turning the one whose paddle had upon it the number corresponding with the one indicated by the leather on the wheel won. The winner received a ticket on which was printed "Good for one turkey" signed by the defendant. Sometime th winner would like the turkey, but more frequently he would sell the ticket to persons who were in the house and there was some proof in the case that there were persons in the house in collusion with the defendant who bought the tickets at from 90 cents to $1.00 each. A portion of the court's charge is as follows:

'If you believe from the evidence beyond a reasonable doubt that defendant established a raffle for gaming purposes and exhibited it to obtain betters thereat and you further believe that from the evidence beyond a reasonable doubt he kept or exhibited the same as these terms have been heretofore defined and that the same was a table or a bank and kept and exhibited by him for the purpose of gaming, you will find the defendant guilty and assess his punishment as hereinbefore directed."

Appellant objected to said charge, because the same was and is contradictory and that it undertakes to make an offense out of a thing the court had heretofore charged was not an offense; that is, the raffle of personal property under the value of five hundred dollars and nullifies by its wording the right of the jury to acquit defendant if he was running a raffle. The Court of Appeals held that there was no error in the charge.

The cases cited here are the principal cases among the Texas decisions that have considered the subject of lotteries and raffles. From the last case cited, that of Dalton vs. the State and the case of Long vs. the State, *supra*, it appears that even a raffle, as defined by Judge Roberts, in Stearnes vs. the State, if operated as a gaming table or bank, or if played with dice, would constitute an offense against the law, though the raffle itself were for property less than five hundred dollars in value is not in itself a violation of the law. Judge Roberts' definition of a raffle as above taken from the case of Stearnes against the State, has been modified in only one particular by the subsequent cases, and that in the case above cited of Rosin against the State and in respect to that part of Judge Roberts' definition which reads "in which every participant is equal with every other in the proportion of his risk and prospect of gain." The persons participating in the raffle described in the Rosin case from the fact that each paid only the amount determined by the number upon the ticket he drew were not equal participants in the risk; that is, each did not contribute equally to the common fund or to the property with which the common fund was purchased.

The same case suggests another difference between raffle and lottery "that in order for the drawing of this character to be a raffle, all the tickets representing the value of the thing played for must be sold; so that the prize will go to one or the other of the players."

It will be noted that Judge Roberts in defining a raffle says: "The element of one against the many, the keeper against the betters, either directly or indirectly, is not to be found in it. It has

no keeper, dealer or exhibiter." I take it that the case stated in your letter has an exhibiter or keeper and that he has adopted the method therein stated for the purpose of disposing of merchandise at a profit, and if such is the case, I think he is violating Article 388a as contained in Chapter 49 of the General Laws of the Thirtieth Legislature, which is substantially a re-enactment of Article 382 of the Penal Code, in respect to persons keeping and exhibiting for gaming purposes any gaming table, etc.

It is my opinion that the raffle which the law considers harmless or at least for which the law has not seen proper to provide a penalty arises either in cases where the participants create a common fund between themselves, each participating equally in the common fund, or where a number of persons subscribe for a certain number of chances, the aggregate number of chances representing the value of a particular article of personal property, which article of personal property is disposed of by some method of chance to some one of those holding chances, the proceeds of the sale of the chances going to the owner of the property disposed of.

Where this method is adopted by a trader or other person for the purpose of disposing of his property at a profit, I think the transaction loses the character of a raffle and becomes within the prohibition of the law. I think the exhibiter could either be prosecuted for establishing a lottery or under the article above cited.

I am of the opinion that it makes no difference whether the lucky number is determined before or after the chances are sold, in determining whether a transaction is a lottery.

Yours very truly,
R. E. Crawford,
Assistant Attorney General.

SUNDAY LAW—CLUBS.

Not a violation of law for a bona fide club to dispense liquor to its members, such clubs not coming within the terms "merchant, grocer or dealer in wares or merchandise, or trader," etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 4, 1909.

Hon. J. Q. Henry, County Attorney, Del Rio, Texas.

DEAR SIR: We have your letter of the 12th ultimo, in which you ask the advice of this Department as to whether or not it is permissible for the Elks Club to serve drinks to its own members and to visitors, the proceeds thereof going into the common fund of the Club, on Sundays.

We have kept this matter under consideration for a longer time than customary, but wished to make a thorough investigation of the authorities before passing upon a question of so much importance.

The Article of the Penal Code under which prosecutions for sales on Sunday must be brought reads as follows:

"Any merchant, grocer or dealer in wares or merchandise or

trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person who shall sell, barter or permit his place of business or place of amusement to be open for the purpose of traffic or public amusement on Sunday shall be fined not less than $25 nor more than $50 * * * .''

In order that a sale on Sunday shall violate the foregoing article, the sale must have been made by a merchant, grocer, dealer in wares or merchndise or trader in some business. (Archer vs. The State, 10 App., 482.)

In the case of Koenig vs. The State, 33 Texas Criminal Reports, 367, the defendant was indicted charged with playing at a game with cards at a house for retailing spirituous liquors. The facts were undisputed that the defendant had played a game of cards in the club room of a building known as Turner Hall, situated in Cuero, on the date named in the indictment. The building was occupied and controlled by the Cuero German Turnverein, a private corporation chartered under the general laws of the State. The question for decision was: ''Was the club room in question a house for retailing spirituous liquors within the meaning of Article 355 of the Penal Code?''

Judge Hurt in delivering the opinion of the court on page 375 cited the case of Seim vs. The State, 55 Maryland, 566, and said:

''In Maryland the statute provides that 'No person in this State shall sell, dispose of * * * any spirituous liquors * * * or beer * * * on the Sabbath day,' * * * and a penalty was fixed. The officers of a corporation known as the Concordia were indicted for selling beer on Sunday. The purpose and management of the Concordia were in all respects the same as that of the Turnverein in this case. It was admitted that one Springer, a member, at the time and place alleged, called for a glass of beer in the usual way, was served by the steward, drank it then and there, and paid five cents therefor, that being the price fixed by the corporation. The Supreme Court of that State says: 'We are all of the opinion that the transaction was not a sale of beer to Springer within the intent and meaning of the statute. * * * The act has no application to a case like the present.' 'The license laws which forbids the sale or barter of spirituous or fermented liquors without a license have never been construed as applicable to a social club * * * . We think it clear that no license is required, for the reason that such a transaction is not a sale within the meaning of the license laws. Such a transaction is not a barter or sale in the way of trade.''

After discussing numerous cases from other States, the opinion concludes:

''We are of the opinion that, upon authority and reason, it must be held under the facts of the present case, the transaction was not a sale of the liquor in the way of trade, and that neither the association, its members, nor its steward were engaged in the occupation of selling liquors. If this be true, was the club room a place for retailing liquors? 'To retail,' in this connection must mean 'to sell in small quantities.' 'A house for retailing' must mean 'a house where the liquors are sold in small quantities in the way of trade.'

Again, our statutes regulating the sale of spirituous liquors recognize the distinction between selling liquors at retail and otherwise as an occupation. It is very clear, both from the decisions we have cited and our statutes, that the club, its members, or steward, are not engaged in the occupation of selling liquors in quantities less than one quart. In the case made by the facts, it is equally clear that no question of evasion of the laws, or of a device to conceal the real objects, purposes and acts of the association, arise in this case. The dispensing of liquors to the members is but incidental, and for the purpose of adding to the pleasure and comfort of the members. Again, reference to the statutes shows that the places and houses named and those intended to be embraced, are all 'public.' The statutes contemplates public houses and public places. Was the club room of the association either? None but members and their guests could enter there or share its privileges. So long as this rule was enforced it was not public, and the evidence shows that the rule was strictly observed. We conclude that the evidence does not show that defendant played cards at a house for retailing spirituous liquors, within the meaning of the statute."

The State of Texas vs. Austin Club, 89 Texas, 20, was a case in which the State of Texas brought suit to recover $1200 alleged to be due from the Austin Club, a corporation, as occupation taxes for continuously engaging in the business of selling spirituous, vinous and malt liquors in quantities of less than a quart. The Austin Club was a corporation created under the laws of the State of Texas; the purpose and business set out in the articles of incorporation were the encouragement of social intercourse among its members, the support of literary undertakings and cultivation of literature, and maintenance of a library and reading room and the promotion of the fine arts. It appeared that said club had from time to time purchased in bulk spirituous liquors and medicated bitters, and through its authorized agent and employe retailed same to its members in quantities less than one quart, and at an agreed price per drink. That members of said club were permitted to purchase in any quantity from said club vinous or malt liquors. Other facts were found to which we refer you to the opinion in the case.

Judge Brown, in delivering the opinion of the Supreme Court, used the following language:

"The question presented is: Was the Austin Club, in dispensing to its members and their guests liquors, in the manner stated, engaged in the 'business of selling spirituous, vinous and malt lisuors,' within the meaning and intent of Article 3226a, as above quoted?"

And further,

"Clubs like this have been formed and maintained in many of the States, and in some of them the question now before the court has been adjudicated, upon which there is likewise a conflict of authority. But we believe that the decided weight of authority upon this question supports the conclusion arrrived at by the Court of Criminal Appeals in the case of Koenig vs. the State, cited above, to the extent that the club was not engaged in the business of selling spirituous liquors."

The effect of the two Texas cases cited is to the effect that clubs of the character of the Cuero Turnverein and the Austin Club do not come within the terms of the law regulating the sale at retail of intoxicating liquors and are not governed or subject to its provisions upon the ground that the manner in which liquor is dispensed to the club members is not a sale in the way of trade, although it may be a sale according to the common and accepted idea of that term.

Considering then that Article 199 of the Penal Code applies only to merchants, grocers, dealers in wares and merchandise, or traders in any business whatsoever, and that only such persons are prohibited from selling on Sunday, I am of the opinion that a sale made by a club of the character passed upon in the two cases cited comes within the two above cited Texas cases.

One inquiry always is, in this character of cases, whether the organization is bona fide a club with a limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the Constitution and rules of the club, or whether, either the form of the club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the member shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it.

See the case of Commonwealth vs. Pomphret, 1378 Mass., 564; 50 Amer. Rep., 340.

You will understand that it would be improper for this Department to pass upon a question of fact and say whether or not a sale by a particular club on Sunday, as the Elks Club of Del Rio, would be a violation of the law, but if such club comes within the class discussed in the cases cited, I am of the opinion that it would not be a violation of law for the steward or other person conneteed with such club for that purpose to sell drinks to members on Sunday.

Yours truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTRUCTION OF LAWS—JURY WHEEL—MANNER OF DRAWING JURORS.

Right of officers to discard cards bearing names of jurors whom said officers know to be dead, over age or who have served six days during preceding six months; manner of replenishing wheel with names.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 26, 1909.

Hon. R. H. Buck, District Judge, Fort Worth, Texas.

DEAR SIR: We have your letter of the 14th instant, in which you ask the advice of this Department upon the construction of the Act passed by the Thirtieth Legislature providing for the selection of

jurors by means of a jury wheel in the particulars stated in the five following questions:

"1. Have the sheriff and clerk, or their deputies drawing the names of the jurors from the wheel, the right to discard such cards as may contain names of men known by them to be dead, to have moved from the county, or to be over age?

"If so, what should be done with such cards; should they be destroyed, returned to the wheel, or placed in box containing names of jurors who have already served four days or more?

"2. Are jurors disqualified from service who have served four days within two years (or since the law became effective), or is the former law governing this matter, i. e., providing for six days service within six months in district court and three months in county court, still effective?

"3. Should the officers authorized to draw the names of jurors from the wheel replenish the same until all the cards have been drawn therefrom and said wheel is empty, except that as provided in Section 7 of said Act, the names of jurors drawn for any week, but who have not served for as many as four days, should be returned to the wheel?

"4. When all of the cards bearing names of jurors have been drawn, from what source should the wheel be replenished?

"5. After the expiration of two years from the time said Act became effective, should said wheel be emptied before being replenished with cards bearing the names of qualified jurors for the succeeding two years, as provided in Section 1 of said Act?"

In reference to the first question above stated, there is nothing in the Act in question from which it can be construed that the Legislature intended to require the officers entrusted with carrying out the provisions of the Act to do any particular thing in reference to such cards as might bear the names of men who had died since their names had been put upon the cards and put in the wheel, or who had grown to an age exempting them from jury service or who had removed from the county; but I take it that when the officers drawing the cards from the wheel under the provisions of Section 4 of said Act, for the purpose of providing jury lists, come upon the name of a juror whom they know to be dead or out of the county, or over age, they could properly destroy such card or mark it for the benefit of the future officers performing the same duties that they then themselves are performing, and deposit the card in the box provided in Section 7, or, for that matter, in the jury wheel, but it seems to me it would be the more sensible thing for them to do to destroy the card.

I think it would be not improper for those officers whom the law designates to compile the names of all the qualified jurors in the county and to put them in the jury wheel, and to carry out the further provisions of the act which have for their purpose the selection of jurors to serve in the respective courts of the county to destroy the cards bearing the names of persons who would not be qualified to serve as jurymen and which, if placed either in the wheel or in the box provided in Section 7, could only serve the pur-

pose of possibly misleading officers in the future charged with carrying out the provisions of the law.

As to the second question propounded, I am of the opinion that a juror would not be disqualified from future services unless he had served six days during the next preceding six months in the district court or during the preceding three months in the county court, as provided in Subdivision 5 of Article 3139. That is, I do not think the Act of 1907 under consideration repealed Article 3139. Section 13 of the Act of 1907 expressly repeals Chapter 2, 3 and 4 of Title 62 of the Revised Statutes. It is true that Section 1 of the Act of 1907 provides that between the first and fifteenth days of August, 1907, and upon said dates every two years thereafter, in certain counties, the officers named shall meet at the court house of the county and select from the qualified jurors of the county the jurors for service in the district and county courts of such county for the ensuing two years in the manner thereafter provided; and that Section 7 of said act provides that after such jurors have been empaneled and served four or more days, envelopes containing the card bearing the names of such jurors so serving as many as four days shall be put in a box provided for that purpose for the use of officers mentioned in Section 1 hereof, who shall next select the jurors for the wheel.

These two sections standing alone would seem to indicate that the jurors who had served four days or more and whose names on cards had been deposited in a box provided for the use of the officers who are required by Section 1 to select the jurors biennially, could not be called upon to serve more than once during the two years; but Section 8 of the Act provides that when, for any reason, the wheel containing the names of jurors is lost or destroyed, with the contents thereof, "or if all the cards in said wheel be drawn out, such wheel shall immediately be replenished and cards bearing the names of jurors shall be placed therein immediately in accordance with Sections 1, 2 and 3 hereof."

This section contemplates that it might arise that all the cards would be drawn from said wheel before the two years from the date said wheel was replenished, and it is provided in such case the wheel shall be replenished in accordance with Sections 1, 2 and 3.

Section 2 provides:

"The aforesaid officers shall write the names of *all men* who are known to be *qualified* jurors under the law residing in their respective counties on separate cards, etc."

This latter provision, especially when taken in connection with the direction contained in the latter part of Section 7, which provides:

"That the cards bearing the names of the men serving as many as four days shall be put in a box provided for that purpose for the *use of the officers* mentioned in Section 1 hereof, who shall *next* select the jurors for the wheel," makes it clear, I think, that it was not intended to change the existing law as to the disqualification of jurors contained in Subdivision 5 of Article 3139.

In respect to the third question, I am of the opinion that the officers would not be authorized to replenish the wheel, except as pro-

vided in Section 7, with the names of such jurors drawn for any week who had not served as many as four days, until the wheel should become exhausted.

Section 1 of the Act provides that the jurors shall be selected biennially. Construed with Section 3, it provides that the wheel shall be filled with cards every two years. Section 8 provides that in case the wheel shall become destroyed "or if all the cards in said wheel be drawn out, such wheel shall be immediately refurnished," etc. It is clear that it was not intended that the wheel should be replenished except every two years, between the first and fifteenth days of August, and in the case provided in Section 8, except that names of jurors drawn from the wheel for any week who had not served as long as four days should be returned immediately to the wheel by the clerk or his deputy.

As to question four, I beg to advise: Section 8 provides that when all the cards in said wheel are drawn out, "such wheel shall immediately be refurnished and cards bearing the names of jurors shall be placed therein immediately in accordance with Sections 1, 2 and 3 hereof."

When this occurs, that is, when all the cards are exhausted, the officers named in Section 1 should meet and as directed in Section 2 write the names of all men known as qualified jurors on cards as provided and deposit them in the wheel as directed in Section 3.

In answer to the fifth question, as to whether after the expiration of two years the wheel should be emptied before being replenished with cards bearing the name of the qualified jurors for the succeeding two years, I am of the opinion that it should be, for the reason that it is then the duty of the officers named in Section 1 to again write the names of all men who are known to be qualified jurors under the law upon cards and put them in the wheel and it might be that some of the cards already in the wheel would bear names of men dead or removed from the county, and it would be useless to cumber the wheel with such names.

Besides, the officers, if they did not remove all of the cards from the wheel, might put the names of jurors already upon cards in the wheel, in which case such jurors would have two cards in the wheel bearing their names.

Yours truly,

R. E. CRAWFORD,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION.

Appropriation by joint resolution for defenders of State Treasury against band of robbers in violation of Section 44, Article 3 of Constitution.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 29, 1909.

Hon. A. J. Porter, House of Representatives, Capitol.

SIR: You have requested our opinion as to the constitutionality of a certain proposed joint resolution of the Senate and House of

Representatives of the State of Texas making an appropriation for the benefit of certain citizens who, it is recited in said resolution, under the leadership of Captain G. R. Freeman, rescued the State Treasury from a band of robbers on the night of the 11th of June, 1865.

The words employed in the resolution are not apt for making an appropriation from the State Treasury, but the resolution evidently contemplates and attempts to make such an appropriation amounting to five thousand dollars for the benefit of each survivor of said citizen rescuers of the Treasury and of the heirs of those who may have died, although the number of such rescuers is recited in the preamble as eighteen and in Section 1 as nineteen.

The resolution provides for a commission to determine who will be entitled to the benefits of such appropriation.

I am of the opinion that said resolution, in its present form, is probably in contravention of the provisions in Section 6 of Article 8 of the Constitution of Texas that "no money shall be drawn from the Treasury but in pursuance of specific appropriations made by law."

Section 44 of Article 3 of said Constitution provides that the Legislature shall not "grant by appropriation or otherwise any amount of money out of the Treasury of the State to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law."

Section 8 of Article 16 of said Constitution declares that "no appropriation for private or individual purpose shall be made."

It seems clear to me that the said proposed joint resolution would be violative of the above quoted provisions of said Section 44; and it may be violative, also, of the above quoted portion of said Section 6.

Said joint resolution is herewith returned.

Truly yours,

WM. E. HAWKINS,
Acting Attorney General.

CRIMINAL DISTRICT CLERKS, GALVESTON AND HARRIS COUNTIES—APPOINTMENT OF, BY THE GOVERNOR, NEED NOT BE CONFIRMED BY THE SENATE.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 6, 1909.

Hon. T. M. Campbell, Governor of Texas, Capitol.

MY DEAR SIR: In reply to your request for an opinion as to whether the Governor should submit to the Senate for their advice and consent, the appointment of clerks of the Galveston and Harris Criminal District Courts, you are respectfully advised that Article 1505 of the Revised Statutes provides that the Governor shall appoint a judge of said district, by and with the advice and consent of the Senate. Article 1511 of the Revised Statutes, providing for the ap-

pointment of the clerks, does not stipulate that the appointment shall be made "by and with the advice and consent of the Senate."

The language of the statute is as follows:

"Art. 1511. There shall be appointed by the Governor a clerk of said court for each of said counties, who shall hold his office for a term of two years, or until his successor is qualified."

The express use of the language that the appointment of the judge shall be "by and with the advice and consent of the Senate," and the absence of any such suggestion relating to the apopintment of the clerks, carries with it the logical negation that it was not within the purpose and intent of the Legislature that the same rule should apply to the clerks as was laid down for the judge, especially where the subject matter of both appointments is treated in the same Act; otherwise the Legislature would have so provided.

Unless the Constitution of the State or some statute expressly directs that such appointment be made by and with the advice and consent of the Senate, that body would have no juri-diction or authority to pass upon the appointment.

The only provision of the Constitution that relates to the subject is Section 12 of Article IV which is copied in full:

"Sec. 12. Filling vacancies.—All vacancies in State or district offices, except members of the Legislature, shall be filled, unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter."

It will be observed that this provision of the Constitution relates only to the filling of "vacancies" by appointment. The question would, therefore, arise whether the statute authorizing the Governor to "appoint" the clerks of the Criminal District Court would be filling a vacancy within the meaning of the provision of the Constitution.

The word "vacancies" as used in this connection, both by the constitutions and statutes of the several States of the nation has frequently been considered by the courts and judicially defined.

Webster defines "vacancy" to be, "The state of being vacant; emptiness."

Bouvier defines it as "A place which is empty." The term "vacancy in office" as used in a Kentucky statute was defined by the courts of that State to mean, such as exists when there is an unexpired part of the term of office without a lawful incumbent therein.

or when the person elected or *appointed* to an office fails to qualify according to law, and when there has been no election to fill the office at the time appointed by law. It applies whether a vacancy is occasioned by death, resigntion, removal from the State, district, county or otherwise.

Hopkins vs. Swift, 37 S. W. Rep., 155.

In North Dakota it was decided that a "vacancy in office within the meaning of the Constitution can never exist when an incumbent of the office is lawfully there, and is in the actual discharge of official duty. The vacancy contemplated by the Constitution relates only to such actual vacancies as may arise from death, resignation or the like."

State vs. Boucher, 21 L. R. A., 539.

Any number of the courts of other states have held that "vacancy" as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it.

Collins vs. State, 8 Ind., 344.

People vs. Tilton, 37 Cal., 614.

Commonwealth vs. Hauley, 9 Pa., 513.

Johnson vs. Wilson, 2 N. H., 202.

Pruitt vs. Squires, 64 Kan., 855.

"Vacancy" does not apply to an instance where there is a de facto, though not a de jure, incumbent.

Harrison vs. Simonds, 44 Conn., 318.

In view of the foregoing authorities it is clear that the provision of our Constitution relates to such vacancies, as may arise from death, resignation, removal, etc., and does not affect appointments made in due time by the Governor when the term of office of an occupant has expired by operation of law, under a statute expressly authorizing him to make such appointment containing no requirement that such appointment shall be "by and with the advice and consent of the Senate." However, in any event, should the contention be made that the language of the Constitution employing the words "all vacancies" is broad enough to include vacancies arising from expiration of term of office as well as from death, etc., even then it is clear that it was not within the purpose of either the framers of the Constitution nor the Legislature that such construction should be placed upon the act authorizing these appointments.

Article 1511 of the Revised Statutes providing for the appointment of the clerks was passed in 1870 and was therefore the law in 1876 when the present Constitution was adopted. This law was brought directly before the Constitutional Convention in Section 1 of Article V of the Constitution in which we find the language, "The Criminal District Court of Galveston and Harris Counties shall continue with the district, jurisdiction, and organization *now existing by law*, until otherwise provided by law."

The law has never been changed and by this direct reference, it must be considered as a part of the Constitution until changed by the Legislature.

Therefore, being read into the Constitution, this statute and the two sections of the Constitution referred to, are in pari materia, and must be construed together, and being thus construed, it must be decided that the appointments of clerks does not require confirmation of the Senate.

Section 12 of Article 4, relating to vacancies is a general provision relating to all offices falling within the classes specified throughout the State.

Section 1 of Art. 5, and the statute referred to, is a special provision relating to a locality and under the well known rules of construction in such cases the special provision will be effective over a general provision and for that reason our conclusions must be upheld.

Another circumstance giving weight to this view is that Section 1 of Art. 5 of the Constitution was amended and ratified by the people in 1891, in which this law was again referred to in identical language. The amendment referred to contains this language: "The Criminal District Court of Galveston and Harris Counties shall continue with the district, jurisdiction, and organization now existing by law, until otherwise provided by law."

The final proposition which I will submit is that the law referred to by the Constitution provides specifically how vacancies arising in the office shall be filled and nowhere does it provide that either the original appointment or any subsequent vacancy filled shall be by the advice and consent of the Senate, the provision relating to vacancies is as follows:

"Art. 1518. When a vacancy occurs in the office of clerk of the criminal district court, the Governor shall fill the same by appointment, and the person appointed shall hold the office for the unexpired term, and until his successor is qualified and shall enter into bond and take the oath of office as heretofore prescribed in this chapter."

It is, therefore, our opinion that it is improper to refer the names of the clerks appointed under the law, to the Senate for confirmation.

Yours very truly,

JEWEL P. LIGHTFOOT,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—DELEGATION OF LEGISLATIVE POWER.

Legislature can not delegate legislative authority to a State Board of Health in the promulgation of a sanitary code to have the force and effect of law.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 12, 1909.

W. M. Brumby, M. D., State Health Officer: Hon. J. P. Hayter, Chairman Senate Committee on Public Health; Hon. J. C. Ralston, Chairman House Committee on Public Health, Capitol.

GENTLEMEN: Senate Bill No. 94 and House Bill No. 201, which are now pending before the Legislature, are identical, and provide.

among other things, for the creation of a State Board of Health with power and authority to adopt and promulgate a sanitary code which shall operate upon local boards of health and upon the people generally and which shall have the force of law throughout the State.

You have each asked of this Department an opinion as to whether those provisions of the proposed statute do or do not involve unconstitutional delegation of legislative powers?

This precise question seems not to have been expressly decided by the courts of this State, and the decisions of the courts of other States upon similar questions have not been uniform; and by reason of these facts the question propounded by you is perplexing and difficult, and does not admit of ready or positive answer.

The Constitution of Texas contains the following provisions which bear upon the subject:

Article 2, Section 1: "The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Article 3, Section 1. "The legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'"

Article 16, Section 32. "The Legislature may provide by law for the establishment of a board of health and vital statistics, under such rules and regulations as it may deem proper."

Other constitutional provisions doubtless bear, more or less, upon the question here under consideration, but it is believed that the construction to be given to those above quoted will be decisive of the question presented.

Now, it is well settled by what are practically uniform decisions of the courts of many if not all the States that under constitutions similar to ours purely legislative powers cannot be delegated, unless it be under constitutional provisions expressly authorizing it, as, for instance, to the Railroad Commission, or to municipalities or local communities, or in some States, by reason of usage and construction of long standing.

The practical difficulty lies in making a proper application of this principle to a particular statute, and it is upon this point that the authorities so widely disagree. From a discussion of the question of the delegation of legislative power, found in Lewis' Sutherland on Statutory Construction, Second Edition, Volume 1, Sections 87, etc., the following is taken:

"The power to make laws for a State vested in the Legislature is a sovereign power, requiring the exercise of judgment and discretion. It is a delegated power,—delegated in a Constitution by the people in whom inherently are all the powers. On common-law principles, as well as by settled constitutional law, it is a power which cannot be delegated. (Citing Willis vs. Owen, 43 Texas, 41; State vs. Swisher, 17 Texas, 441, and other cases.)

This is a general rule or maxim; but like all other rules of the common law it is flexible, extending as far as the reason and principles on which it is founded go, and ceasing when the reason ceases. It admits of exceptions connected with the principle which supports the rule, or which may be presumed to have been intended by the party or people who are the original source of the power.

The legislative department as an integral part of our political system is confined to the exercise of its proper powers, and possesses them exclusively, as the other departments severally have theirs. As the possessor of the law-making power, it may confer authority and impose duties upon the others and regulate the exercise of their several functions. *It may pass general laws for that purpose, giving them expressly or by necessary implication an incidental discretion to employ the proper means to fill up and regulate the details for themselves and subordinates, though the exercise of that discretion be quasi legislative.* This is illustrated by laws empowering the courts in the exercise of their jurisdiction to adopt rules of practice and forms of procedure; etc.

The true distinction is between the delegation of power *to make the law*, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The Constitution vests this power in the Legislature; it must there remain by force of the Constitution. It is exclusively vested in the Legislature. The Legislature cannot divest itself of the power, nor impart it to others except in accordance with this distinction, though there are some recognized exceptions which will presently be considered. Legislative power is delegated contrary to the maxim stated when the Legislature attempts to confer on others *a power of substantive legislation*, to be exercised independently or in conjunction with the Legislature, or when it *constitutes an inferior Legislature or law-making body.* At the same time it is necessary for the Legislature to confer more or less of discretion upon executive and administrative officers in applying a law and carrying it into effect, and in many cases it is expedient to vest in such officers more or less of power to make rules and regulations for the purpose of applying and executing the law. It is, perhaps, impossible to lay down any general rule by which it may be certainly and readily determined whether such a law is or is not an unlawful delegation of legislative power. (Citing State vs. Gloucester County, 50 N. J. L., 585, 15 Atl., 272, from which the following is taken: 'When we recur to the fact that the power of eminent domain has been delegated to railroads and other corporations without challenge; that the important power of taxation and all the powers of local government have, for more than three generations, been delegated in our State, we are admonished not to be too confident in asserting where the precise limitation is upon the competency of the Legislature to delegate powers of government.')"

Following this in the text is a quotation from Brodbine vs. Revere, 182 Mass., 598, 66 N. E., 607, which is as follows:

"Apparently on grounds of expediency amounting almost to necessity, the making of rules and regulations for the preservation of the public health has been intrusted to boards of health in towns as well as in cities, and to a *State Board of Health,* and a violation of rules established by city or town boards has long been and is now punishable in the courts. The validity of these statutes, which has long been recognized, stands upon one or both of two grounds. They may be considered as being within the principle permitting local self-government as to such matters, the board of health being treated as properly representing the inhabitants in making regulations, which often are needed at short notice and which could not well be made, in all kinds of cases, by the voters in town meeting assembled. Perhaps some of these statutes may also be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the *substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties.*"

In discussing Health and Quarantine laws, Prentice on Police Powers, has this to say at page 105:

"Health and quarantine are immediately recognized as of the domain of police powers and laws. Quarantine, as a means of assuring the public safety, is one of the most ancient and formidable prescriptions of government of every form, and barbaric or civilized, it indicates a sacrifice of individual rights, to what often seems an irresponsible authority. The general subject, on the other hand, of the public health has enlisted the greatest wisdom, the use of every science, and the widest experience in its behalf, but equally refers most provisions rather to discretion and reason, than to exact definitions under fixed laws. It is of this necessity, for no one can foresee accurately the quarter, the time, the description, of the dangers against which there must be a defense, nor when their approach is signaled can there be hesitation, the possibility of a revolt, or an opportunity to call for a council or Legislature to determine by statute what shall be the appropriate and adequate action. Naturally some details can be prearranged, and experience warns every State and every locality of its peculiar perils. Laws may establish reasonable barriers, and room is left for ordinances and regulations of local administrations enforced in self-defense, and many of them exclusively within the local province; but generally powers are delegated by the sovereign State to boards and officers, who are to take cognizance of everything relating to this subject, and to exercise discretionary authority of great efficiency and of the highest importance."

From the opinion of the Supreme Court of Wisconsin in State vs. Burdge, 95 Wis., 300; 70 N. W., 347; 60 Amer. St. Rep., 123; 37 L. R. A., 157, we quote the following:

"It cannot be doubted but that, under appropriate general provisions of law, in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the Legislature upon the State board of health or local boards to

make reasonable rules and regulations for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative power, but there must be some substantive provision of law to be adminstered and carried into effect. *The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority and discretion as to its execution, to be exercised as under and in pursuance of the law. The first can not be done. To the latter, no valid objection can be made.*"

Freund in his treatise on Police Power says at page 31:

"It cannot be left to an administrative officer to determine conclusively the existence of a danger and the choice of measures to be taken against it, since that would involve an unconstitutional delegation of legislative power. It seems, however, that this objection may be avoided by interpreting the delegation of power as vesting the administrative officer merely with a discretion in requiring usual and appropriate safeguards against a danger, subject to judicial control as to the existence of the danger and the reasonableness of the relief. Such delegation of powers is certainly in accordance with legislative practice, so especially in dealing with a danger of epidemic disease."

We thus find that the real issue in the controversy is as to whether a particular statute confers legislative powers or only such powers as are merely administrative; and if the powers conferred be legislative, that much at least of the act must fall, while if the powers conferred are administrative only, the act may stand.

With regard to the application of these principles to local boards of health there has been practically unanimity in most, if not all the States; but with regard to their application to State boards of health there has been and is a great and irreconcilable diversity of opinions and decisions by the courts of last resort in different States.

The following case presents the view that the pending measure does not delegate legislative powers:

Blue vs. Beach, 155 *Ind.*, 121; 80 Amer. State Reports, 195; 50 L. R. A., 64.

The opinion of the Supreme Court of Indiana in this case discloses the facts to be as follows:

Section 4 of Article 1 of the Constitution of Indiana lodges in the General Assembly all legislative authority.

Burns's Revised Statutes, 1894, paragraph 6715, expressly authorized and empowered the State Board of Health to adopt "rules and by-laws, subject to the provisions of this act and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious diseases."

Rule 11 prescribed by said State Board of Health made it the duty of local boards of health to require under certain conditions vaccination or revaccination of all exposed persons.

Pursuant to said authority the local board of health of Terre Haute adopted and promulgated an order requiring vaccination of school children. This prosecution arose under said order for violation thereof. The court held this a proper exercise of the police power of the State, saying:

"In order to secure and promote the public health, the State creates boards of health, as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the Legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction; and the right of the Legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities.—(Citing numerous decisions.)

"It cannot be successfully asserted that the power of boards of health to adopt rules and by-laws subject to the provisions of the law by which they are created, and in harmony with other statutes in relation to the public health, in order that the 'outbreak and spread of contagious and infectious diseases' may be prevented, is an improper delegation of legislative authority, and a violation of Article 4, Section 1 of the Constitution.

"It is true, beyond controversy, that the legislative department of the State, wherein the Constitution had lodged all legislative authority, will not be permitted to relieve itself of this power by the delegation thereof. It cannot confer on any body of persons the power to determine what the law shall be, as that power is one which only the Legislature, under our Constitution, is authorized to exercise; but this constitutional inhibition cannot properly be extended so as to prevent the grant of legislative authority to some administrative board or other tribunal to adopt rules, by-laws or ordinances for its government, or to carry out a particular purpose. It cannot be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be by the Legislature referred to some designated ministerial officer or body. All of such matters fall within the domain of the right of the Legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. Cooley, Const. Lim., 114. The rule in respect to the delegation of legislative power is admirably stated in Locke's Appeal, 72 Pa., 491; 13 Amer. Rep., 716, as follows: 'Then the true distinction, I conceive, is this: The Legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things, upon which wise and useful legislation must

depend, which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.' That the power granted to administrative boards, of the nature of boards of health, etc., to adopt rules, by-laws and regulations reasonably adapted to carry out the purpose or object for which they are created, is not an improper delegation of authority, within the meaning of the constitutional inbibition in controversy, is no longer an open question, and is well settled by a long line of authorities. (Authorities are here enumerated.)

"It would seem that the power of the boards of health of this State, under the laws relating thereto, to make and adopt all reasonable by-laws, rules, and regulations to carry out and effectuate the great interests of the public health confided to them by the Legislature, is so well affirmed by the authorities that we may dismiss this feature of appellant's contention withou further consideration."

Pierce vs. Doolittle (Iowa) 106 N. W. Rep., 752.

Constitution of Iowa contains the following provisions:

Article 3, Section 1. "The powers of the government of Iowa shall be divided into three separate departments: The Legislative; the Executive; and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in cases hereafter expressly directed or permitted."

Article 4, Section 1. "The Legislative authority of this State shall be vested in a general assembly, which shall consist of a House of Representatives and the style of every law shall be, 'Be it enacted by the General Assembly of the State of Iowa.'"

This was an action for a malicious prosecution for violating a complaint against plaintiff, charging him with a violation of an ordinance of the town of Carson in failing to notify the proper officers of the existence of scarlet fever and in failing, neglecting and refusing to obey the rules and regulations of the board of health of the State requiring the plaintiff as a physician to report a case of scarlet fever which he was attending. There was a verdict for the defendant from which plaintiff appealed. The Supreme Court of Iowa said:

"The contention for appellant is that the crimes which are punishable under the statutes of the State must be prescribed by statute and that they cannot be left for determination to board or tribunals whose rules and regulations are not prescribed by the Legislature itself. In support of this contention cases are cited in which it has been held that the power of the Legislature to enact and repeal laws cannot be delegated * * * But we do not see the applicability of that well recognized principle to this case * * * The act to be punished is the violation of the rules of the State Board of Health, a tribunal constituted by law and having the authority conferred upon it by law and no other authority. We think it clear that the Legislaure may provide for the punishment of acts in resistance to, or violation of, the authority conferred upon such subordinate tribunal or boar l."

The court then makes the following quotation from Blue vs. Beach, 155 Ind., 121, *supra*:

"When these boards duly adopt rules or by-laws by virtue of legislative authority such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the Legislature; and like an ordinance or by-law of a municipal corporation they may be said to be in force by authority of the State," citing Commonwealth vs. Sisson (Mass.) 75 N. E., 619.)

Below are set out some of the decisions upholding grants by the Legislature of plenary powers to State boards of health and other State boards:

St. L. S. W. Ry. Co. of Texas vs. Smith, 49 S. W. Rep., 627.

Pierce vs. Doolittle (Iowa) 106 N. W., 75.

Blue vs. Beach, 155 Ind., 121; 56 N. E., 89.

Isenhour vs. State, 157 Ind., 517; 67 N. E., 40.

Rurst vs. Warner, 102 Mich., 238; 47 Amer. St. Rep., 525.

State vs. Chittenden, 127 Wis., 468; 107 N. W., 560.

Commonwealth vs. Sisson (Mass.) 75 N. E., 622.

Nelson vs. State Board of Health (Mass.) 71 N. E., 695. (This case holds that rules adopted by the State Board of Health are *quasi* legislative.)

In re Inman, 8 Idaho, 398.

State vs. Southern Ry. Co.; 54 S. E., 294.

Campagnie Francaise, etc. vs. State Board of Health, 51 La. An., 645.

Port Royal Mining Co. vs. Hagood (S. C.) 9 S. E. Rep., 688.

State vs. Spoyer, 67 Ver., 502.

Among the authorities presenting the adverse view which is to the effect that the Legislature cannot delegate to a State board authority to prescribe rules and regulations having the force of law, are the following:

Cooley's Constitutional Limitations, 7th Ed., page 163:

"One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Schaezlein vs. Cabaniss, 135 Cal., 467.

"Petitioners were charged with violating the provisions of 'an act to provide for the proper sanitary condition of factories,' etc., approved February 6, 1889. That act declares as follows: 'If in any factory or workshop any process or work is carried on by which dust, filaments, or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein, and it appears to the commissioner of the bureau of labor statistics that such inhalation could, to a greater extent be prevented by the use of some me-

chanical contrivance, he shall direct that such contrivance shall be provided, and within a reasonable time it shall be so provided and used.' Section 6 of the act makes it a misdemeanor for any person to violate any of the provisions of the act. (Stats. 1889, p. 8.)

"Petitioners were convicted of having unlawfully refused and neglected, after notice, to provide and use a suction exhauster with properly attached pipes, hoods, etc., in a metal-polishing shop, within a reasonable time after having been directed so to do.

"The ultimate question presented for consideration under this writ is that of the constitutionality of the act above quoted.

"*That the Legislature may not delegate its law-making functions, excepting to such agents and mandatories as are recognized by the Constitution, is, of course, beyond controversy.* Equally we think beyond controversy, however, is the right of the State, in the exercise of its police power, to pass reasonable laws for the protection of the health of employes in given vocations, and to make the violation of these laws penal offenses. * * *

"The manifest objection to this law is, that upon the commissioner has been imposed not the duty to enforce a law of the Legislature, but the power to make a law for the individual, and to enforce such rules of conduct as he may prescribe. It is thus arbitrary, special legislation, and violative of the Constitution."

Noel vs. People, 187 Ill., 587; 58 N. E., 616; 70 Amer. State Rep., 238.

This case arose under an act to regulate the practice of pharmacy in the State of Illinois. It was held to be discriminatory, and involving improper delegation of legislative functions. The court said:

"The Legislature undoubtedly has the power, in the interest of the public health, to pass a law, regulating the disposition of these domestic remedies and proprietary medicines; but instead of doing so in Section 8, it has abdicated its own power upon the subject, and conferred such power upon the board of pharmacy to be exercised according to the discretion of the board: Cicero Lumber Co. vs. Cicero, 176 Ill., 9; 68 Amer. St. Rep., 155; 51 N. E., 758; Cairo vs. Feuehter, 159 Ill., 155, 42 N. E., 308; Normouth vs. Popel, 183 Ill., 634, 56 N. E., 348."

Jannin vs. State, 51 S. W., 1126, was a Texas case which arose under the Act of 1893, page 97, making it a penal offense for other persons than the agent of the railroad company to sell its tickets, but providing that it should not apply to tickets on which it is not plainly prined that it is a penal offense for the holder to transfer same. Our Court of Criminal Appeals said:

"We accordingly hold that because the Legislature left it optional with the railroad companies whether or not, in the issuance of tickets, they would create a penal offense, the act of the Legislature is without authority of law; is violative of the law, in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law. In this respect it would appear to be violative of Section 28 of our bill of rights, which said: 'No

power of suspending laws in this State shall be exercised except by the Legislature.' See Suth. St. Const., Sec. 69."

For a valuable discussion of the questions involved in this inquiry, reference is made to the opinion of the Supreme Court of Wisconsin in State vs. Chittenden (Wis.) 107 N. W., 511-516, and cases cited. In that case the Supreme Court of Wisconsin said:

"The true distinction between delegation of power to make law and delegation of power to administer law is as follows: The former contemplates exercise of discretion as to what the law shall be; the other exercise of discreation in the administration of law."

Minnesota vs. Railway Co., 100 Minn., 443; L. R. A., 10, 250 (N. S.) arose under a statute which provided generally for what purposes and upon what terms and conditions and limitations an increase of the capital stock of a railway corporation may be made and conferred upon the Commission the duty of supervising any proposed increase. The court held that it was within the power of the Legislature to delegate to the Commission the duty of finding the facts in each paricular case and to allow or to refuse the proposed increase as the facts may warrant.

The court held, however, that any statute which might attempt to authorize the Commission, *in its judgement,* to allow an increase of capital stock for such purposes and on such terms as it may deem advisable or in its discretion to refuse it, would be unconstitutional as an attempt to delegate legislative power.

Your attention is called to the following decisions of the courts of Texas, bearing to greater or less extent upon the questions here under consideration:

St. Louis Southwestern Ry. Co. vs. Smith, 49 S. W. Rep., 627.

This case involved the validity of an order of the Livestock Sanitary Commission excluding from the State cattle from another State as being affected with a contagious and infectious disease. In connection with the statute defining the power of said Commission this decision of the court, upholding its authority, is both interesting and suggestive.

In Chancey vs. State, 84 Texas, 534, our Supreme Court said:

"When the Legislature conferred the right to sell land only on the condition that the first payment had been made, the Land Board had no power to attach the further condition of actual settlement and occupancy, *unless* the Legislature had conferred upon that body such a power. * * * Laws can be made in this State only by the Legislature," etc.

Staples vs. Llano County (Tex.) 28 S. W. Rep., 571.

San Antonio vs. Jones, 28 Texas, 32.

Ex parte Nate, 17 Texas App., 119.

Wall vs. McConnell, 65 Tex, 399, and discussion thereof in Staples vs. Llano County, *supra.*

State vs. Swisher, 17 Texas, 447.

Ex Parte Tannin, 51 S. W. Rep., 1128.

Lytle vs. Half, 75 Texas, 133.

Kinney vs. Zimpleman, 36 Texas, 577.

Holley vs. State, 14 Texas App., 510.

Arroyo vs. State, 69 S. W. Rep., 503.
Clark vs. Finley, 93 Texas, 181.

I confess my utter inability to determine from the adjudicated cases involving the question here under consideration any definite rule by which to determine whether the powers conferred by a particular statute are legislative or administrative. Indeed, I am reluctantly forced to the conclusion that in formulating said decisions no uniform rule or common standard has been recognized or observed. On the contrary, it seems to me that, speaking generally, the particular case before the court and the rule of construction in that particular State has depended upon whether the court in construing the constitutional provisions conferring legislative power have adopted a strict or a liberal rule of construction and upon the length to which the particular court was willing to go in securing an unfettered and untrammeled exercise of the police power of the State.

The question presented by you is one of the most fundamental and far reaching character and in my estimation is one of the most important which has ever been submitted for the consideration of this Department. It calls for extended research and for the exercise of deliberate and matured judgment.

I regret exceedingly to have to say that by reason of the fact that the volume of work in this Department is overwhelming and the further fact that the number of our office force is very limited have together made it physically impossible for me, in the limited time at my disposal, to do justice to the question or to the Department or to myself.

However, in view of the pressure upon your time and mine I think it best to give you, for whatever they may be worth, and even in a rather crude form, the result of my investigations of the subject down to this time, without awaiting an opportunity for giving to the subject an exhaustive study and consideration which its vast importance demands.

My present impression, which has hardly ripened into a definite opinion, is that the proposed bill, as it is now written, probably involves an unconstitutional delegation of legislative power. It is at least a matter of grave doubt, in my opinion, whether in the event of its enactment into law it will or will not be upheld by our courts as constitutional; and I am inclined to think it will not.

But in this connection I desire especially to call your attention to the above quoted provisions of Section 32 of Article 16 of our Constitution authorizing the Legislature to provide by law "for the establishment of a board of health and vital statistics, under such rules and regulations as it may deem proper", and to suggest that while this constitutional provision does not use the words "with the powers", or any other equivalent expression before the words "under such rules and regulations as it may deem proper", the language used may possibly be construed as authorizing the Legislature to confer upon the State board of health the broad powers enumerated in the pending bill. I have not had time nor opportunity for studying history of the provisions of said Section 32 or the construction which

the courts of other States have placed upon somewhat similar provisions of their own Constitutions relative to other matters, and consequently am not prepared to express any final opinion in the premises; but my impression is, that the provisions of said Section 32, Article 16, should be construed in conjunction with and to harmonize with the above quoted provisions of Section 1, of Article 3 of our Constitution, which confers the legislative power of the State upon the Legislature.

Inasmuch as said bills have not yet been enacted into law and in the hope of aiding you in obviating serious difficulties affecting, to greater or less extent, the validity and power enforcement of the measure in the event of its passage, I beg to point out certain features thereof, and to suggest, in general terms, amendments thereof which will, I think, materially strengthen the bills, even though such amendments may not make them constitutional, such suggestions being as follows, namely:

First. Section 11 authorizes the State Board of Health to prepare, adopt and promulgate by publication a sanitary code covering a great many specifically enumerated matters and things, but does not directly and in express terms give to such State Board of Health authority, supervision and control in such matters and things. I think it would be better to expressly confer, in said section, that power and authority upon the State Board, and to provide, as a collateral or ancillary matter, that such board in the exercise of such statutory powers shall have the right to prescribe necessary and reasonable rules and regulations in carrying such statutory provisions into effect, including the preparation, adoption and promulgation of a sanitary code dealing with and embracing all of the matters and things embraced by or included in the statutory powers thereby conferred upon such State Board, and that such sanitary code when so prepared, adopted and promulgated shall have the force of law throughout the State.

Second. Said Section 11 seeks to confer upon the State Board certain powers which it seems are to be exercised directly in particular instances, involving abatement of specific nuisances, compelling proper drainage, etc. I suggest that in so far as the Legislature may consider it practicable to do so, the statute should provide for enforcement through the courts of its own provisions and of the provisions of the aforesaid sanitary code.

Third. Said Section 11 seeks to authorize said State Board of Health to prescribe various penalties consisting of fines ranging from $1 to $500 for violations of its rules, regulations, ordinances and laws as shall be set forth in such sanitary code, and also seeks to provide for punishment of such offenders. I think it would be better for the statute itself to expressly prescribe all penalties and provide punishment for violation of any provision of the statute itself, or of such sanitary code after it shall have been so prepared, adopted and promulgated.

Harbor Com'rs. vs. Excelsior Red Wood Co., 88 Cal., 491, 26 Pacific, 375, 22 Am. St. Rep., 321.

In this connection it might be advisable for the Legislature, out of considerations affecting jurisdiction of courts, to grade the penalty to fit the offense, placing the maximum of penalty for certain offenses at $200. I also beg to refer you to note in 80 Am. St. Rep., beginning at page 212, for a valuable discussion as to what powers may be delegated to boards of health.

However, even if these suggested changes be made there will yet remain the vital question as to delegation of legislative powers.

Despite my own views, as indicated herein, relative to the proper construction of the above quoted provisions of the Constitution of Texas I think that the weight of authority and the decided tendency of the courts, generally, outside of this State, and even of some of the courts of this State, as indicated by certain expressions in cases referred to herein, particluarly St. Louis Southwestern Ry. Co. vs. Smith, 49 S. W. Rep., 627, is to the effect that if the pending bills be amended in accordance with the foregoing suggestions, which I have taken the liberty of making, the powers thereby conferred upon the Texas State Board of Health should be held to be administrative rather than legislative powers, and that in the event of the enactment of such bills, as so amended, into law, such statute should not be held to involve unconstitutional delegation of legislative powers.

I am of the opinion that the question submitted by you can not be both satisfactorily and finally answered except by our courts of last resort.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

APPROPRIATION—CONSTITUTIONAL CONSTRUCTION—LEGISLATIVE AUTHORITY.

Legislature has authority to make appropriation for the erection of monuments or statues, within or without this State, in memory of distinguished citizens or soldiers.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 18, 1909.

Hon. J. F. Strickland, House of Representatives.

DEAR SIR: In respose to your inquiries which are as follows:

1. "Is there anything in our Constitution which prohibits the State from appropriating money for the erection of monuments to distinguished citizens or soldiers within this State?—and

2. "Is there anything in the Constitution which would prohibit the State from appropriating money to erect a monument to the Texas soldiers in the National Military Park at Vicksburg?"

I beg to say: Under and by virtue of Section 39 of Article 16 of the Constitution,—giving the words of the section—

"The Legislature may from time to time make appropriations for preparing and perpetuating memorials of the history of Texas

by means of monuments, statues, paintings, and documents of historical value."

I am of the opinion that the Legislature has the power under this section to appropriate money for the erection of monuments within this State to distinguished citizens or soldiers.

I am also of the opinion that such power to appropriate money for such purposes is not confined to monuments to be erected within this State, but for monuments which may be erected elsewhere, such as Vicksburg, Mississippi.

As to whether the particular appropriation, or the particular monument erected from such appropriation, is a reasonable exercise of the power granted in this section, is for the Legislature to determine, and unless there is a flagrant abuse of that power the appropriation would be constitutional.

Yours very truly,

R. V. DAVIDSON,
Attorney General.

CORPORATIONS—TEXAS METAL TRADES ASSOCIATION.

Object of association must be one of those authorized by statute.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 18, 1909.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: Your predecessor referred to this Department proposed articles of incorporation of the "Texas Metal Trades Association", together with correspondence between your Department and E. J. Mantooth, Esq., of Lufkin, Texas, upon the question of the propriety of the filing by the Secretary of State of said articles of incorporation. I understand that you desire our opinion in the premises.

Article 2 of the proposed charter is as follows:

"Article 2. This association is formed for the purpose of securing a closer relation between its members, the discussion of various questions affecting their interest, the advancement of ideas towards just and equitable dealings between its members and their employes, whereby the interest of both will be properly and lawfully protected."

I note that it is contended by Mr. Mantooth, as the attorney for the proposed incorporators, that such incorporation should be permitted by you under the provisions of Revised Statutes, Article 713, which provides:

"Any religious society, military or fire company, literary, social, charitable or benevolent association, other than colleges, universities, academies or seminaries, or any grand or subordinate lodge, or other order of Free and Accepted Masons, or of the Independent Order of Odd Fellows, may, by the consent of the majority of its members become bodies corporate under this title, electing directors

or trustees, and performing such things as are directed in the case of other corporations; * * * ."

The accompanying letter from your Department to Mr. Mantooth returning said articles of incorporation bases the declination to file same upon the ground that the proposed articles of incorporation contain nothing indicating that there had formerly existed and is now in existence a society, the majority of whom desire to become incorporated under the provisions of said proposed charter. I am of the opinion that said objection is sound. It is true that it would be an easy matter for the proposed incorporators to first associate themselves together in such manner as to justify them in subsequently incorporated under the provisions of said Revised Statutes, Article 713; and in view of that fact it seems somewhat prefuntory to decline to file this charter upon the grounds stated. But, under the phraseology of the statute, it seems to us that you are correct in so doing.

I beg to add that what seems to me to be a more important objection is that the purpose of the proposed corporation set out in the above quoted article 2, is hardly within the scope of Revised Statutes, Article 713.

It is clear to my mind that the proposed society or corporation does not ocme under any of the heads enumerated in said Article 713, unless it be under the head "social", and Mr. Mantooth frankly concedes that it is the desire of the incorporators to be incorporated under that head and none other.

It seems to me that the purpose of the proposed corporation, as so set out in said articles of incorporation, is more in the nature of a business than a social purpose. At any rate, such declared purpose is so altogether indefinite and nebulous that I am unable to see how it can fairly be said to declare the purpose of forming a social club or society, or incorporating a pre-existing social club. or society. I am, therefore, of the opinion that upon both of the grounds suggested herein you should decline to file said proposed articles of incorporation. Said papers are herewith returned to you.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—COUNTY COMMISSIONER—DRAINAGE COMMISSIONER.

County commissioner can not at the same time hold office of drainage commissioner. being two civil offices of emolument and coming within inhibition of Constitution.

Matagorda County Drainage District No. 1.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, February 23, 1909.

Hon. W. S. Holman, County Judge, Bay City, Texas.

DEAR SIR: In your letter of the 19th inst., you desire to know:

1. If the office of county commissioner and the office of drainage commissioner are incompatible offices.

2. If W. O. Boney, who was selected as drainage commissioner could legally thereafter be elected and qualify as county commissioner and hold both offices at the same time.

3. Did W. O. Boney, who was appointed one of the drainage commissioners, vacate his office as such drainage commissioner when he was elected and qualified as county commissioner of said county, and you further desire to know if a county commissioner, duly elected and qualified, should thereafter be appointed and qualified as drainage commissioner, if he would thereby vacate his office as such county commissioner, both of such offices being offices of emolument.

In reply thereto, I wish to advise:

First. That in my opinion the office of county commissioner and the office of drainage commissioner are incompatible, as that term is defined by the courts. The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree, to its revisory power, and where the functions of the two offices are inherently inconsistent and repugnant. In such cases, it has uniformly been held that the same person can not hold both offices. The sole difficulty lies in the application of the rule and in every case the question must be determined from an ascertainment of the duties imposed by law upon the two offices. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent and the incompatibility must be held to exist. (Attorney General vs. Common Council of Detroit, 112 Michigan, 145).

Another view taken of this question by the courts is that incompatibility in offices exist where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both, and it does not necessarily arise when the incumbent places himself for the time being in a position where it is impossible to discharge the duties of both offices.

Bryan vs. Cattell, 15 Iowa, 538.
State vs. Feibleman, 28 Ark., 424.
Stubbs vs. Lee, 64 Me., 195.
People vs. Green, 58 N. Y., 295.
State vs. Brown, 5 R. I., 11.
State vs. Buttz, 9 S. C., 156.

Under the authorities above cited, I am of the opinion that the office of county commissioner and the office of drainage commissioner are incompatible offices.

Second. Article 16, Section 40 of the Constitution of the State, reads as follows:

"No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided herein."

In the case of Gaal vs. Townsend, 77 Texas, 464, the Supreme Court held that the office of county commissioner and the office of mayor of a town within the county were such offices as could be held at the same time by the same person under this provision of the Constitution, the question of incompatibility of the two offices not being discussed by the court and not being before the court when that decision was rendered.

In the case of Figures vs. The State, 99 S. W. Rep., 412, the Court of Civil Appeals held that the office of county attorney and notary public could each be held by one person at the same time, the question of incompatibility not being before the court, as those offices are clearly not incompatible.

It appears that the higher courts of this State have never construed the provisions of the Constitution herein referred to, wherein there is a question of incompatibility, or incompatibility of an office with one of those mentioned in the provision of the Constitution referred to.

However, it occurs to me from the well settled rule established by the courts in other states that this provision of our Constitution does not authorize the holding at the same time by any person of two incompatible offices, though one of such offices may be one of those mentioned in this provision of the Constitution. In other words, I do not think that a district judge could well retain his office as such judge, being elected and qualified a county commissioner; neither do I think a county judge, while serving as such judge, could be elected and qualified a justice of the peace of one of the precincts of the county and retain both offices at the same time, notwithstanding the provision of the Constitution referred to, for the reason as stated above, such offices being incompatible, the one being subordinate to the other and subject in some degree to its revisory power.

In some cases for official misconduct, the county commissioner might be removed by a proceeding in the district court, and I, therefore, take it that no one could seriously contend that for this reason alone, if for no other, a district judge could hold at the same time the office of county commissioner.

Cases tried in the justice court are appealable to the county court, and it occurs to me that no one could reasonably contend that a county judge could serve as a justice of the peace while holding his office as county judge, though the provision of the Constitution above referred to might appear to authorize the holding of such offices at the same time by the same person.

You will observe from the provisions of Sections 17, 18, 18a and 19, of the Drainage Act that drainage commissioners are selected or appointed by the county commissioners. They may also be removed for any misconduct prescribed in the drainage act by the commissioners court. It would appear to me to be absurd to hold that a county commissioner, acting in his capacity as such county commissioner, could appoint or participate in the appointment or selection of a drainage commissioner, and then accept such office from the other members of the commissioners court and undertake

to; at the same time, hold and exercise the functions of the two offices. It would be clearly as absurd to contend that a member of the commissioners court could participate in the proceedings and pretend to discharge his duties as such commissioner while an application is pending before that court to remove some member of the drainage commissioners if a member of the commissioners court were at the same time a member of the drainage commission.

You are, therefore, respectfully advised that these two offices are, in my opinion, absolutely incompatible and can not be held at the same time by the same person.

It is also a well settled rule of law that where an officer accepts the appointment or the election of some other office which is incompatible to the one held by him, that when he qualifies as such officer he thereby, ipso facto, vacates the office previously held by him.

Viencourt vs. Parker, 27 Texas, 558.

State vs. Brinkerhoff, 66 Texas, 45.

Attorney General vs. Oatman, 86 Am. St. Rep., 574, and authorities there cited.

It is, therefore, my opinion that when Mr. Boney qualified as county commissioner of your county, he thereby vacated the office previously held by him as drainage commissioner of this district.

Any other opinion delivered by this Department in conflict herewith, is hereby withdrawn and set aside.

Truly yours,

J. T. SLUDER,
Assistant Attorney General.

COUNTY FUNDS—TRANSFER OF.

What funds may be transferred; how invested; interest and sinking fund for redemption of bonds; permanent school fund; available school fund. County Treasurer can not legally draw check against fund unless there are sufficient funds to credit of account against which it is drawn.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 9, 1909.

Hon. Fred T. Vickers, County Treasurer, Cleburne, Texas.

DEAR SIR: The consideration of your letter of the 25th ulti., and reply thereto, has been delayed by reason of legislative work. You state that your county has on hand about $24,000 interest and sinking fund collected for outstanding county bonds, and that your county also has on hand about $8,000 permanent school fund; that the commissioners court has selected a county depository paying 6 per cent interest on the daily balances, and that the road and bridge fund, general fund, and jury fund, of your county is almost exhausted, and all the taxes, practically collected; and you desire to know whether or not you can issue checks on the county depository for the payment by the depository of such checks as an over-

draft against such funds, and I infer from your letter that it is the intention of the depository to apply the interest on the bond fund and the school fund to such overdrafts should the same not be satisfied by the county at the close of the depository term.

You are, therefore, advised:

1. That according to my construction of the law, you should keep an account with the separate funds. You should have a Current Expense Fund, a Road and Bridge Fund, a Jury Fund, a Bond Fund, and a School Fund. The bond fund, of course, should then be subdivided and keep a fund for each series of bonds, and the school fund should be subdivided and an account kept for the permanent school fund and also for the available school fund.

Revised Statutes, Article 854 authorizes the commissioners court to transfer money in hand from one fund to another, whenever in their judgment they see proper to do so, except the jury fund, and no amount shall be transferred from the jury fund to any other fund, unless there is an excess in the jury fund.

This provision of the law, however, has application only to the road and bridge fund, the general expense fund, and to the jury fund when there is an excess.

The *interest* on the bond fund deposited with the depository for which the depository must pay interest to the county according to its contract, can be transferred by the commissioners court to any other fund. (Section 22 of the Depository Law.)

The principal must be kept intact and no part of the principal of that bond fund can be appropriated for any other then the purposes for which it was collected.

As to the permanent school fund of your county, the interest arising from the deposit of that fund with the depository must be placed to the credit of the available school fund of your county and can not be used for any other purpose. (Constitution, Article 7, Section 6.)

The law requires the sinking fund for the payment of your bonds, and the permanent school fund to be invested in bonds of the United States, the State of Texas, the bonds of the counties of the State, or the bonds of any city or independent school district of the State. (Sections 2 and 3, Chapter 124, Acts of the Twenty-ninth Legislature.)

The law does not specify the length of time within which such permanent school fund shall be invested by the county commissioners court in such securities but when the same is invested it must be invested as prescribed by law and pending such investment the funds should remain on deposit with the county depository, and the interest paid thereon is as interest is paid on any other county deposits. The interest from the depository on the $24,000 goes to the general fund of the county, but the interest on the $8,000 goes to the available school fund of the county. (Constitution of State, Article 7, Section 6.)

You are advised that you, as county treasurer, can not legally draw any check upon the funds on deposit in said depository unless there is a sufficient amount of such funds belonging to the fund upon

which such warrant may be drawn to pay the same. (Section 29, Depository Law.)

I am of the opinion that an order of the county commissioners court would not protect you and your bondsmen in the drawing of check against funds which were already exhausted, as such a warrant would be invalid and the depository would not be authorized and would violate its own contract if it should pay such drafts or warrants.

Truly yours,

R. V. DAVIDSON,
Attorney General.

GAME LAWS—CONSTRUCTION OF.

Act of 1903 does not repeal Act of 1899, the former being applicable to enclosures containing 2000 acres and less, whether posted or not, and the latter being applicable to enclosures containing more than 2000 acres which have been posted.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 11, 1909.

Hon. Frank Lane, County Attorney, Bracketville, Texas.

DEAR SIR: We have your letter of the 6th inst., in which you ask the advice of this Department as to whether Article 804, Penal Code, as amended by Chapter 103 of the acts of 1903, applies to pastures or enclosures, when posted of 2,000 acres or more.

I suppose that you desire the advice of this Department as to whether or not said Chapter 103, acts of 1903, amending Article 804 of the Penal Code impliedly repeals the act of 1899, page 173; since there is no question but that the said act of 1903 does not apply to enclosures including 2,000 acres or more in one enclosure, whether such enclosure be posted or not, for the reason that Section 2 of said act contains provisions expressly stating that said act shall not apply to enclosures including 2,000 acres or more in one pasture.

At the time of the revision of the statutes in 1895, Article 804, which was the act of March 31, 1885, had been amended by the act of May 1, 1893, but the codifiers failed to substitute the act of 1893 for said Article 804, probably overlooked its existence. However, the general purpose of both acts was to the same effect; that is, Article 804, as it stands in the code and the act of 1893 both provided a penalty for hunting upon enclosed and posted lands of another.

The act of 1899 made it an offense in Section 1 of said act for any person to hunt with firearms or dogs upon the enclosed and posted lands of another without the consent of the owner thereof where such lands were in use as agricultural lands or for grazing purposes for cattle, horses, sheep or goats, herding or grazing thereon. And in Section 2 thereof, making it an offense for any person, without the consent

on the part of the owner of agent, knowingly to enter the enclosed and posted lands of another and to hunt with firearms or dogs thereon, without respect to the character of the lands enclosed and posted, containing, however, the proviso that the act shall not apply to any bona fide traveler while traveling along a public road in an enclosure from killing game within a distance of 400 yards on either side of the road.

Section 4 of this act especially provides that "it shall not be construed to repeal the present law relating to enclosures of 2,000 acres of land."

Then upon the passage of said act of 1899 there were two statutes in effect prohibiting hunting upon enclosed lands. Article 804, either the article as placed by the codifiers in the Revised Statutes of 1895, or the omitted act of 1893, (and for the purpose of the present construction it is immaterial which act was in existence at the time of the passage of the act of 1899); Article 804 or the amendment of 1893, both referred to enclosed and posted lands not exceeding in area 2,000 acres. The act of 1899 referred to enclosed and posted lands where the enclosure contained more than 2,000 acres.

So that the subject matter of the two acts was different.

Chapter 103 of the acts of 1903 provides in Section 1 thereof that "Article 804, Chapter 3, of the Penal Code of 1895 shall be amended so as to read as follows, to wit:"

Section 2 provides: "Any person who shall enter upon the enclosed land of another without the consent of the owner, proprietor or agent in charge and therein hunt with firearms or therein catch or take any fish from any pond, lake, tank or stream or in any other manner depredate upon the same, shall be punished by fine not less than ten nor more than one hundred dollars. Provided, further, that this act shall not apply to enclosures including 2,000 acres or more in one enclosure."

The difference between this act and Article 804 of the Penal Code of 1895 is that Section 2 of the act makes it an offense to hunt upon the enclosed land of another, where the enclosure is 2,000 acres or less, whether such land be posted or not. Under Article 804 it was no offense to hunt on the enclosed land of another unless such land was posted.

I am at a loss to understand how it may be contended that said Chapter 103 repealed by implication the act of 1899. The scope and subject matter of the two acts are different. The act of 1899, by its terms, applies only to enclosed and posted lands in enclosures containing more than 2,000 acres. Chapter 103 applies to enclosed lands whether posted or not, where the enclosure is 2,000 acres or less. Courts in construing statutes never favor repeals by implication. There is no clause contained in the act of 1903 repealing the act of 1899, and there is no reason why the two acts can not stand together, the one being applicable to enclosures containing 2,000 acres and less, whether posted or not, the other being applicable to enclosures containing more than 2,000 acres which have been posted.

It is apparent that the act of 1899 was inartificially drawn, but the Court of Criminal Appeals has in one case sustained a conviction under said act. See the case of Alason Davis vs. The State, 45 Texas Criminal Reports, page 103.

Yours truly,

R. E. CRAWFORD,
Assistant Attorney General.

PENITENTIARY INVESTIGATION COMMITTEE—CONSTITUTIONAL CONSTRUCTION—LEGISLATIVE AUTHORITY.

Legislature had authority to provide that committee should be composed of members of House and Senate to act after final adjournment of Legislature; Speaker of House and Lieutenant Governor may make appointments during session of Legislature.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 15, 1909.

Hon. Thomas M. Campbell, Governor of Texas, Capitol.

DEAR SIR: Senate Bill No. 159 providing for the appointment of four members of the Senate and five members of the House as a committee on investigation of the penitentiaries, etc., has had my consideration.

This act presents the following questions:

1. Did the Legislature have the authority to provide that this committee should be composed of members of the Senate and the House of Representatives, respectively, to act after the final adjournment of the Legislature?

2. Can such members be compensated by the Legislature as members of said committee while they are members of their respective houses?

3. Has such committee authority to make such investigation after the adjournment of the Legislature, and make their report to the Governor?

4. Can the Lieutenant Governor and the Speaker of the House of Representatives make the appointments required by the act during the present session of the Legislature?

The act provides for the appointment of four members of the Senate by the Lieutenant Governor and five members of the House by the Speaker, who shall constitute a committee on investigation to visit the penitentiaries at Huntsville and Rusk, respectively, and such other places as in their judgment may be necessary to the end that a thorough investigation of the penitentiary system may be made, and providing that said committee shall sit in vacation; and makes an appropriation therefor, etc.

I answer each of the above questions in the affirmative.

(Branham vs. Lange, Auditor, 16 Ind., 497).

The general assembly of the State of Indiana passed an act that the sum of $1,000,000 be appropriated to defray the expenses grow-

ing out of the insurrectionary condition of a portion of the United States, and appointed a committee consisting of two members of the House and one of the Senate called an Auditing Committee to meet at Indianapolis monthly and examine and audit the accounts in the matter of such appropriation.

It was provided that such committee should each receive the sum of $3 per day for each day they were employed in the discharge of their duties and 5 cents per mile for the distance traveled in going to and returning from their attendance upon such duties which should be paid out of the money appropriated.

The law was claimed to be unconstitutional because the members of the general assembly could not exercise legislative functions after the adjournment of that body and after it had ceased to exist as an organized body; also that the act created an office and that the members of the general assembly could not hold two offices at the same time.

The court held the act constitutional, and said:

"It seems to be a rule of parliamentary law, that a legislative committee can not regularly sit in a vacation of the sitting of the legislative body. (Cush. Parl. Law, p. 738 and note); but yet Mr. Cushing says, on page 737, that 'it is an expedient sometimes resorted to by committees, with a view to dispose of the business referred to them, to adjourn without day, or to a day beyond the session. This course, though irregular, as it is the duty of the committee to report, may, and commonly does, receive the sanction, or at least the acquiescence, of the house; otherwise, the committee may be directed by the house to re-assemble, and proceed with the business.' The above is the parliamentary rule, we take it, where the Legislature has specially prescribed none upon the subject, or for the given occasion; but, to say that the Legislature has not power to authorize a committee to sit in vacation, is a proposition which the practice of the Legislature of this State, and of Congress, as well, as we think, as the dictates of correct reason contradicts.

"We do not think membership in this committee an office, within the meaning of the Constitution; but rather a special appointment to perform a particular act of service. The Legislature might have passed an act creating the office of Auditing Committee, prescribing its duties, and the mode of continuing it in active, permanent service, by the filling of vacancies that might happen, etc.; but it has not attempted thus to act. The Legislature appropriated a large sum of money upon a special, temporary occasion, not in accordance with the usual course of legislation, which was to be hurriedly expended. To supervise the expenditure of this particular, extraordinary appropriation, they appointed a temporary committee, and provided for paying its members while attending to that duty. It is a special service, not coming within the meaning of the term 'office', as used in the Constitution. As an illustration: a court may have power to appoint a commissioner, or auditor, as he is often called in the English practice, to be a permanent officer of the court, or at least for a term of years, to whom shall be referred all accounts to be taken in pending suits, etc.; or, the court may ap-

point -one given individual to audit and state the account in a particular, pending suit. Now, in one case, the court would appoint an officer, in the other it would not. Again, the law, might provide for the appointment, by the court, of a county arbitrator, to whom all causes should be referred for arbitration, etc., giving such person a salary, or fee in each case, for his compensation. Here, an office would be created; and officer might be appointed. But where the court now appoints an arbitratorto hear a single case, an officer within the meaning of the Constitution, is not appointed."

The case of Commercial Bank vs. Worth, State Treasurer, 117 N. C., Reports page 146, holds the same doctrine, (supra); also Marshall vs. Harwood, 7 Md., 466.

In the North Carolina case, supra, the act provided that if the committee did not report during the session of the Legislature, it should report to the Supreme Court, and it was held that this would be a legal report.

My opinion is that the act is constitutional and that the committee can be appointed and can lawfully exercise the powers and discharge the duties prescribed by said act, though the Legislature may have been finally adjourned.

Yours respectfully,

R. V. DAVIDSON,
Attorney General.

APPROPRIATIONS—TEXAS LIBRARY AND HISTORICAL COMMISSION.

Thirty-first Legislature passed act segregating library from Department of Insurance and Banking; held, that without further legislation Texas Library and Historical Commission can not legally expend any sum segregated for support and maintenance of Department of Insurance and Banking.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 30, 1909.

Dr. George P. Garrison, Chairman:
Hon. E. W. Winkler, Secretary, Capitol.

GENTLEMEN: We have received and carefully considered your communication of yesterday, which is as follows:

"The Texas Library and Historical Commission would respectfully request the opinion of your Department upon the following question: Can the balances remaining, when the Commission takes charge of the State Library, of the funds appropriated for the support of the Library, as part of the Department of Insurance and Banking, for the year ending August 31, 1909, or any part of said funds, be used by the State Library, under the control of the Commission? The funds referred to are the following, the Library having, of course, its proportional interest in the items for porter, for postage, etc., and for contingent expenses:

Salary of librarian and historical clerk	$1,200
Salary of assistant librarian and archivist	1,100
Salary of porter and file clerk	420
Postage, stationery, express	1,000
Gathering historical data	500
Subscription to newspapers	100
Books for the State Library	500
Shelving for library, to be expended in two years	800
Contingent expenses	100"

I understand that the Thirty-first Legislature passed an act which has become effective, segregating the Library from the Department of Insurance and Banking and establishing it upon an independent basis under the supervision and control of the Texas Library and Historical Commission which was created by said act. Said act increases the salary of the librarian from $1200 to $1500 per annum and also makes provision for the appointment by the Commission of an assistant librarian, etc.

I am of the opinion that in the absence of further legislation no portion of the appropriation which was made by the Thirtieth Legislature for the support and maintenance of said Department of Insurance and Banking can hereafter be legally used by said Texas Library and Historical Commission for any purpose and that no portion of said appropriation is available for the support and maintenance of said Library or to carry out any of the purposes or provisions of the above mentioned act creating said Commission and segregating the library and its affairs from the Department of Insurance and Banking.

Respectfully,

WM. E. HAWKINS,
Acting Attorney General.

CONSTITUTIONAL CONSTRUCTION—LEGISLATURE

Suit against the State can not be maintained without the consent of the State; such consent may be given by the Legislature.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 23, 1909.

Hon. J. J. Strickland, House of Representatives, Capitol.

DEAR SIR: Replying to your inquiry of this date I beg to say:

1. From time immemorial and probably in all jurisdictions it has been well recognized that a suit against the State can not be maintained without the consent of the State.

2. Such consent may be given by the Legislature and may be expressed in general terms applicable to all persons similarly situated under certain specified conditions, or may be limited to particular individuals in particular instances, the whole matter being one of legislative discretion.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

MEMBERS OF LEGISLATURE—STATE FIRE RATING BOARD.

Member of Legislature not eligible to hold office created by session of Legislature of which he was a member.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 3, 1909.

Hon. J. J. Strickland, Member House of Representatives, Capitol.

DEAR SIR: Complying with your written request to me for my opinion as to whether or not a member of the present Legislature would be eligible to sit as a member of the State Fire Rating Board, which Board was created by an act of the present Legislature, (Senate Bill No. 25), I beg to advise that I am of the opinion that a member of the present Legislature would not be eligible to appointment upon said Board.

Said act provides for the creation of said Board, to be composed of the Commissioner of Insurance and two other members, and provides as compensation for two members to be appointed a salary of $2,500 per annum. It provides that said two members shall be appointed for a term of two years.

The bill provides the duties and powers of said Board, and while it does not name the members of said Board officers or require an official oath to be taken by them, I am of the opinion that they are officers and that a membership upon the Board is a civil office if profit, and therefore within the terms of Section 18 of Article 3 of the State Constitution which provides that:

"No Senator or Representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this State which shall have been created or the emoluments of which may have been increased during such term," etc.

I am,
Very truly yours,

R. V. DAVIDSON,
Attorney General.

CONSTITUTIONAL CONSTRUCTION—COUNTY ATTORNEY—SCHOOL TEACHER—EX OFFICIO SALARY OF COUNTY ATTORNEY—COMMISSIONERS COURT.

County attorney can not legally serve as school teacher while serving as county attorney.
Commissioners court not authorized to pay county attorney ex officio salary.
Bondsmen of county attorney not responsible for return of money paid him as ex officio salary.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 5, 1909.

Hon. R. L. Allen, Albany, Texas.

DEAR SIR: In your letter of the 3rd inst., you ask the following questions:

"1. Can the county attorney draw a salary from the State as a school teacher and also as county attorney at the same time?

"2. Has the county commissioners court any authority under the law to allow said county attorney an ex officio salary? They are now paying him $25 per month salary over and above the fees allowed by law. If this can not be done, are his bondsmen liable to the county for such salary so paid?

"3. What county officers under the law can the county commissioners court allow an ex officio salary?

In reply thereto, I wish to advise:

First. That I do not think the county attorney can legally serve as a school teacher while serving as county attorney of the county. (Constitution of the State, Article 16, Section 33).

Second. The commissioners court has no authority under the law to allow a county attorney an ex officio salary.

Crooms vs. Atascosa County, 32 S. W. Rep., 188.

There is no provision of the statute authorizing the commissioners court to give the county attorney an ex officio salary, and it is a well settled rule of law that where there is no statutory authority for giving public officers compensation for certain services, the services, if required of them as officials, must be performed without compensation:

Robinson vs. Smith County, 33 Texas Civil Appeals, 251.

Torbett vs. Hale Co., 131 Ala., 143.

Miller vs. Boone Co., 5 Ind. App., 225.

State vs. Roach, 123 Ind., 167.

Painter vs. Polk Co., 70 Iowa, 596.

State vs. Brown, 146 Missourit, 401.

State vs. Mason, 82 Mo. Apps., 239.

I think it is very clear that the county can recover a judgment against the county attorney for the ex officio salary which has been paid him by the commissioners court.

23 Am. & Eng. Ency. of Law, 2nd ed., 403.

I do not think, however, that his bondsmen are responsible for the ex officio salary illegally collected.

United State vs. Boyd, 118 Federal, 89.

Revised Statutes, Article 285 reads as follows:

"Each county attorney, before he enters upon the discharge of the duties of such office, shall take and subscribe the oath of office prescribed by the Constitution of the State, and shall execute a bond with at least two good and sufficient sureties, payable to the Governor and his successors in office, in the sum of $2,500, to be approved by the county commissioners court of his county, conditioned that he will faithfully pay over, in the manner prescribed by law, all moneys which he may collect, or which may come to his hands for the State or any county; * * * ."

You will, therefore, observe that the provisions of the bond do not include funds paid to him illegally for a pretended ex officii salary not authorized by law.

Third. Our law authorizes ex-officio salaries as follows: County Judge, (Article 2450); District Clerk, (Article 2456); County Clerk,

(Article 3450); Sheriff, (Article 2462). No other officers are authorized to collect from the county any ex officio salary.

Yours truly,

J. T. SLUDER,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—LEGISLATURE—LOCAL OR SPECIAL LAW.

Legislature can not enact statute creating county court in all counties in State having therein a city of 50,000 population or over, according to last preceding census, when census shows that there is only one county in State in which the act would be operative, and when no local notice has been given.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 6, 1909.

Hon. Chester H. Terrell, House of Representatives, Building.

DEAR SIR: We are in receipt of yours of the 6th instant, wherein you desire the opinion of this department as to whether the Legislature can enact a statute creating a county court in all counties in this State having therein a city of fifty thousand population or over, according to the Federal census of 1900, if the said census shows that there is only one county in which the act would be operative, and when no local notice of intention to apply therefor has been given without violating the Constitution.

It is our opinion that such an act could not be passed without violating the Constitution of this State.

Section 57, of Article 3, of the Constitution, is as follows:

"No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill, and in the manner to be provided by law. The evidence of such notice, having been published, shall be exhibited in the Legislature before such act shall be passed."

The question to be determined is whether or not the act in question would be a local or special law within the meaning of the Constitutional provision above quoted. That it would be, we think, there can be no room for doubt.

The language of the Supreme Court of this State in the case of Clark vs. Finley, 93 Texas, 178, is in point on the question under consideration. In that case the court says:

"The definition of a general law as distinguished from a special law given by the Supreme Court of Pennsylvania in the case of Wheeler vs. Philadelphia, 77 Pennsylvania State, 338, and approved by the Supreme Court of Missouri is perhaps as accurate as any that has been given. State vs. Tolle, 71 Mo., 645. The court in the

former case says: 'Without entering at large upon the discussion of what is here meant by a local or special law, it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition.' The law in question is applicable to every county of the designated class. Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable; in others, that it must not be unreasonable or arbitrary, etc. If it is meant by this that the Legislature can not evade the prohibition of the Constitution as to special laws by making a law applicable to a pretended class which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of Commonwealth vs. Patton, 88 Pennsylvania, 258. That statute was made applicable to all counties in which there was a population of more than 60,000, and an incorporated city with a population exceeding 8,000, 'situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road.' There was but one city in the State which came within the pretended class. The court held this a covert attempt at special legislation, and that the act was a nullity. It seems that in Pennsylvania there has been a studied and constant effort by the Legislature to evade the constitutional requirement of that State as to local and special legislation, and that the Supreme Court of that State has found it necessary to repress it with a strong hand. In so far as the courts which undertake to define the basis upon which the classification must rest hold that the Legislature can not, by a pretended classification, evade a constitutional restriction, we fully concur with them."

In considering a constitutional provision similar to our own, the Supreme Court of New York in the case of re Horneberger, 155 N. Y., 420, 42 L. R. A., 134, say:

"Although this act is drawn in general terms, if its provisions are such in number and in character as unduly, with reference to the constitutional purpose, to restrict its operation, and, to all intents, to confine it to a particular locality, then, I think, it comes as much under condemnation as though it designated the locality by name. While an act might be general, if it affected all towns of a class, and that class was based on population, or some other condition, which might be recognized as possibly common to a class, or which might permit of classification, if it contain such added limitations as to restrict its operation to what must always be, in the nature of the case, a very limited number of specified localities, if not, in fact, one; then it is local within the constitutional sense. By the title of this act its operation is limited to towns having a total population of 8,000 or more inhabitants, and containing an incorporated village having a total population of not less than 8,000, and not more than

15,000 inhabitants. * * * In my opinion, to call this act a general law would be absurd. It is a device to evade a wholesome constitutional provision so transparent as to be clear to the most ordinary intelligence. Enumeration of restrictions upon the application of the act has reached a point where it ceases to be classification, and, as Mr. Justice Cullen well suggested, serves the purpose of identification. * * * When restriction is imposed upon restriction, until, as in the present case, its generality is hidden and impossible, the courts should not ehsitate to adjudge its invalidity. When such an act as this has been passed by the Legislature the question may well be asked whether the constitutional provision has come to be regarded as a dead letter, and whether its continued violations by the legislative body may be justified upon such grounds. The question is whether the constitutional provision shall continue to stand as a vigorous expression of the will of the people, or whether the Legislature may evade its inhibition, with the approval of the judicial branch of the government. It is my judgment that, when a constitutional question is presented to the court, it should be answered according to the view which takes in the purpose of the adoption of the constitutional provision and the consequences to the people of its disregard. I do not think it to be a safe principle of construction to adopt that the general form of the legislative enactment may save it from condemnation, when a wilful and impolitic, or unnecessary purpose to evade the constitutional mandate is to be seen through the transparent device. That would be too fraught with danger to the efficiency of the constitutional provision.

Yours very truly,

JAMES D. WALTHALL.
Assistant Attorney General.

LEGISLATURE—JOURNAL CLERK.

Journal Clerk is without authority to change in any respect printed Journals of either house of Legislature; either house may authorize presiding officer to have corrections made before being printed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 19, 1909.

Hon. James L. Robinson, Journal Clerk, House of Representatives, Capitol.

DEAR SIR: I am in receipt of your communication of the 18th instant, enclosing a letter from A. M. Kennedy, flotorial representative from McLennan County, in which Mr. Kennedy makes the following request:

"Re the correction.

"The part I want corrected appears March 10-12 and is my statement about the McEachen matter—Cut all of my reply out except the affidavit of R. L. Foulkes. Please don't forget this."

On page 1238 of the House Journal of March 11, 1909, I find the following statement printed therein:

"Mr. Kennedy, rising to a question of personal privilege, submitted a statement to the House and asked that it be printel in the Journal in connection with the testimony taken before the committee to investigate the matter and method of appointment of the employes of the House under resolution offered by himself.

"The statement was read to the House.

"On motion by Mr. Reedy it was ordered that the same be printed in the Journal as requested (see appendix)."

On paged 1290 and 1291 of the Journal appears the statement referred to, including the affidavit of Mr. Foulkes, which statement, as I understand, Mr. Kennedy now desires you to eliminate from the Journal.

You desire to know whether or not you have authority as Journal Clerk to comply with that request.

In reply to your inquiry, I wish to advise that the Constitution requires that each House shall keep a Journal of its proceedings and publish the same. (Art. 3, Sec. 12.)

The obvious purpose of this provision of the Constitution was to preserve a record of the action of the individual members of the House, to the end that their constituents should fix upon them a proper responsibility for their conduct. (Williams vs. Taylor, 83 Texas, 672.)

The proper construction of this provision of the Constitution would be, that the House is required to keep a Journal of all of its proceedings and not simply a part of the proceedings.

Each House of the Legislature is also authorized to determine the rules of its own proceedings. (Art. 3, Sec. 11.)

In compliance with that provision of the Constitution, the House adopted rules for the government of its proceedings during the sessions of the Thirty-first Legislature.

Section 8 of Rule 1 authorizes the Speaker to examine, correct and approve the Journal of each day's proceedings before the same is printed, and it is a well recognized rule that no question can legally be raised against the Speaker making such corrections as appear to be necessary in the Journal of the proceedings of the day before the Journal of that day's proceedings is printed. After the Journal is made up for the day and examined, approved and corrected by the Speaker and turned over to the printer it seems there is no authority either in the Constitution or the rules of the House to authorize the Speaker to make any corrections in the Journal, unless authorized to do so by the House; and unless the Speaker is given such authority by the House there appears to be no authority in the Speaker to change or correct any published proceedings of the House, even the day after it is printed, much less two or three months after the adjournment of the Legislature.

Rule 4, Section 4, prescribes the duties of the Journal Clerk, and Assistant Journal Clerk, requiring such officers to keep a Journal of the proceedings of the House, and which rule requires the same to be done concisely and accurately, and also reiterates the provision that

"the Journal as made up each day shall be submitted to the Speaker for his examination, correction and approval, and when approved by him shall be printed under the supervision of the Journal Clerk and copies thereof laid upon the desk of each member on the succeeding day."

In other words, the proceedings of each day of the House are made up by the Journal Clerk and presented to the Speaker for examination, correction and approval, turned over to the printer and copies of the day's proceedings printed in the Journal and laid upon the desk of each member on the succeeding day. Corrections can then be made in the Journal on motion of any member, if adopted by vote of the House; otherwise, there is no authority to make any change, correction or omission in any of the proceedings of the House as printed in the Journal, and you are respectfully so advised.

Yours very truly,

J. T. SLUDER,
Assistant Attorney General.

CONSTRUCTION OF LAWS—ROBERTSON-FITZHUGH LIQUOR LAW.

Liquor dealer, in order to obtain license to do a saloon business in a business block in which is situated a church, would be required to obtain the consent of a majority of the residents of said block who have resided there six months, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 24, 1909.

Hon. C. W. Hoeth, County Attorney, Beaumont, Texas.

DEAR SIR: We have your letter of the 15th instant, in which you say that the Baptist Church and Y. M. C. A. building in the city of Beaumont are situated in a business block in said city in which there is a saloon, and you request the opinion of this department as to whether or not the liquor dealer, in order to obtain a license under the Fitzhugh-Robertson liquor act, would be required to obtain the consent of the residents of said block composed of roomers in a rooming house and the occupants of rooms in the Y. M. C. A. building.

Section 10, so far as it is necessary to be considered in this connection, provides:

"And if the place of business be in any block or square of any town or city where there are more bona fide residences than business houses in said block or square, *or in any block where there is a church or school*, then such petition shall be accompanied with the written consent of a majority of the bona fide householders or residents in said block or square who have resided for at least six months preceding such application, and those within 300 feet of such place of business."

The block described by you in your letter is a business block in which is situated a church. According to the provision of the law above quoted, it would be necessary for the liquor dealer situated in such block to obtain the written consent of a majority of the bone fide householders and residents in said block who have resided there at least six months preceding his application, and those within 300 feet of such place of business.

The word "householder" is properly defined as a person who resides with his family. A "resident" as the term is used in the language above quoted, in my opinion, would be an adult who had actually resided in said block or within 300 feet of the sallon for six months immediately preceding such application, and who had not moved into the block either for the purpose of signing the petition or for the purpose of preventing the license being issued.

Yours truly,

R. E. CRAWFORD.
Assistant Attorney General.

LAND OFFICE, REMOVAL OF.

Without act of Legislature authorizing it, would be illegal to remove archives, papers, etc., of the General Land Office to Capitol building.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 29, 1909.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Under recent date you have asked whether, in our opinion, under existing laws, the General Land Office of Texas can be moved from its present location to the State Capitol building. Replying, I beg to say:

By an act approved February 2, 1856, entitled, "An act to provide for the erection and furnishing a fireproof building to be used as a General Land Office for the State of Texas," the Legislature appropriated $40,000 "for the erection, completion and furnishing a fireproof building to be used as a General Land Office for the State of Texas." 4th Gam. (231). I understand that under that act was constructed the building in which the General Land Office is now located.

The language employed in that act clearly evidences an intention upon the part of the Legislature that until otherwise provided by law, such building should be used as the domicile of the General Land Office, and that all of its archives, records and papers should be placed and kept, and that its buisness should be transacted in said building.

I have been unable to find in any later statute any expression whatever to the contrary.

Nor can I find where any officer or board has statutory authority to direct or permit such removal.

An act approved February 2, 1860, page 35, expressly placed the Land Office and grounds under the special charge of the Commissioner of the General Land Office. 9 Gam. (592).

None of the statutes relating to the powers and duties of the Superintendent of Public Buildings and Grounds have ever given him control of any of the rooms occupied by any of the heads of the exective departments, or authority to change the location of any such department.

R. S. 3823, which is now in force, is as follows:

"It shall be the duty of the Superintendent to have and take charge and control of all public buildings, grounds and property of the State, which may not be used by the different officers of the State government, including the State Cemetery, and to properly care for and protect the same from damage, intrusion or improper uses."

The act approved April 18, 1879, entitled "An act to provide for building a new State Capitol" (8 Gam., 1411), provided in Section 19, as follows:

"The contract for building shall provide for fireproof vaults sufficiently large and numerous to contain and efficiently preserve all the archives and papers of the different departments of the State government that may be located in said building, and which shall be surrounded and protected by masonry in the most approved manner."

From this it appears that the Legislature did not contemplate that the entire Capitol building should be constructed fireproof throughout, but rather that specially prepared vaults in it would be necessary to "efficiently preserve all the archives and papers of the diff erent departments of the State government that may be located in said building," and that some of the departments were to be, or might be, located elsewhere.

In view of the well known fact that no vault in the Capitol building is sufficiently large to hold all the archives and papers of the General Land Office, it may well be presumed that in the enactment of said statute and in the erection of the Capitol, the Legislature and those to whom it delegated authority to supervise the construction thereof, contemplated that the General Land Office should remain located in the building which had been specially constructed for its accommodation and use under said act of 1856.

Upon the whole, I am of the opinion that in the absence of further legislation it would be illegal to remove the archives, papers and business of the General Land Office from its present quarters.

Respectfully,

WM. E. HAWKINS,
Acting Attorney General.

CONSTRUCTION OF LAWS—BANK GUARANTY LAW.

In the designation of the manner in which a bank shall guarantee its depositors under the law passed by the Thirty-first legislature, it is necessary that the holders of a majority of the entire capital stock shall concur.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 13, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have you letter of this date in which you say:

"Section 3 of Chapter 15, of the General Laws of the Second Called Session of the Thirty-first Legislature of the State of Texas, reads as follows:

" 'Section 2. Each and every bank and trust company mentioned in Section 1 of this act shall have the right and privilege, at its option, to secure its depositors by the manner, methods and under the terms, provisions and regulations as set forth in this act for the depositors' guaranty fund or the bond security system; provided that all such banks and trust companies shall secure their depositors by one of said plans on January 1, 1910; provided further that such option shall be exercised by the holders of the majority of the stock, and the president or cashier of such bank shall notify the Commissioner of Insurance and Banking by registered mail of such action.'

"I attach hereto copy of the notice just received from the New Ulm State bank of New Ulm, Texas, of the result of a meeting of the stockholders of that corporation held on August 10. The capital stock of this bank consists of 100 shares. You will note that 67 shares of the capital stock was either present in person, or represented by duly authorized written proxies at the stockholders meeting and that the resolution exercising the option of the bank was adopted by a vote of yeas 45, nays 22.

"I am writing to ask your opinioon as to whether or not, in view of the fact that less than a majority of all the stock voted in favor of the action taking such option is a compliance with the requirement of the statute above quoted that the option shall be exercised 'by the holders of a majority of the stock.' "

Replying I beg to say, in my opinion, your inquiry should be answered negatively. In other words, I am of the opinion that the above quoted statute contemplates that in the exercise of the option mentioned the holder of a majority of the entire capital stock of the bank shall concur.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 2, 1909.

Mr. E. W. Winkler, Librarian, Capitol.

DEAR SIR: We have from you the following inquiry:

"I respectfully request the opinion of your department on the following question: Does the appropriation made for the Texas Library and Historical Commission for the year ending August 31, 1909, become available at once?"

I understand that your inquiry refers to the general appropriation act of 1909.

In reply I beg to say that I am of the opinion that your question should be answered affirmatively.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF STATUTE — CORPORATIONS, FOREIGN—TELEPHONE COMPANIES—PERMIT FEES.

Words "telegraph lines" construed to mean "telephone lines," and maximum permit fee for foreign telephone company is $10,000.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 25, 1909.

Hon. W. B. Townsend, Secretary of State, Capitol.

SIR: You have asked for our opinion as to the maximum fee which you may legally require to be paid by a foreign corporation under House Bill No. 120 which was passed by the Thirty-first Legislature for a permit to engage in conducting, operating or managing a telephone line in this State.

Said House Bill No. 120 provides, among other things:

"That the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this State, shall in no event exceed ten thousand dollars ($10,000.00)."

Accompanying your inquiry is a memorandum from the attorneys for The Southwestern Telegraph and Telephone Company, which is as follows:

"It has been held in the State of Texas that the terms "magnetic telegraph line" as used in the statutes of this State, (Art. 698) include telephone companies, (Ry. Co. vs Telegraph and Telephone Co., 93 Texas, S. W. 273). At the time Art. 2439 was enacted, Art. 698 was in force, and at the time of the re-enactment of an amendment of Art. 2439 as last above indicated the term "magnetic telegraph line" had been construed by the courts of this state to include telephone

companies. It is a recognized principle of law that where the Legislature re-enacts by amendment a statute in language previously construed by the court, it is presumed to adopt the language of the old with the construction placed on it by the court. Hall vs. White, 94 Texas, 454.

"And it is another familiar principle that where any term of an art or a science wholly unknown to the law is used in statutes courts will be compelled to look to that particular science for its definition. Postal vs. Champlain, 29 Texas, 27. This principle is illustrated further by the reasoning of the court in the case of Dolbear vs. Amer. Bell Telephone Co., 126 U. S. 1.

"Even in the absence of a special statute expressly so providing, the term telegraph used in the State statute embraces the telephone also. This rule has been applied where the mode is provided in the statute for assessing and taxing telegraph lines. Telegraph Co. vs. Board of Equalization, 67 Iowa, 250; 25 N. W., 155; 1 Amer. Elec. Ca., 749. The rule has also been applied to statutes providing for the incorporation of telegraph companies and for the construction and maintenance and regulation of telegraph lines. Telephone and Telegraph Co. vs Berks and Dauphin Tr. Co., 199 Pa. St., 411; 49 Atl., 284; Telephone Co. vs. Watterlite, 135 N. Y., 393; 32 N. E. 148; 4 Amer. Elec. Ca. 275.

"And it has also been held that a telegraph company acting under a statutory right to construct and operate telegraphs is empowered to establish a telephone service. Telephone & Telegraph Co. vs. Elec. Ry. Co. 42 Fed., 273; 12 L. R. A., 544; 3 Amer. Elec. Ca., 408; State, Duke Bros. vs. Central N. J. Tel Co., 53 N. J. L., 341; 21 Atl., 460; E. Amer. Elec. Ca. 546-550; Telegraph Co. vs. Telegraph Co., 66 Md., 399; 7 Atl. 809; 2 Amer. Elec. Ca., 416.

"And it has been further held that under such an act as last referred to where a telephone business is done the company is subject to the provisions of a telegraph law as to receiving and transmitting messages and that the telephone company can not discriminate. And it has also been held that a code provision providing that actions may be brought against telegraph companies in any county through which the line passes or is operated applies also to telephone companies. Franklin vs. Telephone Co., 69 Iowa, 97; 28 N. W. 461; 2 Amer. Elec. Ca., 439.

"Art. 2439 was originally enacted in 1883 and carried forward in the Revised Statutes of 1895 and used the same expression, "magnetic telegraph line." The same expression is carried forward in the last amendment and since the expression under discussion had received a judicial interpretation by the courts of the State of Texas, wherein it was determined that the expression included telephone companies, it would seem to necessarily follow in line with the rules of construction that the term now used in Art. 2439 as amended embraces the telephone companies, and therefore determines what fees shall be paid to obtain the permit provided for. Further on the question of construction, see paragraphs 8-11, inclusive, 2 Ed., Vol. 1, Joyce on Electric Law.

Without undertaking to discuss the authorities cited above, I will say that I concur in the general views experssed in said memorandum.

It is clear that if the words "any telegraph lines" include *telephone lines*, the maximum fee inquired about can in no event exceed ten thousand dollars; and I am of the opinion that under the decisions of the appellate courts of this and other States it must be held that the words "any telegraph lines," as used in this statute, do include telephone lines and that the maximum permit fee of a foreign telephone company is ten thousand dollars.

In discussing the words "magnetic telegraph line" said memorandum says: "The same expression is carried forward in the last amendment."

It is true that the expression "magnetic telegraph line" is used in R. S. Article 2439, as amended by said House Bill No. 120; but only in the portion of said article which fixes fees for obtaining a domestic charter, and not that portion which fixes permit fees.

However, the words "any telegraph lines," as used in the paragraph of said House Bill No. 120 which fixes permit fees, has been held by our Supreme Court under R. S. Art. 699, conferring the right of eminent domain, to be broad enough to include telephone lines, both telegraph and telephone lines being used for the one purpose of transmitting messages by electricity.

As above indicated, my conclusion is that the maximum permit fee so enquired about by you is fixed by said House Bill No. 120 at ten thousand dollars.

Respectfully,
WM. E. HAWKINS.
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—OFFICERS—OFFICES OF EMOLUMENT.

Office of Chief Clerk of Agricultural Department and Chief Inspector of Nurseries are civil offices of emolument, and one party can not, under Section 40 of Article 16 of Constiution, hold both.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 28, 1909.

Hon. Ed. R. Kone, Commisioner of Agriculture, Capitol.

SIR: You have requested of this Department an opinion as to whether under the provisions of House Bill No. 121, passed by the Thirty-first Legislature, relating to the inspection of orchards and nurseries, etc., you can legally appoint your Chief Clerk as Chief Inspector of nurseries, orchards, etc.,

Replying, I beg to say:

Under the provisions of the Act of 1907 creating your Department your Chief Clerk is clearly an officer within the meaing of Section 40 of Article 16 of the Constitution of Texas, which is as follows:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein."

It will be obesrved that said House Bill No. 121 confers very broad and far reaching powers upon such Chief Inspector and imposes upon him the duty of exercising important governmental functions; that his term is to be of at least considerable duration and that his appointment and duties are not merly temporary; and that his compensation is fixed by law.

It is often difficult to determine the exact significance and intent of meaning of the term "office," and the decisions of thecourts of the several States upon that point are not entirely uniform.

However, the Supreme Court of this State in Kimbrough vs. Barnett, 93 Texas, 310, has quoted approvingly the definition of the term "office," as given by Mr. Mecham in his work on Public Officers, thus:

"Public office is the right, authority, and duty created and conferred by law by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the soverign functions of the government to be exercised by him for the benefit of the public."

I am inclined to the view that under the decisions of the appellate courts of this State and upon the weight of authority, generally, it should be held that a chief inspector under said statute will be a civil officer within the meaning of the above quoted constitutional provison, and that consequently he could not at the same time hold the office of Chief Clerk in your Department.

Kimbrough vs. Barnett, 93 Texas, 301.

Hendricks vs. State, 49 S. W., 705.

State vs. Catlin, 64 Texas, 46.

McCormick vs. Pratt, 17 L. R. A. 243, and cases cited in note.

Words & Phrases, Volume 6, pages 4933-4-5.

I beg to call your attention to these facts:

1. Section 8 of said Act of 1907, creating your Department, provides that "the chief clerk shall possess all the powers and perform all the duties attached by law to the office of Commissioner during the necessary or unavoidable absence of the Commissioner or his inability to act for any cause."

2. Said House Bill No. 121i n Section 1 contains this provision: "In case of objections to the findings of the chief inspector, employe or representative of the Commissioner the appeal may be made to the Commissioner whose decision shall be final."

This statute could hardly have contemplated that the Chief Clerk and Acting Commissioner of Agriculture may be required to decide upon an appeal from the findings made by the same individual when acting as Chief Inspector. Upon the whole, my conclusion is that as a matter of law your Chief Clerk should not at the same time be Chief Inspector.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—LIQUOR LAWS—LICENSES, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 2, 1909.

Hon. J. W. Stephens, Comptroller of Public Accounts, Austin, Texas.

DEAR SIR: We are in receipt of your letter of the 1st instant, in which you address the seven following questions involving the proper construction of the Act of the First Called Session of the Thirty-first Legislature regulating the sale of intoxicating and malt liquors, known as the Robertson-Fitzhugh Bill, which will be in effect on the 11th day of July:

"(1) When a party has a beer license only under the old law, or should he have such license under the Robertson-Fitzhugh law when it takes effect, can he surrender the beer license and by complying with the law in regard to obtaining licenses, in lieu thereof, obtain a license as a retail liquor dealer which would authorize the sale of both liquor and beer?

"(2) In determining the number of licenses permitted by Section 9j of the Robertson-Fitzhugh law in cities, towns or justices precincts, in such city, town or justices precinct limited to the number of saloons according to the population of such city, town or justices precinct, and must the population be separately estimated in each subdivision and the number of licenses issued in such separate subdivision according to the population therein, or do you estimte the population of the town or city and the justices precinct, and if the city or town does not have the number of licenses that it is entitled to have upon the basis of population therein, can the number of licenses to which such city or town is entitled, but which have not been issued therein, be issued in justices precinct outside of such city or town; or, in other words, do we treat cities or towns and justices precincts as separate subdivisions, and in such subdivisions issue licenses only to the extent which the population in such separate subdivisions authorize?

"(3) As the Robertson-Fitzhugh law takes effect on July 11th, and as the law, Section 9j, provides that the commisioners court, at its August term of every year, shall determine the population of cities or towns and justices precincts, and as all licences terminate on the day the law takes effect, until the commissioners courts meet at their August terms and determine the population of cities or towns and justice precincts, how will the Comptroller determine the number of permits he is authorized to issue?

"(4) Under the Robertson-Fitzhugh law, can a license be obtained within 300 feet of a church upon obtaining the consent of a majority of the people within 300 feet of the church, whether such church be in a business block or in a residence block, as defined in section 10?

"(5) Does the Robertson-Fitzhugh law prohibit minors from entering beer gardens or from becoming guests in dining rooms of bona fide hotels or restaurants where intoxicationg liquors are served to guests, (1) when accompanied by their parents, and, (2) when not so accompanied by their parents?

"(6) Would it be a violation of the law for a saloonkeeper to have a wire screen door at the place of entrance into the saloon for the sole and bona fide purpose of keeping out flies and mosquitos and which wire screen door would not obstruct the view through the door or place of entrance into the saloon?

"(7) The Robertson-Fitzhugh law takes effect on the 11th day of July next, upon which date all licenses in force on that date are continued in force for sixty days after the law takes effect, in order that the holder of such licenses might comply with the new law in taking out licenses. Now then, if the license expires by its own terms before the expiration of the sixty days, and before by the exercise of diligence a license can be obtained, can the saloon keeper conduct his business under the old license until he obtains a new license within the sixty days? In other words, say that a license by its own terms expires on the 12th of July. Is this license by virtue of the law continued in force until such time within the sixty days the holder of such license can obtain a new license, and will he under such circumstances be authorized to do business under the old license until the new license is obtained?"

(1) I take it that the opinion sought in the first question above set out is whether or not the holder of a beer license under the present law issued upon a permit granted by the Comptroller on or before the 20th day of February, 1909, would be entitled to make aplication and obtain a license as a retail liquor dealer under the new law in a city, town, or jusitce precinct in which there are applicants for licenses in excess of one for each five hundred inhabitants of such city, town or pustice precinct who held licenses as retail liquor dealers at the time the new law went into effect and on the 20th day of February, 1909.

My opinion is that the holders of such beer licenses would be entitled to make application and receive licenses as retail liquor dealers under the new law and have the tax collector credit the new license with unearned portion of such cancelled beer license. There is no provision in the Robertson-Fitzhugh Bill which prevents any person, if he is qualified, from making application and receiving a permit from the Comptroller, except the provisions contained in Section 9j of said Act which imposes a limit upon the number of permits which will be granted in any city, town or justice precinct.

Section 9j is as follows:

"The Comptroller of Public Accounts of the State of Texas shall not issue any permits to any person or firm for any city or town or justice precinct of any county in excess of the number of permits actually issued and existing on the 20th day of February, 1909, in such city or town or justice precinct, respectively, unless such number of permits are less than one for each 500 inhabitants in which event he shall, if applied for, issue permits not exceeding one for each 500 inhabitants of such city, town or justice precinct. In case the number of permits issued and existing on the 20th day of February, 1909, for each said city or town or justice precinct is in excess of one for each 500 inhabitants, the number of permits existing on the 20th day of February, 1909, is applied for, shall be granted, but that number

shall not be increased until the number of inhabitants of such city or town or justice precinct increases to the extent that the permits issued and actually in existence on February 20, 1909, is less than one for each 500 inhabitants, but the provisions of this section shall not apply to hotels now in existence or which may be hereafter opened, when located in the business section of a city or town, having a population of over 20,000, and provided, that in granting permits for licenses as a retail liquor dealer or a retail malt dealer the Comptroller of Pubilc Accounts shall give preference to those applicants who apply for a permit to do business at the places and location in said city or town or justice precinct where permits had heretofore been issued and granted, provided, further, that at least one permit may be issued in any city, town or justice precinct, when local option is not in force. The population of each city, town or justice precinct in the State shall be ascertained by the commissioners court of such county at the August term thereof of each and every year, in the following manner: It shall be the duty of the superintendent of public instruction of such county upon the request of such commissioners court to inform such commissioners court of the total school census of such city and town and justice precinct, and it shall be the duty of the commissioners court in determining the population of the city, town or justice precinct to estimate the population at the rate of six persons for every name in such scholastic census, and upon such basis, at the August term of thesaid court of each year, to ascertain and determine the population of such city, town and justice precinct, and to enter an order and decree upon the minutes of said court finding and determining what such population is, and shall send a certified copy thereof to the Comptroller of Public Accounts of the State of Texas."

The prohibition against the issuance of a greater number than the prescribed number of permits contained in the section quoted makes no distinction between permits issued for retail liquor licenses and retail malt licenses. The requirements in the other sections of the law for obtaining the one are the same as for obtaining the other. There is a distinction only in the tax required to be paid and in the amount, though not in the terms of the bonds required to be given.

Section 35 of the same act provides:

"That as soon as this law goes into effect all licenses heretofore issued shall immediately cease and determine, but the holders of such licenses shall have until sixty days after this act takes effect in which to obtain licenses under this act, said licenses to be dated as of the date this act takes effect, and the tax collector shall give such licenses credit for the unearned portion of such cancelled license as of the date this act takes effect; and provided, during said sixty days said licensee shall have the right to pursue his business under and in accordance with the cancelled license and the laws applicable to the same, which for that purpose are hereby kept in force, for said sixty days."

In the language above quoted the two character of licenses are treated together without any distinction being made in the law.

The permits being of the same general character and issued upon practically the same conditions, I see no objection why you should not issue a permit for a retail liquor dealer's license to the holder of a retail beer license, since you would not thereby increase or diminish the number of permits limited and allowed by the provisions of the act in questioon.

(2) Answering your second question, I am of the opinion that the Legislature in the provisions contained in Section 9j above quoted, intended to treat cities, towns and justices' precincts as separate and independent subdivisions. It is clear that they so intended to treat cities and towns. This being the case, in order that the application of the law may be harmonious, it is necessary to infer that they intended to treat justices' precincts in which cities or towns are situated as separate and distinct from the cities and town which they contain.

Cities and towns under the Constitution and laws of the State are given the right to adopt local option. If we are not to give said Section 9j the construction hereinabove suggested, a city or town in a justice precinct in a county might adopt local option, the effect of which would be to prevent the issuance of any permits or the granting of any licenses in said city or town and still the Comptroller would be required to issue the full number of permits to applicants within said precinct, but outside said city or town to which such justice precinct would be entitled, including in the population of said precinct the inhabitants of such city or town which has adopted local option. We can imagine still another case in which a justice precinct contains two cities or towns of about equal population. It may be that one of these towns has heretofore adopted local option, and that the other town has now or at the time of the going into effect of the new law a number of licenses equal to the number to which the entire precinct is entitled. If afterwards the town which now has local option in force should vote upon the question, as it is entitled to do under the Constitution, and the election results against prohibition, unless we adopt the construction above suggested, the Comptroller would not be permitted to issue any licenses to applicants residing in said town, for the reason that he had already issued to the other town the full number to which the justice precinct in which the said two towns are situated would be entitled.

I am, therefore, of the opinion that in issuing permits to a justice precinct containing a city or town you should issue permits to the precincts outside of the city or town in such precinct in proportion to one for each five hundred inhabitants, subtracting the population of such city or town from the entire population of the precinct. When there is more than one city or town in the precinct you should subtract the population of all cities and incorporated towns in the precinct from the population of the entire precinct.

(3) Answering your third question, I beg to say that Section 9j above set out limits the number of permits that you are allowed to issue in the several subdivisions therein specified, but provides that you shall issue the number of permits issued and actually in existence on February 20, 1909, where the number of such permits then

existing is greater than the number permitted to be issued by you.

Said section further provides that the population of each city, town or justice precinct shall be ascertained by the commissioners court of the county at the August term thereof for each and every year in the manner therein specified. This provision furnishes you the only basis upon which you can determine under the new law the number of permits to be issued in cities, towns and justices' precincts. The language contained in the first part of said section is:

"The Comptroller of Public Accounts of the State of Texas *shall not* issue any permits to any person or firm for any city or town or justice precinct of any county in excess of the number of permits * * * unless such number of permits are less than one for each five hundred inhabitants."

I am of the opinion that prior to the time you receive certified copies of the orders or decees entered by the commissioners court at the August term thereof you have no basis whatever upon which to issue permits and should only issue the number in existence on the 20th day of February, 1909.

It is my opinion that the fourth question above stated should be answered in the negative. The law does not permit a county judge to grant a license in any village, town or city for the establishment of a saloon within three hundred feet of a church, school or other educational or charitable institution, unless such saloon is within a business block or within three hundred feet thereof (a business block meaning a block in which there are more business houses than bona fide residences).

I quote the following language from Section 10 of the Robertson-Fitzhugh bill, which occurs in connection with the requirements of the law in respect to the application to be made to the county judge and is a statement required to be contained in said application, to wit:

"That he desires a license as a retail liquor dealer or as a retail malt dealer, as the case may be, specifically stating the place where such business is to be conducted, describing with reasonable certainty the house or place wherein the same is to be conducted, and if the place of business be in any block or square of any town or city where there are more bona fide residences than there are business houses in said block or square, or in any block where there is a church or school, then said petition shall be accompanied with written consent of a majority of the bona fide householders or residents in said block or square, who have resided for at least six months preceding such application, and those within 300 feet of such place of business."

The effect of the above quoted provision is that where the proposed place of business is within a residence block, as therein defined, the application must be accompanied with the written consent of a majority of the bona fide householders or residents. Within a business block this is not required, unless there is a church or school within such block; then the written consent of a majority of the householders and residents in said block and within three hundred feet of such place of business is required. Section 10a is as follows:

"The county judge shall in no case grant a license in any village, town or city, where the proposed place of business is within 300 feet of a church, school or other educational or charitable institution, the measurements to be along the property lines of the street fronts, and from front door to front door, and in a direct line across intersections where they occur; provided, the proposed place of business is not within a business block, or within 300 feet thereof, as such block is defined in Section 10 hereof."

The section last quoted is an inhibition against the granting of a license for a saloon in a residence block where the saloon is within three hundred feet of a church, school or other educational or charitable institution, unless such saloon is also within three hundred feet of a business block.

If the saloon is within a business block or within three hundred feet thereof, although it may be within three hundred feet of a church, school or other education or charitable institution, license may issue provided the application is accompanied with the written consent of a majority of the householders and residents in the block and within three hundred feet of such place of business.

I do not think it can be contended that there is any conflict between the provisions contained in Section 10, as above quoted, and the provisions contained in Section 10a. It is true that Section 10 in general provides that whenever the place of business is within a residence block, the applicant shall accompany his petition with the written consent of a majority of the householders and residents.

Section 10a is negative in its terms and denies the right of the county judge to grant a license in a residence block where the proposed place of business is within three hundred feet of a church, school or other educational or charitable institution. It is a limitation upon the county judge's authority to issue a license in a residence block, although the petition is accompanied with the written consent of a majority of the householders and residents where the place of business is within three hundred feet of a church, school or other educational or charitable institution.

(5) The fifth question, as above stated, involves the construction of Section 19 of the Robertson-Fitzhugh bill, as well as certain language contained in Section 15 of said act prescribing conditions in the bond required of licensees.

Section 19 is as follows:

"Every retail liquor dealer or malt liquor dealer, or other person who shall knowingly sell, give away, deliver or otherwise dispose of, or suffer the same to be done, about his premises, any intoxicating liquor in any quantity to any minor, or who shall have in his employ about his place of business, or who shall permit any minor to enter and loaf or remain in his place of business, shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than $10 nor more than $200, or by imprisonment in the county jail for not longer than sixty days, or by both such fine and imprisonment."

The language referred to in Section 15 is as follows:

"Which bond shall be conditioned * * * and that he will not permit any person under the age of twenty-one years to enter and remain in said house or place of business."

The object sought to be accomplished by the Legislature in Section 19, which defines the act of the liquor dealer in permitting any minor to enter and leave or remain in his place of business and the condition in the bond that he will not permit any minor under the age of twenty-one to enter and remain in such house or place of business, was doubtless the same. Therefore the language used in said Section 15 may be looked to if it throws any light upon the meaning of Section 19. It would see from a construction based alone upon the verbiage of the two provisions quoted that the Legislature only had in mind the house or saloon in which the liquor dealer transacts his business.

We find throughout the act in other connections that the Legislature employs the words "premises" and "about the premises." Indeed, in Section 19 it is made an offense for the liquor dealer to sell, give away, deliver or otherwise dispose of "about his premises any intoxicating liquor in any quantity to any minor," and the following language occurs, "or who shall have employed about his place of business."

It would seem from the various provisions in the act that the words "house" "or place of business" have been employed as convertible terms. In Section 10 the applicant for a license in his petition to the county judge is required to specifically state the place where such business is to be conducted, describing with reasonable certainty the *house or place* where the same is to be conducted. One of the conditions of his bond is that he will keep open the house or place where liquors shall be sold under such license. Another condition "that such persons shall keep an open, quiet, orderly house for the place of sale of spirituous, vinous or malt liquors."

As stated, one of the conditions in the bond required by the act is that he will keep an open house. An open house is defined in said Section 15 as follows:

"An open house in the meaning of this chapter is one in which no screens or other device is used or placed inside or outside of such house or palce of business for the purpose of, or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold, to be drunk on the premises."

In Section 24 of said act certain acts done or permitted to be done in his place are made offenses against the law and in the same section certain other things done or permitted to be done in or about the premises in connection with such place of business are made offenses, there being a clear distinction between the character of these offenses, the one being offenses done in the place of business and the other offenses committed either in the place of business or in or about the premises or in connection with such place of business. In said section it is not only made an offence to run or permit to be run billiard tables, pool tables, etc., in a house or

place of business, but it is made an offense to run billiard tables or pool tables in or about said premises or in connection with such place of business.

Section 26 of said Act makes it "unlawful for any liquor dealer or malt dealers to permit minors from entering beer gardens or suffer the same to be done about his premises any intoxicating liquors to any habitual drunkard, etc."

It would seem from the above mentioned provisions that the Legislature whenever they have deemed it advisable to make the act of the liquor dealer penal when done outside of his saloon or bar room to use words more comprehensive than the words "house or place of business," as used in Section 19 and in the language quoted from Section 15 of said Act.

I am, therefore, of the opinion that under the provisions of the Robertson-Fitzhugh Bill, it will not be unlawful for liquor dealers or malt dealers to permit minors from entering beer gardens or becoming guests in dining rooms of bona fide hotels or restaurants where intoxicating liquors are sold to guests, either when accompanied by their parents or when not so accompanied by their parents.

(6) The sixth question propounded involves the construction of the open house provision contained in the bond required to be given by Section 13 of said Robertson-Fitzhugh Bill, said condition being "and that such person shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors, etc."

The second paragraph of said section defines an open house as follows:

"An open house in the meaning of this chapter is one in which no screens or other device is used or placed inside or outside of such house or place of business for the purpose of, or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold, to be drunk on the premises."

The question as stated should be answered in the negative. A wire screen door placed at the entrance of a saloon for the sole purpose of keeping out flies and mosquitos, which does not obstruct the view through the door or open place of entrance into the saloon, would not be a violation of the provision of the law above quoted. However, as to whether or not a wire screen door would obstruct the view would be a question of fact in each case. Some doors so placed might obstruct the view and others not. If such a door as a matter of fact does obstruct the view, then it is quite clear that the provision of the law above quoted would be violated; otherwise, if such screen door as a matter of fact did not obstruct the view.

(7) The seventh question stated requires a construction of Section 35 of said Robertson-Fitzhugh Act. Said Section 35 being as follows:

"All laws and parts of laws in conflict with this act are hereby expressly repealed; provided, all of the provisions relating to the sale of intoxicating liquors contained in any special charter granted

by the Legislature to any city or town shall not be repealed by this act, but the same shall be cumulative thereof; provided, that as soon as this law goes into effect all licenses heretofore issued shall immediately cease and determine, but the holders of such licenses shall have until sixty days after this act takes effect in which to obtain licenses under this act, said licenses to be dated as of the date this act takes effect, and the tax collector shall give such licensee credit for the unearned portion of such canceled license as of the date this act takes effect: and provided, during said sixty days said licensee shall have the right to pursue his business under and in accordance with the canceled license and the laws applicable to the same, which for that purpose are hereby kept in force for said sixty days."

It will be noted that by the terms of the section above quoted all licenses in existence upon the day the new law goes into effect are expressly repealed and determined and thereafter no person holding a license under the old law can continue buisness, except under the terms and conditions prescribed in said Section 35, the effect of which is that any of the holders of licenses at the date said act takes effect who shall apply to the Comptroller for permits shall have sixty days within which they may obtain licenses under the new law, during which time or so much thereof as is required they are by grace of the Act of theLe gislature contained in said section permitted to do business as under their old licenses and under the laws governing the same. The act makes no special provision in reference to the licenses which will be in effect at the date the new law takes effect and which will expire before the holders of such licenses will be able to obtain licenses under the new law. The holders of such licenses are placed on the same terms as the holders of licenses which will not expire by their own terms until after sixty days after the act takes effect. The fact that the old law under which existing licenses were granted is expressly repealed and the further fact that all existing licenses are expressly repealed shows the intent of the Legislature to allow the holders of licenses under the old law who shall promptly and diligently apply for permits and seek to qualify under the new law a sufficient time in which to obtain such licenses, not as an obligation existing by virtue of the previous granting of said licenses, but as a matter of legislative grace extended to those who may desire to continue in business.

I am of the opinion, however, that this grace is extended only to such old licensees as make a bona fide effort to obtain licenses under the new law.

Yours truly,

R. E. CRAWFORD.
Assistant Attorney General.

CONSTRUCTION OF STATUTES—CONFEDERATE PENSION LAW OF 1909—PENSION COMMISSIONER.

Pensioners on old rolls may not obtain pension under new law after September 1, 1909, without making new application, and Pension Commissioner is without authority to pass upon merits of applications made under old law.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 2. 1909.

Capt. E. A. Bolmes, Commissioner of Pensions, Austin, Texas.

DEAR SIR: Your letter of the 12th has remained unanswered longer than usual for the reason that the question addressed to this Department is one of serious importance to a class of Texas citizens whose welfare is especially regarded by the organic law of this State, in that, two amendments to our Constitution have been adopted by the people of Texas, enjoining upon the Legislature the duty to provide out of the revenues of the State pensions to relieve, in some part, the necessities of the needy veterans of the Lost Cause in their declining years.

Your letter contains a request for an opinion upon two questions:

First: As to whether or not under the provisions of House Bill No. 217, entitled "An Act to carry into effect the amendment to the Constitution of the State of Texas providing that aid be granted to disabled and dependent Confederate soldiers and sailors and their widows in certain circumstances," etc., pensioners now on the rolls to whom pensions were granted under the Act approved May 12, 1899, may draw quarterly pensions without making new applications and proving up their claims under the provisions of the new law; and,

Second: If the above question is answered in the negative, then whether or not the authority is vested in you, as Commissioner of Pensions, by the Act approved March 26, 1909, would be sufficient to enable you to pass upon the merits of old applications made under the Act of April 1, 1899.

No doubt had the Legislature had their attention directed to the matter, and had they been careful to carry their intention into the legislation enacted, they would have no doubt made provision whereby pensioners now on the rolls could have continued to draw their pensions without the necessity of making new applications and proofs of their claims. But the sole question now is upon a proper construction of the law enacted. I take it that the primary object of the Legislature in enacting the new law was to carry into effect the provisions of the amendment to the Contsitution adopted on the 8th day of November, 1904, which differed in its provisions from the amendment adopted in November, 1898, in that it permits soldiers or sailors who were married to such soldiers or sailors prior the Legisalture to grant pensions to the widows of Confederate to the first day of March, 1880, whereas, the old act only permitted the Legislature to grant pensions to such widows married to such soldiers or sailors anterior to March 1, 1866.

There are, however, several other important changes made by the new law. Section 2 of the first Act requires that the applicant for a pension shall furnish the testimony of at least two creditable witnesses who personally know that he enlisted in the service and performed the duties of a soldier or sailor as claimed by him and that he is unable to support himself by labor of any sort. Section 2 of the new act provides that if an applicant can secure the testimony of two witnesses, then he shall furnish such documents or evidence in connection with his service in the army as may establish his claim for a pension.

Section 2 of the old Act requires the applicant to state that he is in indigent circumstances and is not able, by his or her labor, to earn a support, and defined indigent "to mean one who is in actual want and destitute of property and means of subsistence." Section 6 of the new Act defines indigent as follows: "To constitute indigency within the meaning of this act, neither the applicant himself nor his wife nor both shall be the owners of property, real or personal, in excess of the value of $1000 (household goods and wearing apparel excluded), nor in the enjoyment of an income, annuity, the emoluments of an office or wages for their services in excess of $150 a year, or who is in receipt of aid or of a pension from any State or the United States, or from any other source, or who is an inmate of the Confederate Home, or other public institution at the expense of the State shall not be entitled to a pension under this act."

There are other provisions of the act which it is unnecessary to cite which tend to extend the benefits of the pension law.

There are other provisions of the act, however, which are more restrictive than the provisions contained in the former act, and which might bar applicants under the new act who would nevertheless have been entitled to pensions under the old act. A part of Section 4 reads as follows:

"Every Confederate soldier applying for a pension under this act shall have served honorably from the date of his enlistment until the close of the Civil War between the States, or until he was discharged or paroled in some military organization regularly mustered into the army or navy of the Confederate States until the surrender."

This provision is contained in the new Act, but not in the old Act.

The following provision is contained in the new Act:

"Nor shall any application be allowed nor any aid given nor any pension paid to any widow of any soldier or sailor who has been divorced from any such soldier or sailor being her husband, nor to any widow who voluntarily abandoned and without cause any such soldier or sailor, being her husband, and continued to live separately from him up to the time of his death, nor to any such soldier or sailor who served as a substitute for another, nor to the widow of such substitute."

This provision is not in the old law.

There are other minor differences between the two acts, but those above quoted are sufficient to show that the new Act, while in some of its provisions it seeks to extend the benefits to the pension law, in other provisions it is more restrictive than the old Act and that there may be pensioners on the old rolls who would not be entitled to draw pensions under the new Act.

The new law is a complete system providing who are entitled to pensions, the character of applications such persons shall make, the proof required to be made to establish their claims and the administration connected with the payment of penisons and the appropriation available for the purposes of the act. It was intended as a complete act covering the entire subject matter of granting and paying pensions to the class therein designated. By its terms, said act comes into operative effect on the 1st day of September, 1909, after which time the granting of pensions to Confederate soldiers and all the rules and regulations to be employed in so doing is contained in said act. After said date nothing will be left of the old Act whatever.

Section 15 of the new law is as follows:

"That for the year beginning September 1, 1909, and ending August 31, 1910, there is appropriated the sum of five hundred thousand dollars ($500,000), for the purpose designated in this bill, and that for the year beginning September 1, 1910, and ending August 31, 1911, that there be appropriated the further sum of five hundred thousand dollars ($500,000), the same sums to be paid out of any funds belonging to the general revenue in the State Treasury not otherwise appropriated; provided, that on the first day of September, 1909, and on the first days of March and each succeeding year, the Commissioner of Pensions shall first allot to each blind, maimed and totally disabled soldier or sailor, or the blind, and totally disabled widows of such soldiers or asilors, the sum of eight dollars per month for each year, and the remainder of said appropriations shall be equally prorated among the pensioners, who are in indigent circumstances only, and whose claims to pensions have been established and filed with the Pension Commissioner under the provisions of this act, and the Comptroller shall issue his warrant for the amount due said pensioner in the manner hereinbefore provided, all pensioners to be paid at the end of each quarter and shall begin on the first day of September and March after the filing and establihsment of the application herein provided for, provided, however, that the Pension Commissioner is authorized to fill, after the apportionment is made, any vacancies created by death or other causes, at any time between the first day of March and the first day of September in each year."

I call particular attention to the provision that on the first day of September and March of each year the Commissioner of Pensions shall allot to each blind, maimed and totally disabled soldier or sailor, the sum of $8 per month for each year, and the remainder or sailor, the sum of $8 per month for each year, and the remainder of such appropriation shall be equally prorated among the pensioners who are in indigent circumstances only and whose claims to

pensions have been established and filed by the Pension Commissioner *under the provisions of this act.*

The Commissioner of Pensions is only allowed by the language of the above provision to "prorate among the pensioners whose claims to pensions have been established * * * under the provisions of this act and filed by the Pension Commissioner."

I call attention to Section 5 of the new law, to wit:

"That there shall be a Commissioner of Pensions whose term of office shall be two years with a salary of two thousand $(2000) dollars per annum, who shall be appointed by the Governor; it shall be the duty of said Commissioner of Pensions to examine and pass on all pension claims under the existing law, to keep a record of all approved claims, with the name, disability, service, county and amount paid; to furnish the county judges with suitable blanks for the use of claimants."

It will be noted that it is made the duty of the Commissioner of Pensions to examine and pass on all pension claims under the *existing law*. The old law can not be said to be existing law after the new law is in effect. I call attention to the following language contained in Section 7 of the Act:

"The payments of such pension shall begin on the first day of September of each year, payable at the end of each quarter and on and after the first of each quarter the pensioner shall make his or her affidavit, stating the county of his or her residence and postoffice address and that he or she is the identical person to whom a pension has been granted under this law."

Pensioners to whom pensions were granted under the old law could not make the affidavit required in this act, which it is necessary for every person obtaining pensions under the law to make.

In view of the above considerations, I am of the opinion that both questions, as stated, should be answered in the negative. The Legislature in enacting the new law have made no provision whereby pensioners on the old rolls may obtain pensions after the first of September, without making new applications and the new law nowhere gives the Commissioner of Pensions authority to pass upon the merits of applications made under the old law; but limits his authority expressly to passing upon pension claims under the existing or new law.

It is with regret that the Department has reached the above conclusion, but "the law is so written."

Yours truly,
R. V. DAVIDSON,
Attorney General.

CONSTRUCTION OF THE STATUTES—PENSION LAW—PENSION COMMISSIONER—CIVIL OFFICES OF EMOLUMENT.

New pension law does not go into operative effect until September 1, 1909.
Comptroller may pay pension under provisions of old law until September 1, 1909.
Pension clerk of Comptroller's Department not a public officer, and Com-

missioner of Pensions may hold position as pension clerk until September 1, 1909, the date when said new pension law becomes effective, although he has been appointed and has qualified as such Pension Commissioner.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 2, 1909.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have your letter of the 10th instant, in which you refer to House Bill No. 217, passed at the Regular Session of the Thirty-first Legislature, providing for the payment of pensions of certain Confederate soldiers, and propound the four following questions to this Department for its opinion:

First: "Since the Act of the Thirty-first Legislature, which becomes effective June 12th, repeals the former law, can the Comptroller pay the unexpended balance in the appropriation made by the Thirtieth Legislature, to the pensioners now on the roll, on the 1st day of July, as he would have been required to do, had the Act of the Thirtieth Legislature not been passed? If not, will said balance be available to pay any pensions under said Act of the Thirty-first Legislature, and if so, what time should such payment be made?"

Second: "If it is held that any part of the unexpended balance in the appropriation made by the Thirtieth Legislature, to pay Confederate pensions for the year ending August 31st, 1909, can be paid by the Comptroller on July 1st, next, under the Act of 1899, to the pensioners now on the rolls, can the whole of such unexpended balance be paid if the amount thereof does not exceed $8 per month for the time covered by such payment?"

Third: "In the appropriation for this Department for the year ending August 31, 1909, provision is made for the payment of a Chief Pension Clerk. Can this item in that appropriation be used for the payment of such clerk from June 12th, to August 31st, next, the services of such clerk being needed?"

Fourth: "The present Chief Penson Clerk has been appointed to the office of Pension Commissioner under the Act of the Thirty-first Legislature. I understand that his appointment becomes effective on the 12th instant and that he will qualify as such Commissioner on that date. Could he lawfully hold and discharge the duties of the position of Chief Pension Clerk in this Department after his qualification as Pension Commissioner?"

We have heretofore verbally advised you that we are of the opinion that all four of the questions above stated should be answered in the affirmative. We have not heretofore had the time to write you, giving you our reasons for such opinion.

The old law provided for the payment of quarterly pensions and the proper construction of its provisions permit the payment by the Comptroller of pensions to persons who had qualified under the act at the beginning of the quarter, and you state in your letter that payment for the quarter ending July 1st has been made to the pensioners on the rolls. The question as to whether or not the unexpended balance in the Treasury appropirated by the Thirtieth

Legislature to be paid out under the provisions of the repealed law may be paid to pensioners upon the old rolls, depends upon whether or not the Act of the Thirty-first Legislature expressly or by implication repeals the direction contained in the old law to pay pensions to persons entitled to such under the provisions of the old law out of an appropriation made by the Thirtieth Legislature for that purpose up to the 1st of September, 1909.

The repealing clause contained in the new Act is "That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed." The act becomes effective on the 12th day of June by operation of the Constitutional provision providing that Acts of the Legislature shall become effective ninety days after the adjournment of the Legislature. An examination of said Act discloses, however, that the same cannot go into operative effect until the 1st of September, 1909; that is, that said Act does not operate upon the subject matter of granting pensions to the persons therein designated until that date.

Section 15 of said Act is as follows:

"That for the year beginning September 1, 1909, and ending August 31, 1910, there is appropriated the sum of five hundred thousand dollars ($500,000), for the purposes designated in this bill, and that for the year beginning September 1, 1910, and ending August 31, 1911, that there be appropriated the further sum of five hundred thousand dollars $500,000), the same sums to be paid out of any funds belonging to the general revenue in the State Treasury, not otherwise appropriated; provided, that on the first day of September, 1909, and on the first days of March and each succeeding year, the Commissioner of Pensions shall first allot to each blind, maimed and totally disabled soldier or sailor, or the blind, and totally disabled widows of such soldiers or sailors, the sum of eight dollars per month for each year, and the remainder of said appropriations shall be equally prorated among the pensioners, who are in indigent circumstances only, and whose claims to pensions have been established and filed with the Pension Commissioner under the provisions of this Act, and the Comptroller shall issue his warrant for the amount due said pensioner in the manner hereinbefore provided, all pensioners to be paid at the end of each quarter and shall begin on the first day of September and March after the filing and establishment of the application herein provided for; provided, however, that the Pension Commissioner is authorized to fill, after the apportionment is made, any vacancies created by death or other causes, at any time between the first day of March and the first day of September in each year."

A part of Section 7 reads:

"The payment of such pensions shall begin on the first day of March and September of each year, payable at the end of each quarter and on and after the first of each quarter the pensioner shall make his or her affidavit stating the county of his or her residence, postoffice address, and that he or she is the identical person to whom a pension has been granted under this law."

It will be seen that no pension under the new Act can be paid for any period beginning prior to the first of September, 1909;

Therefore, said Act does not operate upon the subject matter of granting pensions prior to that time.

The Legislature which enacted the new law understood that the same would go into operation by virtue of the Constitutional provision, some months prior to the first day of September. They also knew that there would be an unexpended balance in the Treasury appropriated by the Thirtieth Legislature for the payment of pension claims under the old law. They so constructed the new law that it does not go into operative effect until the first of September, 1909. I am of the opinion that a consideration of the above facts would not justify the opinion that the Legislature intended to repeal the provisions of the old law for paying out pensions up to the first of September, 1909.

Applications for pensions under the new law and all the provisions in the new law relating to the same, relate to pensions, rights to which cannot accrue prior to the first day of September, 1909. Therefore, such provisions would not conflict with the payment of pensions under the provisions of the old law up to September 1, 1909.

I am of the opinion that you may pay out the whole of the unexpended balance in the Treasury appropriated by the Thirtieth Legislature for the payment of pensions under the old law. The unexpended balance of said appropriation being available to pay pensions under the old, the only limitation contained in the old law upon the amount to be paid is that the amount so paid shall not exceed $8 per month.

I am of the opinion that you would be authorized to retain a Pension Clerk and that he should be paid out of the appropriation made for that purpose by the Thirtieth Legislature. As stated in answer to your first question, the duties of the Commissioner of Pensions created by the new law relates to claims established under said law, and relate to the administration of the new law. The machinery provided by the old Act of carrying into effect its provisions may be maintained until the new law goes into operative effect, to wit, on the first day of September, 1909.

It is my opinion that the present Commissioner of Pensions may lawfully act as Pension Clerk until the first of September, 1909. Section 40 of Article 16 of the Constitution provides:

"No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein."

I am of the opinion, however, that the Pension Clerk provided in the old law is not an officer within contemplation of the section of the Constitution above quoted. Said Act designates him as "Pension Clerk," and provides that "he shall take charge of accounts and matters pertaining to this Act, and shall keep a list of the applications for pensions sent to the Comptroller, and who shall, with and under the direction of the Comptroller, examine all applications for pensions carefully and thoroughly, and shall see that such applications are made in strict compliance with the provisions of this Act, and such pension clerk, with and under the direction of

the Comptroller, shall pass upon the validity of such claims."

This is the only provision in the old law relating to the duties of said clerk. Said clerk is not required to take an oath of office nor to give an official bond. The duties as prescribed above are all provided to be done under the direction of the Comptroller.

I am, therefore, of the opinion that such clerk is not an officer within the meaning of the Section of the Constitution above quoted. The Commissioner of Pensions is undoubtedly an officer, but there would be no legal objection to his holding the position of Pension Clerk up to and until the 1st of September, 1909.

Yours truly,
R. V. DAVIDSON,
Attorney General.

MEDICAL BOARD—COSTS.

Where Medical Board loses in a suit involving construction of medical law, said Board is liable for costs incurred.
Individuals composing the Board not liable.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 13, 1909.

Dr. M. E. Daniel, Honey Grove, Texas.

DEAR SIR: In your letter of the 10th instant you submit to this Department the quetsion whether or not the State Medical Board can be held responsible as a board or as individuals for the costs accruing in mandamus suits involving the construction and constitutionality of the State Medical Law, where the board is cast in the suit and the court has adjudged the costs against said board.

Article 1421 of the Revised Statutes provides:

"The successful party shall recover of his adversary all the costs expended or incurred therein, except when it is or may be otherwise provided by law."

There is a general statute applicable in all cases, unless the law makes provision otherwise for the payment of costs.

The Supreme Court of this State in the case of McMeans vs. Finley, 32 S. W., 524, which was a mandamus proceeding brought by a tax collector against the State Comptroller, in passing upon the question as to whether this statute applied in mandamus cases, said:

"We know of no law that affects this provision (Art. 1421) as applied to cases of this character," and held the tax collector, who was refused the writ of mandamus, liable for the costs incurred in said application.

It is clear, therefore, that the law provides for the payment of costs by the unsuccessful party in mandamus proceedings generally, and the further question arises whether this board being a public board created by the Act of the Legislature and acting in an official capacity in defending against a mandamus proceeding is liable for the payment of costs, either as individuals or as a board.

The Supreme Court of Illinois, in pssing upon this question in the case of Lyons vs. Highway Commissioners, 38 Ill., 347, held that in mandamus proceedings against a public board the costs should be taxed against them in their official capacity and not as individuals. To the same effect are the cases of People vs. Madison County, 125 Ill., 334; Oran Highway Commissioners vs. Hoblet, 19 Ill. App., 259.

Section 8 of the law creating the present State Medical Board, Acts 1907, page 226, provides:

"The funds realized from the aforesaid fees (referring to the fees paid the Board by applicants for license to practice medicine in this State) shall be applied, first, to the payment of the *necessary expenses* of the Board of Examiners: any remaining funds shall be applied by the order of the Board to compensating members of the Board in proportion to their labors."

We see from the terms of the Medical Act that this is the only source of revenue of the Board and the only property officially coming into the hands of the Board. The Legislature has placed no limitation upon the expenditure of this fund beyond limiting it to the necessary expenses of the Board of Examiners and the question arises whether this term is broad enough to include the payment of costs necessarily incurred in defending proceedings of this character against the Board.

In the case of Babbitt vs. Selectman of Savoy, 57 Mass., 530, the Court in constructing a statute which provided that "the town may raise and expend money for the support of schools and for all *necessary expenses* arising in the town," held that the term *necessary expenses* included the expense of a suit against the agents or servants of the town in which its interests were directly involved.

We therefore conclude that the State Medical Board in mandamus proceedings, where the Board is cast in the suit and costs awarded against it by the Court, is liable for the payment of said costs as an official board and the fund provided by Section 8 would be subject to the payment of such costs. However, the individual members of the Board are not liable for the payment of such costs and no legal levy can be made against the individual property of any member of the Board to satisfy the payment of costs of any proceding by or against the Board in an official capacity. The Board, in defending mandamus proceedings, is acting officially and not as individuals and is only liable as an official board, as the proceedings brought in these cases are to compel a performance of an official duty and not a private one. Hence, under no just rule could the Board be held liable as individuals.

Yours truly,
C. A. LEDDY.
Assistant Attorney General.

BOOKS AND RECORDS OF SURVEYOR'S OFFICE, TRANSCRIBING OF, ETC.

Old book or record of field notes of county surveyor, when transcribed and certified to by Commissioner of General Land Office as to its correctness, becomes a permanent record of the surveyor's office; but there is no provision of the general law authorizing or permitting same to be used as evidence.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 20, 1909.

Judge Ernest Herring, County Judge, Aspermont, Texas.

DEAR SIR: On June 20, 1909, you addressed a letter to this Department asking for our opinion on the law as applicable to certain stated facts recited therein. We mailed you a card at the time, stating that the matter would receive attention later.

Your letter refers to a re-survey of Blocks D and F of the H. & T. C. R. R. Co. in Stonewall County by George N. Williams, State Surveyor, which you say was made by him several years ago and in which you also state that he made two copies of field notes of said work, one of which he filed in the Land Office at Austin and the other he filed with the County Surveyor of Stonewall County; that this work contained the field notes of corrected surveys for said sections of land; that the field notes as filed with your surveyor have been recorded in a book which has become worn and torn in parts, although all of it is still readable and intact and that the surveyor of your county desires your commissioners court to have said old book transcribed. You ask two questions:

1. Will said old book of field notes when certified to as to its correctness by the Commissioner of the Geenral Land Office become a record of the Surveyor's Office of Stonewall County within the meaning of the statute as to such records?

2. Will said oid book when so certified to by the Commissioner of the General Land Office be such a record as can be legally transcribed within the purview of the statute authorizing surveyors' records to be transcribed?

Answering these questions in the order in which they are propounded, will say that such old book when properly certified to by the Commissioner of the General Land Office will become a record of the Stonewall County Surveyor's Office within the meaning of the statute, and in this connection I call your attention to an Act passed by the Legislature in the year 1887 providing for the correction of surveys, and especially to Section 3 thereof, which reads as follows:

"The Commissioner of the General Land Office may have any lands belonging to the common school, University or asylum funds ternating therewith, surveyed or resurveyed and field notes or or other lands in which the State may be interested, or lands alcorrected field notes of same returned to his office by any surveyor appointed under this Act, which field notes shall have the same force and ecect as if made by the county or district surveyor of the county or district in which said land lies, and upon the

adoption and approval of said field notes by the Commissioner of the General Land Office, he shall forward to the surveyor of the county or district in which said land lies certified copies of said field notes, which thereafter shall be a part of the records of said surveyor's office." (See Acts of 1887, page 107.)

This seems to settle the first question and it seems from the above that there can be no doubt but that when the Commissioner of the General Land Office shall have adopted and approved said field notes and shall have forwarded them to your surveyor, that such certified copies may be placed of record and become a permanent legal record of your surveyor's office.

2. Article 4105 of the Revised Civil Statutes authorizes the transcribing of surveyors' records, but does not provide that such transcribed records shall have the same force and effect as the original. The last named Article was passed by the Legislature in the year 1871 as Chapter 24 of the Acts of said Legislature and approved November 6th of that year. Chapter 23 of the Acts of 1871 is as follows:

"Be it enacted by the Legislature of the State of Texas that the county surveyor of Dallas County be and he is hereby authorized and required to transcribe the records contained in books C, D and P of his office into one or more well bound books, which said records, so transcribed and their correctness certified to by the presiding justice of the County of Dallas shall have the same force and effect as the original records from which they shall be transcribed."

This is a special Act of the same Legislature that passed the general law as Chapter 24 and brought down into the statutes as Article No. 4105.

Now the question arises as to why the Legislature of 1871 should on November 1st pass a special statute for the relief of Dallas County, authorizing and requiring the surveyor of said county to transcribe the records contained in books C, D and P and declaring that when so transcribed that they shall have the same force and effect as the original records from which they should be transcribed if the general statute passed at the same session of the Legislature providing for the transcribing of surveyors' records was a sufficient relief for said county? In other words, this special statute affecting Dallas County only provides that the transcribed records shall have the same force and effect as the original, while the general statute does not so provide.

Also Chapter 25, page 18 of the Laws of 1871, referring to the transcribing of the records of San Saba County, and approved November 6th of that year, especially provides that when said records shall have been transcribed that they shall have the same force and effect as the original and that they shall be received in evidence on the trial of all causes in the courts of this State the same as the original records.

Article 2319 of the Revised Statutes provides:

"Where a county has been heretofore, or may hereafter be created out of the territory of any organized county, and the records

of deeds and other instruments required or permitted by law to be recorded, relating to lands or other property in such new county have been transcribed and placed on record in such new county, in accordance with law, certified copies of such transcribed records in the new county may be admitted in evidence with like effect as certified copies of the original records."

Article 2320 of the Revised Statutes provides:

"Transcribed records for new counties or for newly attached territory, as provided for by law, when properly verified and certified shall have all the force and effect in judicial proceedings in courts of this State as the original records."

Chapter 1 of Title 95 of the Revised Civil Statutes covers the transcribing of old records and provides that "when the records or indexes of any county have become or may become defaced, worn, or in any condition endangering their preservation in a safe and legible form, to procure a good and well-bound book or books, as the case may be, and require the county clerk to transcribe, or have transcribed by a sworn deputy, the records contained in such book or books, in a plain, legible hand, and with some standard ink of a permanent black color, and that the book or books so transcribed shall conform in all respects to the original record as indexed and the designation of such transcribed book or books, whether by letter or number, shall not be changed from the original, and that when carefully compared with the original record and the correctness thereof certified to, as required by the provisions of said Chapter, that the said transcribed records shall have the same force and effect as the original record, but Article 4589, which is a part of this Chapter, specially provides that this Act shall not apply to the records of the surveyors' office. So it seems that by a study of the history of the recording acts of this State that the Legislatures of the State of Texas have made a studied effort to provide for the perpetuation of all the records of the State and of the counties therein, but notwithstanding this fact, they have failed to provide that surveyors' records when transcribed shall have the same force and effect as the originals, and whether this was by design or an oversight, I will not attempt to say. I know of no good reason, legal or otherwise, why that a surveyor's record becoming old and worn out could not be transcribed and the transcribed record, when properly compared with the old and certified to by the one doing the transcribing, should not be used as evidence, as provided by the statutes of this State for other records, yet it is a strange fact nevertheless that the Legislature of this State has never provided for such an emergency.

I will suggest, however, that it would be better to have the Commissioner of the General Land Office send your surveyor direct from his office copies of the corrected field notes of the surveys under discussion and that from these a record shall be made up, being an original surveyor's record. This would cost probably a little more than to have your old book certified to and then transcribed, as suggested by your surveyor.

I do not desire it to be understood that this Department holds

herein that a transcribed surveyor's record can not be used as evidence in the courts of this State, but I am simply calling your attention to the fact that from a sudy of the history of legislation in connecion with the recording acts, that the Legislature of this State has at no time provided for such an emergency, and what the courts would hold if the matter was presented to them direct when called upon to rule upon the admissibility of record testimony from such transcribed records, I will not pretend to say.

Yours truly,

L. A. DALE,
Assistant Attorney General.

DISTRICT JUDGES—EXCHANGE OF DISTRICTS.

Governor is without authority to direct an exchange of districts by district judges.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 30, 1909.

Gov. T. M. Campbell, Capitol.

DEAR SIR: You have referred to this Department a letter from Jno. B. Howard, Esq., of Stanton, Texas, of date July 15, 1909, to which is attached a copy of a letter to him from Judge James L. Shepherd of Fort Worth, Texas, dated July 13, 1909, and have asked our opinion upon the questions therein presented. From said letter it appears that Judge Shepherd, as District Judge of the district in which Martin County is situated, granted an injunction restraining certain parties from using the grass of certain land in Martin County; that after service upon him of the writ of injunction, one of the defendants so enjoined ejected plaintiff's cattle from said land and now has men guarding the place with Winchester rifles; that attorneys for the plaintiff at whose instance the writ of injunction issued, are desirous of having an inquiry into the facts with a view to punishment of said defendant as for contempt for violating said injunction; that Judge Shepherd is in Fort Worth where he is necessarily detained for medical treatment, by reason of which fact he can not hear such contempt proceedings; and that Judge S. J. Isaacs, the presiding judge of an adjoining district, is willing to go to Martin County and there act for Judge Shepherd in the premises if he can legally do so.

Mr. Howard asks that if you can legally do so you request or order some judge to exchange with Judge Shepherd and hold an inquiry into said matter upon proceedings as for contempt.

I understand that all the courts in both districts are in vacation. In reply to your questions I beg to say:

First: Revised Statutes Article 3011 provides that "disobedience of injunction may be punished by the court or judge in term time or in vacation as a contempt." Articles 3012 and 3014 provide the procedure and Article 3013 prescribes the punishment in such cases.

Under these statutory provisions the power and authority of the regular district judge to deal with the situation, even in vacation, is manifest.

Second: Section 11 of Article 5 of the Constitution of Texas contains the following provisions:

"No judge shall sit in any case wherein he may be interested, or when either of the parties may be connected with him, either by affinity or consanguinity within such a degree as may be prescribed by law, or where he shall have been counsel in the case. * * * When a judge or the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient and shall do so when required by law."

Revised Statutes, Article 1108, is as follows:

"Any judge of a district court may hold court for or with any other district judge and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so."

The inquiry here arises: if, during vacation, and while Judge Shepherd remains in Fort Worth for medical treatment, and at his request, Judge Isaacks shall go to Martin County to act for him in said matter, will that constitute an "exchange" of districts or be holding court for each other within the meaning of the foregoing constitutional and statutory provisions?

I am of the opinion that this inquiry should be answered affirmatively, and that such action by Judge Isaacks would be legal.

Third: Revised Statutes Article 1069, as amended in 1897, is as follows:

"Whenever any case or cases, civil or criminal, are pending in which the district judge is disqualified, from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately notify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall also notify both of said judges of such order, and it shall be the duty of said district judges to exchange districts for the purpose of disposing of such case or cases, and in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof."

In the case of Burrell Oates vs. State of Texas our Court of Criminal Appeals, upon motion for rehearing, recently denied the authority of the Governor to appoint a special judge to try a criminal case in which the regular district judge was disqualified, holding said Article 1069 not repugnant to the above quoted constitutional provisions. That decision of the court was contrary to my opinion of May 29, 1907, addressed to you, to which, with due respect to said Honorable Court, I still adhere.

But, assuming that said decision is correct and must be observed and followed, I cannot find in any constitutional or statutory provision, or in the decision of the Court in the Oates case, anything to authorize or empower the Governor to direct district judges to exchange districts except in cases where one of the judges is disqualified; and upon that feature I beg to here reiterate what I said in my above mentioned opinion to you.

In other words, I am now of the opinion that in the case presented to you by Mr. Howard, as above stated, you are without authority to direct Judge Shepherd or any other district judge to make an exchange of districts, or to direct any other district judge to go into Judge Shepherd's district and in his place and stead take any action whatever in the premises.

Respectfully,
WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—MEDICAL LAW.

Practitioners must have licenses to practice medicine, and a "masseur" can not legally treat diseases or propose to effect cures by other means than merely to perform the act of massaging, without procuring license as practitioner.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 21, 1909.

A. McFarland, Esq., Lampasas, Texas.

DEAR SIR: Your letter of the 20th instant requests of this Department a construction of a portion of Section 10 of the One Board Medical Act passed by the Thirtieth Legislature, which provides: "This Act shall not apply * * * to masseurs in their particular sphere of labor who publicly represent themselves as such."

Under the rules of this Department we are restricted in giving official opinions to answering inquiries from public officers concerning the proper discharge of their official duties; but in this case, as you are associated with the county attorney in the prosecution involving the question upon which you seek information, it will be treated as coming from that official.

This provision must be construed in connection with those provisions of the act which define the practice of medicine. Section 13 of said Act provides:

"Any person shall be regarded as practicing medicine within the meaning of this Act:

"(1) Who shall publicly profess to be a physician or a surgeon and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof.

"(2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any sys-

tem or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

A "masseur" within the meaning of this Act is one who performs massage, and massage is defined to be rubbing or kneading of the body. In view of the broad definition of what constitutes the practice of medicine, it is clear that in exempting "masseurs" from the operation of the Act, it was only intended to exempt them from the compliance with the terms of the Medical Act so far as they keep strictly within their own sphere of labor—that is, to perform massage, and it was not intended by this exemption to permit them to treat or offer to treat any disease or disorder, and charge compensation therefor, even though their method of treatment is by massaging the body; and whenever any "masseur" treats or offers to treat any disease or disorder of any kind and charges therefor, he would be subject to criminal prosecution, unless he had prior thereto had license duly issued to him authorizing him to practice medicine. Merely because no drugs or medicines are used by such person in treating diseases, nevertheless they are practicing medicine within the maning of this Act.

The Court of Criminal Appeals in the case of Ex parte Ira Collins, appealed from El Paso County, in an opinion rendered June 19th, in construing the meaning of the word medicine uses this language:

"The term medicine * * * means the art of healing by whatever scientific or supposedly scientific method may be used. It means the art of performing cures or alleviating diseases and remedying, as far as possible, results of violence and accidents. It further means something which is supposed to possess or some method which is supposed to possess curative power."

The construction that such parties are not entitled to treat disease by virtue of this exemption, is strengthened by reference to the Medical Act where we find that osteopaths are not exempt from its provisions, and yet their particular system of treatment is by kneading and manipulating the body. The definition of the practice of medicine in this Act is comprehensive and includes any and all systems and methods of practice whereby any party treats or offers to treat any character of disease or disorder, and the exemption with reference to "masseurs" was only intended to permit them to perform the act of massaging strictly as a "masseur" and whenever by massage they treat for disease, they are not "strictly within their sphere of labor," but are engaged in the practice of medicine and liable to criminal prosecution for failing to comply with the terms of this act.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—APPROPRIATION FOR ENFORCEMENT OF ALL LAWS.

Comptroller is authorized to draw warrants against said appropriation on vouchers approved by Attorney General without the approval of the Governor.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 27, 1909.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

SIR: In reply to your oral inquiry of this date as to the proper construction of S. B. 18, an Act entitled:

"An Act making an appropriation for the enforcing of any and all laws of the State of Texas, and for the purpose of paying any and all necessary expenses in bringing and prosecuting or paying expenses in prosecuting same, providing the manner of expending such appropriation, and declaring an emergency, approved April 20th, 1909."

I beg to say that in my opinion you are authorized to draw warrants against said appropriation on vouchers approved by the Attorney General but not having endorsed thereon the approval of the Governor. In other words, I do not think that this Act contemplates that vouchers for expenditures out of said appropriation shall bear the Governors approval.

It is true that the Act specifically declares that the expenditures out of said appropriation shall be "under the direction of the Attorney General by and with the approval of the Governor," and such provision clearly and expressly negatives the idea that any portion of such appropriation shall be expended without the Governor's approval; but said Act also expressly provides that payments out of said appropriation are to be made "upon warrants drawn upon the Comptroller of Public Accounts on vouchers approved by the Attorney General," and this declaration in and of itself, and especially when taken in conjunction with the above quoted provision authorizing the Attorney General and Governor to *jointly incur expenses* under said Act, indicates clearly the legislative intention that it shall not be necessary for the Governor to actually endorse vouchers in payment of expenses so incurred.

I am of the opinion that the approval by the Attorney General of such vouchers affords sufficient assurance to you that the expenditure thereby shown is by the direction of the Attorney General and has received the approval of the Governor.

Truly yours,

WM. E. HAWKINS,
Assistant Attorney General.

VITAL AND MORTUARY STATISTICS—BOARD OF HEALTH.

There is no provision in the law authorizing appointment of local registrars of vital and mortuary statistics, nor would the Board of Health have authority to require the county clerk to appoint, nor does the law authorize the county clerk to appoint a deputy whose duty would be confined solely to making report of vital and mortuary statistics. The Board of Health has no authority to require the various counties to pay to a local registrar a fee for every birth and death registered.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 2, 1909.

Hon. W. M. Brumby, State Health Officer, Capitol.

DEAR SIR: We have your letter of the 30th ultimo in which you refer to Chapter 135 of the General Laws of 1903 which makes it the duty of all physicians, surgeons and accoucheurs attending the birth of a child to report the same, with certain other facts, in connection therewith, to the clerk of the county court; and makes it the duty of all physicians, surgeons and accoucheurs and coroners cognizant of the death to report the same, with certain facts, to said clerk; and requiring the clerk to make a record of these facts and to make monthly reports thereof to the State Department of Public Health; and providing fees for the clerk in connection therewith.

You also call attention to sub-division "e" of Section 10 of an Act of the Thirty-first Legislature known as "a bill to create a State Board of Haelth" which gives the State Board of Health authority to prepare a sanitary code which shall provide rules and regulations governing the manner and method of collecting and reporting all vital and mortuary statistics, including reports of births and deaths, designating to whom and by whom such reports shall be made and the form of same.

In connection with the two provisions of the law above specified, you request the opinion of this Department upon the four questions stated in your letter as follows, to wit:

"(1). Has the clerk of the county court authority to appoint a deputy or local registrar of vital and mortuary statistics, in as many local registration districts or precincts in his county as are necessary to efficiently collect these statistics."

"(2). If he has such authority and should refuse to do so, has this Board authority under the section above quoted in regard to the collection of vital and mortuary statistics power to require him to do so?"

"(3). As a part of the method of collecting these statistics can this Board require the various counties to pay to the local registrar a small fee for each birth and death registered and reported and burial permits issued?"

"(4). Can this rule requiring clerks of county courts to appoint local registrars, if legal, be applied only to counties of a certain density of population?"

Answering your first question I beg to advise that there is no provision in the law authorizing the appointment of local registrars of vital and mortuary statistics. However, there is provision for the appointment of deputy county clerks. Such provisions are contained in Articles 1138 and 1139 of the Revised Statutes, and in Section 12 of Chapter 5 of the General Laws of the first called session of the Twenty-fifth Legislature, known as the fee bill.

Article 1138 provides that the clerk of the county court shall have power to appoint one or more deputies. Article 1139 provides that such deputies shall take the oath of office prescribed in the Constitution, and shall act in the name of their principal and may do and

perform all such official acts as may be lawfully done and performed by such clerk in person. Section 12 of the fee bill provides "that whenever any officer named in Section 10 of said bill, (Section 10 names county clerks), shall require the service of deputies or assistants in the performance of his duties, he shall apply to the county judge * * * for authority to appoint same, and the county judge shall issue an order authorizing the appointment of such number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said officer. The official applying for the appointment of a deputy * * * or deputies * * * shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require in addition a statement showing the needs of such deputies or assistants * * * ."

Said article provides a maximum salary for the deputies to be appointed, and further provides: "The amount of compensation allowed shall be paid out of the fees of office to which said deputies or assistants may be appointed and shall not be included in estimating the maximum salaries of officers named in Section 10 of this Act."

From the provisions above quoted it is apparent that the county clerk may appoint deputies only after he has obtained the order of the county judge authorizing such appointment. The number of deputies which may be appointed rests in the discretion of the clerk and the county judge. Both these officers must act in appointing deputy clerks. The clerk must make the application and the county judge must approve the appointment.

I do not think that the law would authorize the clerk to appoint deputies whose duties would be confined solely to making report of vital and mortuary statistics. A deputy appointed by the clerk would be a deputy clerk, with power to perform the duties conferred upon deputy clerks as per Article 1139 above cited.

Answering your second question: I am of the opinion that the Board of Health would have no authority to require the clerk to appoint deputies for the purpose of collecting vital, and mortuary statistics. The manner of the appointment of deputy clerks is given in Section 12 of the fee bill above quoted; and as above stated, deputies can only be appointed at the suggestion of the clerk with the approval of the county judge.

Answering your third question: I am of the opinion that the Board of Health has no authority to require the various counties to pay to the local registrar a fee for every birth and death registered and reported and burial permits issued. This authority is no where expressly given the Board of Health, nor does any act of the Legislature make the collection of vital and mortuary statistics a charge upon the several counties.

Your fourth question does not require an answer for the reason that clerks cannot be required to appoint local registrars.

Yours very truly,

R. E. CRAWFORD.

Assistant Attorney General.

CONSTRUCTION OF LAWS—PURE FOOD LAW.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 3, 1909.

Dr. J. S. Abbott, Dairy and Food Commissioner, Denton, Texas.

DEAR SIR: We have your letter of the 19th instant, in which you call the attention of the Department to a former opinion of the Department given by Mr. Claude Pollard in a letter addressed to Mr. E. G. Eberle, Secretary of the Texas Pharmaceutical Association at Dallas, Texas, in which Mr. Pollard expressed the opinion that a retail druggist is not required to state upon the package the amount of alcohol, morphine, phenacetine, opium, cocaine, heroine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein, in medicines he dispenses over the counter, such as paregoric and Jamacia ginger, where the said medicines are taken from a stock bottle properly labeled in reference to the quantity or proportion of said drugs above mentioned; as well as to another opinion given by Mr. Pollard also to Mr. Eberle, in which Mr. Pollard, stating the opinion of this Department, held that the provision of the Pure Food Law required a statement on the label of the quantity or proportion of any alcohol, morphine, etc., does not apply to the prescriptions of regularly practicing physicians, filled either by themselves or by druggists. You say that these opinions are "contrary to the rulings of all the State Commissioners that have verbatim copies of our law which is also a copy of the National Law" and that you are greatly crippled in the enforcement of the Food and Drug Law in following them out.

I beg to advise that I have given the matter submitted by you close attention and have reached the conclusion that Mr. Pollard's opinions, as above stated, are erroneous.

Section 1 of the Pure Food Law provides as follows:

"That no person, firm or corporation shall within this State manufacture for sale or have in his possession with the intent to sell, offer or expose for sale, or sell or exchange any article of food, drink or drugs which is adulterated or misbranded within the meaning of this act * * * ."

The language above quoted from Section 1 states the purpose and scope of the act which is to prevent the manufacture and sale of food, drinks or drugs which are adulterated or misbranded. The ultimate object of the act undoubtedly is to protect the consumer against adulterated drugs and to afford him information of the existence of certain named drugs when such durgs enter into the composition of foods or drugs purchased by him for consumption. The various provisions of the act are merely means to the end that the consumer be protected from adulterated and misbranded foods and drugs.

Section 2 of the Act deals with adulterated foods and drinks.

Section 3 of the Act deals with misbranded drugs and foods. The first paragraph of Section 3 applies the prohibition of the law against misbranding foods and drugs to misstating the composition or

the ingredients or substances contained in foods and drugs upon any statement, design or device placed upon them.

The second provision contained in Section 2 is as follows:

"That for the purposes of this act an article shall also be deemed to be misbranded:

(a) In the case of drugs: (1) If it be an imitation of or offered for sale under the name of another article: (2) if the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, phenacetine, opium, cocaine, heroine, alpha or beta ucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substance contained therein."

The question is, what is the meaning of the word "package" in the language "or if the pacakge fail to bear a statement on the label of the quantity or proportion of any alcohol, etc.?" The word "package" has been variously defined in decisions construing statutes and contracts. In the various cases the courts have given it the meaning indicated by the context. None of the authorities that I have examined would throw any light upon the meaning of the word as used in the connection in which it is used in the above quoted provision of the Pure Food Law. It is, however, a fundamental rule of construction that in arriving at the meaning of a statute the purpose and scope of the statute should be taken into view, and that construction given it which will conform it to such purpose and scope. If we give the word "package" the meaning given it by Mr. Pollard, then it seems to me that this provision of the Pure Food and Drug Law would fall short of the obvious purpose of the Legislature in enacting it. The druggist would then be able to put his drugs in stock bottles and out of sight of the public and supply his customers from these stock bottles and no protection be afforded such customers purchasing at retail, where the evident purpose of the law is that the purchaser at retail should have information as to the proportion of alcohol, morphine and other drugs named in the articles purchased by him. The language above quoted from Section 1 indicates the purpose of the Legislature to prevent the adulteration or misbranding of any *article* of food, drink or drugs. In order to do this we must hold that the word "package" in the connection now considered would include any parcel, bottle or container containing any drug or drug compound sold by the druggist to his customer or kept in stock for the purpose of being sold, containing any of the drugs mentioned.

We always hesitate before overruling a previous opinion of the Department, but when we reach the conclusion that such an opinion does not properly express the law, it is our duty in every such case to withdraw the former opinion, and this we do in this instance.

Yours very truly,

R. E. CRAWFORD,
Assistant Attorney General.

CORPORATIONS—STOCK OF.

A share of stock of a corporation can not be divided into different parts and sold to different individuals.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 3, 1909.

Hon. Thos. B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Your letter of the 2nd instant submits for a ruling by this Department the following question:

"Can shares of stock of a life insurance company be divided and sold in lesser parts? That is to say, can one share of the par value of $100 be split up and sold in say five parts to five different individuals?"

We answer the above question in the negative. Corporations are creatures of the statutes, having only such powers as are expressly given them by the law which brings them into existence. Article 643 of the Revised Statutes prescribes that all charters of private corporations must set forth, among other things, "the amount of its capital stock, if any, and the number of shares into which it is divided." It appears from this provision that the charter of every corporation must specify the number of shares into which the capital stock is to be divided; and there is no provision of the statutes which gives a corporation the power, after incorporating, to divide its capital stock into any greater number of shares than that specified in the charter. In the very nature of things this provision of the charter is a limitation upon the power of the corporation to divide its capital stock into any greater number of shares. If a corporation can divide a share of its capital stock into five parts and make five shares by selling them to five different persons, then it would necessarily follow that there could be no limit to its power to divide such a share into any number of parts it might see fit, in the face of the provision of its charter which specifically provides the number of shares into which the capital stock is divided. The effect of dividing a single share of stock necessarily means the creation by the corporation of other shares of stock, even though they are called fractional portions of a single share, because if such division was made and was sold to different purchasers the ownership of such portion of a share would clothe the purchaser with all the rights and liabilities of a stockholder in the corporation in proportion to the amount of stock held by him.

By the provisions of Article 643 R. S., the value of each share of stock is fixed by the terms of the charter in requiring the amount of the capital stock and the number of shares into it is divided to be set forth. To hold that a corporation has the power to divide a share of stock into any number of shares would permit them to fix not only a different number of shares than that specified in the charter, but would permit them to fix a different value on the shares from that set forth in the charter.

Ordinarily where a stockholder sells his shares of stock to another and the corporation fails to transfer them upon their register,

an action is liable for damages against the corporation for conversion of stock. This principal was sought to be applied in a suit brought by one Hagle against the Western Stove Company in the Circuit Court of Missouri, in which he alleged that he acquired a two-thirds interest in a share of stock in the defendant company by purchase from the administrator of a deceased shareholder. His suit was for damages against said corportion for refusing to issue him a certificate for two-thirds portion of said share of stock, and for refusing to recognize him as a stockholder in the company and to pay him dividends and for converting the stock to the defendant's own use. The United States Circuit Court of Appeals, in passing upon said case upon appeal, used this language:

"We know no principle of law, common or statute, which compels a corporation to transfer upon its books, a fractional interest in a single one of its shares, or to pay a dividend to such a person or to recognize him as a stockholder in any way."

Hagle vs. Western Stove Company, 29 Mo. App., 486.

That a corporation is bound by the provisions of its charter with reference to the limitation as to the number and value of its shares see Sturges vs. Stetson, 1 Biss (U. S.), 246.

With respect to the ownership of a fractional portion of a share of stock in a corporation the rule in England is the same as in the United States. Barton vs. London R. R. Co., 24 Q. B. Div., 77.

It is plain there is no such thing as the fractional ownership in a single share of stock. Where two or more parties own a single share of stock they hold the same jointly and their interest is not subject to division.

Yours very truly,
C. A. LEDDY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—APPROPRIATION FOR THE DEAF AND DUMB INSTITUTE.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 30, 1909.

Mr. J. H. W. Williams, Supt. Deaf and Dumb Institute, Austin, Texas.

SIR: In reply to your inquiry of this date, I beg to say that in my opinion the third paragraph on page 517 of the General Appropriation Act passed by the Second Called Session of the Thirty-first Legislature authorizes the expenditures, during the year ending August 31, 1911, of any portion of the appropriation $960 made by said act for "salaries of two trained nurses, with board, at $480 each," which may remain unexpended at the close of the fiscal year which will end with August 31, 1910.

Said third paragraph is as follows:

"Provided, that any portion of appropriations made herein for the year ending August 31, 1910, for maintenance and support, and

erecting, remodeling or equipment, for repairs of buildings or for any institution of this State for which appropriations have been made herein which remain unexpended at the end of said fiscal year, shall be available and may be used for the year ending August 31, 1911."

Respectfully,
WM. E. HAWKINS,
Assistant Attorney General.

JUSTICES OF PEACE—JUSTICE PRECINCTS,—METHOD OF DETERMINING POPULATION OF, ETC.

Justice precinct is entitled to elect two justices of the peace only when said precinct contains a city of 10,000 population. Method of determining population is by last preceding United States census.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 7, 1909.

Mr. T. T. Webb, Justice of the Peace, McKinney, Texas.

DEAR SIR: Your letter of the 3rd instant submits the following question to this Department for a ruling:

"Will justice precincts containing a city that has attained to the 8000 population since the last United States census (1900) have elected in them two justices of the peace at the November election 1910?"

Article 5, Section 18, of the Constitution contains the following provision:

"In each such precinct (justice) there shall be elected at each official election one justice of the peace and one constable, each of whom shall hold his office for two years and until his successor shall be elected and qualified, provided that in any precinct in which there may be a city of eight thousand or more inhabitants there shall be elected two justices of the peace."

In 1876 the Legislature enacted a statute virtually in the language of the Constitution, which provides:

"Where in any justice precinct there may be a city of eight thousand or more inhabitants there shall be elected two justices of the peace."

It will be observed that neither in the constitutional provision nor in the statute enacted thereunder has the Legislature provided any method of enumeration to determine the population of cities in order for them to avail themselves of the privilege of having two justices of the peace when they shall contain a city of eight thousand inhabitants, nor has the Legislature passed any general statute authorizing an official census by a city or any other political subdivision of the State. There being no method prescribed by the Constitution or by statute of fixing the population, it is necessarily implied that it should be fixed by some official enumeration. The only official enum-

eration fixed by law at the time of the adoption of the constitutional provision and statute above quoted was a decennial census provided for by the laws of the United States.

It is therefore to be presumed that the framers of the Constitution and that the Legislature intended that the United States census should be made the test as to whether a precinct is entilted to elect two justices of the peace, because if it had been the intention to permit a precinct to have the privilege of two justices of the peace as soon as it had a city within its limits of eight thousand inhabitants, it would have provided some uniform method of ascertaining that fact and not leave the same to be determined in a different manner by different precincts of the State.

Practically the identical question of law here involvel was decided by the Supreme Court of Texas in the case of Brook vs. Dulaney, reported in 100 Texas, page 86, in which case the court had under consideration that provision of the Constitution which provides that one officer shall fill the position of district and county clerk in counties of eight thousand inhabitants or less. This section of the Constitution like the one with reference to justices of the peace does not mention how the population should be determined and the Suprme Court held that no provision having been made in the Constitution for an official enumeration, the census taken by the United States Government would control.

You are therefore respectfully advised that a justice precinct is only entitled to elect two justices of the peace when it contains a city of more than eight thousand inhabitants as shown by the last official United States census.

Yours very truly,
C. A. LEDDY,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—CORPORATIONS. CAPITAL STOCK OF.

No capital stock of any corporation can legally be issued except for money paid, labor done or property actually received.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 10, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

SIR: You have transmitted to this Department a letter of 7th instant addressed to you by Mr. John D. Mayfield, Secretary of Texas Life Insurance Company, and the literature therein mentioned, same being (1) a prospectus for sale of an authorized increase from one hundred thousand dollars to two million dollars in the capital stock of said company, (2) a form of subscription to such capital stock, (3) a form of promissory note to be given in payment for such

capital stock and (4) a form of receipt for first payment upon such stock, and you have requested our opinion as to the legality of the plan of selling stock shown by said letter and printed literature.

It is impracticable to set out here said printed matter in full but I make the following excerpts therefrom:

Said prospectus declares:

"Stock will not be issued until all notes are paid in full."

Said form of stock subscription embodies the following paragraph:

"A majority of the present board of directors and a majority of every board of directors which may hereafter be elected, prior to the time when the stock and subscribed surplus herein provided for shall have been paid, are hereby vested with full power to vote any and all equities I may have in said company, or on any and all subjects which may come before said company, until this stock and subscribed surplus shall have been paid in full. They shall in every matter act irrevocably as my attorneys in fact."

It thus appears that under said plan a very large amount of treasury stock of said corporation is to be sold with the understanding that while no stock is to be actually issued until paid for in full, it is to be voted and treated as stock of the company prior to such payment and while perhaps nothing more than the first intsallment payment for such stock shall have been made.

Section 6 of Article 12 of the Constitution of Texas declares:

"No corporation shall issue stock or bonds except for money paid, labor done, or property actually received * * * ."

Section 1 of Chapter 166 of the General Laws of the Thirtieth Legislature provides:

"The stockholders of all private corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21, Revised Statutes of the State, shall be required in good faith to subscribe the full amount of its authorized capital stock, and to pay fifty per cent thereof before said corporation shall be chartered; and whenever the stockholders of any such company shall furnish satisfactory evidence to the Secretary of State that the full amount of the authorized capital stock has in good faith been subscribed, and fifty per cent thereof, paid in cash, or its equivalent in other property or labor done, the product of which shall be to the company of the actual value at which it was taken, or property actually received, it shall be the duty of said officer, on payment of office fees and franchise tax due, to receive, file and record the charter of such company in his office, and to give his certificate showing the record thereof. Satisfactory evidence above mentioned shall consist of the affidavit of those who executed the charter stating therein (1) the name, residence and postoffice address of each subscriber to the capital stock of such company; (2) the amount subscribed by each and the amount paid by each; (3) the cash value of any property received, giving its description, location, and from whom and the price at which it was received; (4) the amount, character and value of labor done, from whom and price at which it was received."

While it is true that this last quoted statute is by its terms restricted to corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21, same being the general incorporation law, and while domestic insurance companies are generally treated and considered as being incorporated under insurance laws specially providing for such incorporation, it is also true that Subdivision 46 of Article 642, which is found embodied in said Chapter 2, Title 21, provides for the incorporation of life insurance companies.

Said last quoted statutory provisions (Acts of 1907, page 309), if not directly applicable to life insurance companies, at least indicate the general policy of our laws with regard to fictitious issuance of capital stock of domestic corporations.

Section 3 of Chapter 183 of the General Laws of the Thirtieth Legislature (page 342) provides:

"Where any corporation has issued and has outstanding any stocks or bonds given or issued for any purpose, other than money paid to, labor done for, or property actually received by the corporation it shall be the duty of the Attorney General of this State, when convinced that the facts exist which authorize the action to institute quo warranto or other appropriate judicial proceedings in some court of competent jurisdiction in Travis County or in any other county of this State where such corporation may be sued, to have any such stock can be issued in consideration of promissory notes or other con- of this State cancelled, expunged and held for naught."

I think it is clear that under our State Constitution and laws no capital stock of any corporation can legally be actually issued except for money paid or for labor done or for property actually received by the corporation; or, in other words that no such capital stock can be issued in consideration of promissory notes or other contracts or agreements to pay for such stock.

And I am of the opinion that in so far as the plan outlined in said printed literature contemplates that capital stock of said corporation shall be voted by any one or treated by the corporation as valid capital stock of such corporation, such plan is at least to that extent illegal and repugnant to the spirit and effect of said constitutional provisions.

Said form of stock subscription recites:

"The par value of each share is one hundred dollars ($100); and I, we, or either of us agree and promise to pay to the order of said company at its offices in Waco, Texas, the sum of two hundred and fifty dollars ($250) per share; one hundred dollars per share of said amount to go to the credit of the capital stock account, and one hundred and fifty dollars per share of said amount, less necessary expenses, to be placed in the surplus of said company."

It will be observed that said stock subscription form does not specifically enumerate or indicate what such "neecssary expenses" are to be; the natural inference being however that such expenses are to be reasonable only.

However said letter from Mr. Mayfield to you says:

"We are placing this stock at $250 per share, the par value of which is $100. We are paying general agents $40 per share for placing this stock, out of which they pay soliciting agents from $25 to $30 per share."

It will be observed that in none of said printed literature is there any intimation that such excessive commissions are to be paid for the sale of such capital stock.

Our statute plainly prohibits insurance companies from conducting their business in a fraudulent manner. (Chapter 108, Section 59, Subdivision 11, General Laws of 1909, page 212). Whether an insurance company is or is not conducting its business fraudulently is perhaps a question of fact; but it seems to me that under the circumstances above set forth the plan of operation in the sale of such stock by said company, as above disclosed, would probably, if not unquestionably, involve fraud in the management of its business.

It is hard to believe that any investor would subscribe for such stock if he knew that such enormous commissions were being paid for the sale thereof and that such excessive commissions were to be diverted from the surplus of the company.

Upon the whole I am constrained to believe that said plan of selling capital stock is in its material features in contravention of the Constitution and laws of this State and such as should not receive your sanction.

Respectfully,
WM. E. HAWKINS,
Acting Attorney General.

COUNTY'S SCHOOL LANDS—COMMISSIONERS COURT MAY LEASE AND GIVE OPTION.

Where commissioners court leases county's school land for a term of years, giving option to lessee to purchase at expiration of lease, such contract of lease and option is binding on commissioners court except for fraud.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 15, 1909.

Hon. E. R. Yellott, County Judge Borden County, Gail, Texas.

DEAR SIR: Your favor of the 11th instant has been received and carefully considered by us.

You state:

"Sometime ago the County of Borden leased her school lands for a term of years. Before the term expired gave a second lease to the same parties for a term of ten years from the beginning of the first lease. In that lease the commissioners court gave the parties leasing the preference right to buy the land at the termination of the lease, providing the county desired to sell at that time and providing that the lessee would give as much as any one else and that the

price suited the county. The county commissioners court want to sell the land as the schools need the interest, and the question is, can they do so legally so as to avoid making the county liable to the lessee for damages? Had the court the legal right to give any one the prior right to buy at the termination of the lease?"

All the other questions propounded in your letter will rest upon your second one, to wit:

"Had the court the legal right to give any one the prior right to buy at the termination of the laese?"

From your statement of the contents of the lease contract it seems that your commissioners court gave the lessees thereunder an option to purchase the lands leased by them at the expiration of the leasehold period. An "option" is defined to be a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future.

It is desirable that we keep in mind the distinction between the "option" or right of choice which one party buys from the other and the "contract by which the option is acquired." The first is the option and the last is the contract for the option. A contract for an option must be sufficiently clear and explicit to be capable of enforcement as a binding agreement on both sides.

Essex vs. Essex, 20 Beav., 442.

Christian, etc. Grocery Co. vs. Bienville Water Supply Co., 106 Ala., 124.

Estes vs. Furlong, 59 Ill., 298.

Emmerson vs. Somervel, 166 Mass., 115.

Such contract must also be free from fraud and must comply in its creation with the statute of frauds, and the contract must not create a perpetuity.

Where either party to a contract for an option refuses to perform according to agreement the other may go into a court of equity and ask for specific performance of the contract. The principles upon which such equitable remedy is granted are the same here as in other contracts. However, an option to purchase being an integral part of the lease, it is a substantial part of the whole contract; and it is not obnoxious to the option if there is a want of mutuality; and the agreement to pay rent or do other acts will support the option as well as the right to occupy under the lease and bind the lessor, notwithstanding the lessee is not bound to purchase, and the lessor cannot withdraw his offer before the time of acceptance has expired.

Tilton vs. Sterling Coal Co., 28 Utah, 173; 77 Pac., 758.

Frank vs. Stratford-Hancock, 67 L. R. A., 571.

In other words, the contract for an option in this instance is your lease contract, and there must be the essential mutuality in this contract necessary to all binding contracts, so that the lessee will be required to pay Borden County all lease money promised to be paid in this contract for option. The mutuality does not extend to the acceptance or rejection by the lessee of the option provided for in the contract for option.

And as to whether or not a county is bound by the action of her commissioners court in giving the lessee of her county school lands an option to purchase them at the expiration of the lease contract, the contract being equitable and free from fraud, would rest, it seems, upon the general law of contracts, and I know of no reason why a county should not be bound thereby to the same extent as would a private individual.

In the case of Ellerd vs. Cox, 114 S. W. Rep., 410, the Court, through Chief Justice Conner, says:

"Appellees insist that the option was of no force for that Wilson County was without authority to give it. In view, however, of the policy of the State as manifested in the Constitution and decisions giving the actual settler on county school lands an option or preference right to purchase (See Art. 7, Sec. 6, State Constitution and Baker vs. Dunning, 77 Texas, 28; 13 S. W. Rep., 617) and in the lease giving a like privilege to lessees of State school lands (Revised Statutes, 1895, Art. 4218n) at least a majority of us are inclined to hold that the conceded power of a county to sell or to lease includes by implication the power to give its lessees an option or preference right to purchase, where, as here the option is granted, as a mere incident to and in furtherence of the lease."

This qustion is not really decided in this opinion, but is left open for the reason that the appellees in that case were not in a position to question the validity of the Ellerd and Lewis option, as this could only have been done by Wilson County. The Supreme Court denied a writ of error in the case just referred to, but in doing so may not have given its approval to the quotation made for the reason that it was not necessary to decide that question, it not being property before the court. Yet this may be taken as a strong intimation from the Court of Appeals as to what its holding will be in case the question is properly before it.

I am of the opinion, therefore, that the commissioners court of Borden County had the legal right to give to the lessees of their county school lands a preference right to purchase the lands leased by them at the expiration of the lease-hold period. This being true, it is unnecessary to go into the other questions, for if they had a legal right to do as you say they have done, the contract is a legal and binding one and you can hardly find a purchaser for your lands who will purchase in violation of the right given to the lessees in question.

You have added a postscript as follows:

"If the action of the commissioners court is held to be legal, then would the county save herself from damage for breach of contract by selling to a party who in the deed takes subject to all the rights of the lessee?"

As to this I will say that if he should take subject to all the rights of your lessee he would probably have no rights, and as we hold the contract as detailed by you a valid one, I see no escape from the force and effect of the provisions set out therein.

Respectfully,

L. A. DALE,

Assistant Attorney General.

CONSTRUCTION OF LAWS—STENOGRAPHERS' LAW.

Fees of, in what cases collectible, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, September 18, 1909.

Hon. B. T. Pipkin, District Clerk Jefferson County, Beaumont. Texas.

DEAR SIR: This Department is in receipt of your favor of the 13th instant, asking for our construction of Sections 10 and 7 of the stenographers' bill passed by the Thirty-first Legislature. Section 10 provides as follows:

"Hereafter the clerks of all courts having official shorthand reporters as provided for in this Act shall tax as costs in each civil case now or hereafter pending in such courts, except suits for the colection of delinquent taxes, and except suits which are not contested, a stenographer's fee of three dollars, which shall be paid as other costs in the case, and which shall be paid by said clerk, when collected, in to the general fund of the county in which said court sits, except cases in which the district court has not original jurisdiction."

You ask whether or not it is proper for you to tax the stenographer's fee in divorce cases when the defendant files an answer and waiver and fails to appear further in the case and whether or not you should tax such fee where judgment has been taken by default or where the case has been dismissed. The proper construction of this section as relates to the questions propounded by you depends upon the meaning of the words "pending" and "contest."

In the case of Clindenin vs. Allen, 4 N. H., 385-386, it is held that an action is considered pending from the time of its commencement. In the case of Tilden vs. Johnson, 52 Vermont, 628-30, it is held that the term "pending in court" as used in a statute relative to causes which exempts from its operation causes then pending in court means causes on the docket.

In Turner vs. Norris, 35 Me., 112-115, it is held that a suit is pending until final judgment is rendered. In Wentworth vs. Town of Farmington, 48 N. H., 207-210, it is held that a petition for highway as soon as filed with the clerk of the proper court is pending.

From these and many other authorities which I deem it unnecessary to cite, I conclude that the requirement of said Section that the clerk shall "tax as cost in each civil case now or hereafter pending in such courts," means that he shall tax the stenographer's fee of $3.00 in all cases filed in his court, and that he shall not await final disposition of such case before taxing such fee as costs therein, and that consequently a suit thereafter dismissed would not be an exception to such rule requiring the clerk to tax such fee as costs.

In the case of Parks vs. State, 13 Southern, 756-759, 100 Alabama, 634, and in Robertson vs. State, 10 N. E. R., 582, 109 Indiana, 79, it is held that to "contest means to strive in win or hold, to controvert, litigate, uphold, call in question, challenge, dispute, to defend as a

suit or other proceeding. In Pratt vs. Breckenridge, 65 S. W. Rep., 136, 112 Kentucky, 1, it is held that the word "contest" in Constitutions and statutes is a word of art having a definite meaning. It is a litigation, it implies a plaintiff and defendant, and a thing in controversy, and a board or other tribunal which decides such contest is essentially a court.

Mr. Webster gives the following definition of the term "contest": "To make a subject of dispute, to call in question, to dispute, to dispute the declared result of an election."

In the case of Breeding vs. Grantland, 33 Southern, 544, 135 Alabama, 497, it is held that a will is contested under the provisions of Code Section 4298 providing that any person interested in a will who has not contested the same may after it is admitted to probate contest its validity in equity by a party in interest by filing in the court where it is offered for probate allegations in writing that the will was not duly executed or as to the soundness of mind of the testator or of any other valid objection thereto.

It seems from the authorities above cited that a cause is contested when an answer has been filed, putting in issue the allegation of the petition, so one answering under general denial or specially denying certain allegations in the petition is contesting said suit, and I am of the opinion that you are required, under the provisions of Section 10 of said stenographers' bill, to tax as costs a stenographer's fee of $3.00 in each case pending in your court wherein the cause is contested within the meaning of the word "contest" as defined herein. Excepting, of course, suits for collection of delinquent taxes.

Section 7 of said law provides that an appellant has thirty days after the adjournment of court within which to file statement of facts and bills of exception, unless the term of court may continue for more than eight weeks; that when such term may continue for more than eight weeks, the appellant is granted thirty days after the rendition of final judgment within which to file the statement of facts and bills of exception, unless additional time is granted by the court.

I am of the opinion that the time given in which to file statement of facts and bills of exception is allowed by law as a matter of right and that it is unnecessary to have an order of court entered allowing appellant such time in which to file his statement of facts and bills of exception. Such order was required under our previous law where such statement of facts and bills of exception were filed after the adjournment of the court for the reason that the additional time of twenty days was not a matter of right but that request must be made therefor and that by having an order to that effect entered on the docket appellant should be granted twenty days after the adjournment of the term at which such cause was tried to present and have approved and filed the statement of facts and bills of exception. There is no such provision in the present law. No order of court for that purpose seems to be required. Where, however, appellant fails to file his statement of facts and bills of exception within the time given him by statute, he may present his appli-

cation to the trial court asking for additional time in which to prepare and have filed such statement of facts and bills of exception and for a good cause shown, the trial court may grant the necessary additional time, provided, however, the same shall not be so extended as to delay the filing of the statement of facts together with the transcrip of record in the appallate court within the time prescribed by law.

I am of the opinion, therefore, that the case to which you refer wherein the appeal has been perfected but the appellant failed to file the statement of facts within the time allowed by law, that is, thirty days after the rendition of final judgment, that the court may grant such additional time as is necessary for the preparation and filing of the statement of facts and bills of exception on application therefor, duly made, showing good cause why they were not filed within the time required by law.

Yours truly,

L. A. DALE,
Assistant Attorney General.

STENOGRAPHERS, OFFICIAL.

Must be in attendance in the actual discharge of his duties in reporting cases or performing other services under the direction of the judge of the court in order to entitle him to per diem.

Not necessary in appealed cases that statement of facts or transcript in question and answer form be prepared, unless stenographer requested to do so by party to cause. Appellant or appellee has right to request transcript in question and answer form.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, Oct. 20, 1909.

Mr. Phillip R. Livaudais, Official Court Reporter, Beaumont, Texas.

DEAR SIR: We have your letter of the 6th instant in which you request the opinion of this Department upon the following questions as to the proper construction of the provision contained in Section 8 of the Act of the Thirty-first Legislature providing for the appointment of official stenographers for district and county courts, etc., page 374, General Laws:

First. As to whether or not the provision contained in Section 8 of said Act providing for the per diem compensation to the stenographer should be given the same construction as that put upon the Act of the Thirtieth Legislature: and whether or not if the stenographer should be on hand to discharge his duties and the lawyers agreed to continue or postpone a case the stenographer would be deprived of his per diem for that day.

Second. Whether or not, in view of the provisions contained in Sections 5 and 6 of the Act, it is the duty of the stenographer in all appealed cases to "transcribe the testimony and other proceedings recorded by him in said case in the form of questions and answers" and "file the same in the office of the clerk of the court

within such reasonable time," etc., leaving it optional with the appellant's attorney to prepare the statement of facts or have the stenographer do so in addition to the transcript. In other words, can a transcript be ordered in place of the statement of facts and vice versa?

Third. Do the words "taxed as costs in the case," merely mean that the charge for preparing the statement of facts shall not be taxed against the party cast in the suit; or that the stenographer taxed against the party cast in the suit; or that the stenographer shall receive no compensation for additional service of narrating the testimony? In other words, is it the intent of the law that appellant, having previously ordered a transcript and taxed same as costs, and desires for his own convenience that the stenographer should prepare in addition a statement of facts shall pay for it himself or have no recourse against his opponent for the additional costs incurred?

Fourth. Does the law contemplate furnishing necessary stationery for a stenographer by the respective counties?

The proviison in the Act of the Thirtieth Legislature relating to the per diem of the official stenographer reads as follows:

"The official stenographer shall receive as per diem compensation the sum of $5 for each and every day he shall be in attendance upon the court for which he is appointed. * * *"

The provision of the present law reads as follows:

"The official short hand reporter shall receive per diem compensation of $5 for each and every day he shall be in the actual discharge of his duties in reporting cases in the court for which he is appointed, or in performing service under the actual directon of the judge of such court upon work by such judge deemed necessary."

The former Act provided compensation for each and every day the stenographer should be in attendance upon the Court. The latter Act provides compensation for each and every day the stenographer shall be in the actual discharge of his duties in reporting cases or in performing service under the actual direction of the judge of such court. The Legislature in enacting the present law evidently intended to change the conditions under which the official stenographer should be entitled to his per diem. That is, they intended that he should not be entitled to a per diem compensation simply for being in attendance upon the court as was provided in the old Act; but before he could be entitled to compensation he must be in attendance in the actual discharge of his duties in reporting cases or in performing service under the actual direction of the judge of such court.

You are, therefore, advised that it is the opinion of this Department that the stenographer can only lawfully claim his per diem of $5 for such days as he may be in the actual discharge of his duties in reporting cases or performing other service under the actual direction of the judge of the court.

Answering your second question: You are respectfully advised that it is the opinion of this Department that it is not necessary

in any appealed cases that the stenographer prepare a statement of facts or transcript in question and answer form unless requested to do so by a party to the cause. Section 5 provides that in appealed cases the official short hand reporter shall transcribe the testimony, etc., in the form of questions and answers, provided the same is requested by either party to the suit. There might be a question as to whether or not the proviso contained in said section, to wit: "provided the same is requested by either party to the suit," related only to the form in which the transcript should be prepared, and that said section makes it the duty of the stenographer in every appealed case to prepare a transcript; but the language contained in the latter part of Section 6, to wit: "provided such amount shall not be taxed as costs in the case if a transcript of the testimony in the form of questions and answers has been theretofore filed with the clerk and taxed as costs," indicates that the Legislature understood that in some cases transcripts in question and answer form would not be filed in the case. My opinion of the effect of Section 5 is that it is the duty of the stenographer, when requested by either party to the suit, to file a transcript in question and answer form. If he is not requested to do so it is not his duty to do so. If he has done so at the request of either party then, by virtue of the provisions of Section 6, the appellant may either prepare his own statement of facts or require the stenographer to prepare it from the transcript already prepared and filed by the stenographer; and when the stenographer prepares a statement of facts, there being already a transcript as provided in Section 5, the stenographer is entitled to be paid for same by appellant at the rate of ten cents per folio of one hundred words for the original copy.

The further provision is contained in said Section 6, to wit:

"Provided, however, that the official shorthand reporter shall, when requested by the party appealing, prepare under the direction of the party appealing, a statement of facts in narrative form, in duplicate, and deliver same to the party appealing, for which said statement of facts he shall be paid the sum of ten cents per folio for 100 words for the original copy and no charge shall be made for the duplicate copy; provided such amount shall not be taxed as costs in the case if a transcript of the testimony in the form of questions and answers has been theretofore filed with the clerk and taxed as costs."

This provision makes it the duty of the reporter, when requested by the appellant, to prepare a statement of facts in narrative form in duplicate whether there had theretofore been prepared a transcript in question and answer form by the stenographer or not. In case no transcript in question and answer form has been requested by either party to the suit and prepared by the reporter, and at the request of appellant he prepared a transcript in narrative form, then his compensation would be as provided in said section, to wit: "ten cents per folio of 100 words, the same to be taxed as costs in the case."

You are advised, however, that under Section 5 either party, appellant or appellee, has the right to request a transcript in ques-

tion and answer form; so that it is not left optional with the appellant as to whether or not a transcirpt in question and answer form shall be filed in the case as the appellee has an equal right to make such request of the reporter.

Your third question has been answered above to the effect that it is my opinion that in the case stated the stenographer is entitled to compensation to be paid by the appellant.

Answering your fourth question: I am of the opinion that the Act does not authorize the respective counties to furnish stationery for the stenographers. The only liability imposed upon the counties is for per diem compensation of the stenographer, and for such further compensation and services as the district judge may certify to the Commissioners Court and allowed by the Commissioners Court.

Yours very truly,
R. E. CRAWFORD,
Assistant Attorney General.

LABOR—CHILD LABOR—CONSTRUCTION OF LAWS.

Meaning of word "employ." Owner or his agent or employe, in control of the operation of mill, factory, etc., guilty of violating law by *permitting* children to labor in such mill, factory, etc.; exemptions.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, November 18, 1909.

Hon. Joseph S. Myers, Labor Commissioner, Capitol.

DEAR SIR: We have your letter of the 13th instant, in which you make request for the opinion of this Department upon the following questions:

First. Does the word "employ" as used in Section 1, of Chapter 28, of the General Laws of the Regular Session of the Twenty-eighth Legislature, making it a misdemeanor for any person or any agent or employe of any person, firm or corporation to employ any child under the age of twelve years to labor in and about any mill, factory, manufacturing or other establishment using machinery, refer only to a hire of children below the prohibited age, or does it also refer and make unlawful the permitting of such children to labor in and about mines, factories, or other establishments using machinery where such children render such services for compensation, and where they are compensated by their parents with whom and under whose direction they may work?

Second. Does the exemption contained in Section 2 of said Chapter 28, which reads as follows, to wit: "Provided that such child," apply to cases where children under the age of sixteen years it may be employed between the hours of six a. m. and six p. m.; provided, further, that such parent is incapacitated from earning a living and has no means of support other than the labor of such child." apply to cases where children under the age of sixteen years are employed to labor in or about coal mines?

Third. Whether or not the owners of coal mines who employ miners and pay them for the coal they produce by the ton and permit or fail to prevent such miners from taking their own sons or children under their control into the mine to assist them in their work, the mine owner not employing such children and having nothing to do with the arrangement between them and the miners, would be guilty of violating Section 3 of said Chapter, or would Section 3 only be violated by the miner so using such children?

Said Chapter 28 of the General Laws of the Regular Session of the Twenty-eighth Legislature, leaving out the caption and emergency clause, is as follows:

"Section 1. Any person or any agent or employe of any person, firm or corporation who shall hereafter employ any child under the age of twelve years to labor in or about any mill, factory, manufacturing establishment, or other establishment using machinery, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, and not more than two hundred dollars, and each day the provisions of this Act are violated shall constitute a separate offense.

"Sec. 2. Any person, or any agent or employe of any person, firm or corporation, who shall hereafter employ any child between the ages of twelve and fourteen years (who cannot read and write simple sentences in the English language) to labor in or about any mill, factory, manufacturing establishment, or other establishment using machinery, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, nor more than two hundred dollars; and each day the provisions of this Act are violated shall constitute a separate offense; provided, that such child who has a widowed mother, or parent incapacitated to support it, may be employed between the hours of 6 a. m. and 6 p. m.; provided, further, that such parent is incapacitated from earning a living, and has no means of support other than the labor of such child; and in no event shall any child between the ages of twelve and fourteen years be permitted to work outside the hours between 6 a. m. and 6 p. m.

"Sec. 3. Any person, or agent or employe of any person, firm or corporation, owning, operating or assisting in operating, any mine, distillery or brewery, who shall employ any child under the age of sixteen years to labor in or about any mine, distillery or brewery, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty, nor more than two hundred dollars."

The word "employ" has several different shades of meaning. I quote from Webster's definition the following: "To use; to have in service; to cause to be engaged in doing something; to make use of; as an instrument, a means, a matering, etc.; as to employ the pen in writing; to have or keep at work; to give employment or occupation to."

In the case of McCluskey vs. Cromwell, 11 N. Y. (1 Kern.), 593, it is said:

"Employ means to use, as an instrument or means of effecting an object; it is a word of more enlarged signification than the word

hire. A man hired to labor is empolyed, but a man may be employed in work who is not hired."

While the word is sometimes used in a sense conveying the idea of contractual relation between the employer and the employe, it is not always so used and has a broader meaning, as is indicated by the definitions above given. In order to ascertain the meaning of the word as used by the Legislature in the Act under consideration, we should look to the general purpose which the Legislature had in mind.

Article 3268 of the Revised Statutes provides:

"In all interpretations the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil, and the remedy."

This is only a legislative sanction of a well established canon of construction. It is evident that the object of the Legislature was the welfare of the children of the State. The evil that they sought to prevent was injury to children of tender age resultant from the occupation of such children in manual labor in and about mills, factories and other places named in said statute. The payment of wages by the employer to children engaged in working in or about the place prohibited evidently constituted no evil for which the Legislature designed a remedy. The work of the children in such places was the thing sought to be prohibited. Granting, then, that the evil sought to be prevented by the Legislature was the working of children in and about the places designated, the word "employ" should be construed to have been used by the Legislature in a sense to effectuate such ascertained purposes on the part of the Legislature. I am of the opinion that your first question should be answered that the word "employ" as used in Section 1 refers to the use of children as laborers in and about mills, factories or manufaturing establishments, or other establishments using machinery, and the owner of the mill, factory, etc., or his agent, or employe, in control of the operation thereof, would be guilty of violating said Section 1 of said Act, should such owner or agent or employe permit children to labor in or about such mill, factory or manufacturing establishment or other establishment using machinery and it would make no difference whether such children were paid wages for their services or not, the thing prohibited by said Section being the working of children in or about such establishment.

It is my opinion in answer to your second question that the exemption in favor of children who have a widowed mother or parent incapacitated to suport them, only applies to children between twelve and fourten years of age who can not read and write simple sentences in the English language working in or about any mill, factory, establishment, or other establishment using machinery. That is, said exemption only applies to Section 2 of said Act and not to Sections 1 and 3. It will be noted that the three sections contained in said chapter are each separate, definite and distinct offenses. The three could have been very well enacted separately. The provision occurs only in Section 2. There is no reason to conjecture that the Legislature intended the exemption to apply to any other than said Section 2.

Answering your third question, I am of the opinion that if the mine owner retains control of the mine and its operation, although he may contract with persons for the taking out of coal therefrom, and pay such persons by the ton, he would, nevertheless, be responsible for the employment by such person or children under the ages of sixteen years. If, however, he leases the mine or turns its control over to such persons, it is my opinion that such persons directly employing such children would alone violate the law in employing such children in the operation of such mine. If the owner of the mine is in control of the mine, then it is within his power to prevent children under the age of sixteen from working therein. However, should he, by contract, as he is entitled to do, lease such mine or turn over its management and control to other parties, then he would have no authority to prevent childen from working therein, nor could the permitting of them to work in such mine be chargeable against him, as his act. I am, therefore, of the opinion that he would not, under such circumstances, violate the provisions of said act.

Yours truly,
R. E. CRAWFORD.
Assistant Attorney General.

DSISTRICT JUDGES—EXCHANGE OF DISTRICTS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 8, 1909.

His Excellency, Governor T. M. Campbell, Capitol.

SIR: You inform us that Judge E. B. Muse, the Honorable District Judge of the District Court of Dallas, Forty-fourth Judicial District, has certified to you his disqualification in two cases which are pending in his court, and you ask our opinion as to what course you should pursue, under the Constitution and laws, in the premises.

In reply I beg to say:

For the reasons set out in the opinion which I had the honor to address to you on May 29th, 1907, I adhere to the views therein set forth as to the proper construction to be given to Section 11, of Article 5, of the Constitution of Texas, as to the unconstitutionality of R. S. Article 1069, and as to the legal effect of the Act of 1879, page 1 (8 Gam. 1301), relating to disqualification of district judges, the appointment of special district judges and the exchange by district judges of judicial districts.

This is said with due respect to the opinion of our Honorable Court of Criminal Appeals in the recent Burrell Oates case, in which case, upon motion for rehearing, the majority of the court held R. S. Article 1069 constitutional and valid, the dissenting opinion being, as was the original opinion of the majority of said court, in line with the views theretofore expressed by me to you as afore-said.

But, assuming that you will desire to follow the majority opinion of said court upon said motion for rehearing, and conform executive

action to the provisions of said R. S. Article 1069, as so upheld and construed, I have to say:

First. Judge Muse's disqualification in these instances is shown to exist by reason of the fact that in each of said cases in his court he is a party defendant; and his certificate of disqualification is in compliance with statutory requirements.

Second. Because of his disqualification aforesaid Judge Muse cannot legally transfer either of said cases to another district court of Dallas County.

Third. The procedure so held applicable to such instances is for you to designate some district judge in an adjoining district to exchange with Judge Muse and try the cases, and for you to issue an executive order to that effect, notifying both such judges of such order.

Fourth. There are in Dallas County four district courts, three of them having jurisdiction in civil cases only and one having jurisdiction in criminal cases only, the territorial jurisdiction of each of said four courts being co-extensive and co-terminus with the statutory boundaries of Dallas County, the presiding judge of each such court being a resident of Dallas County.

This fact may give rise to the question: Can Judge Muse legally exchange districts with any of the other three district judges of the county, in order that the two cases in which Judge Muse is so disqualified may be disposed of according to law?

The Constitution declares that "the district judges may exchange districts or hold courts for each other when they may deem it expedient, and shall do so when required by law."

Waiving, out of deference to said opinion of the Court of Criminal Appeals, all questions as to the prior and superior right of the parties litigant to agree upon a special judge in the event of the disqualification of the regular district judge, said constitutional provision appears to justify and authorize a voluntary exchange of districts by district judges resident in Dallas County; for it will be noted that there is here no direction that such exchange shall be with the judge of an *adjoining* district.

But it is not so clear to my mind that such an exchange may legally be directed by the Governor, in view of the fact that the statute, which alone, if at all, authorizes the Governor to direct an exchange, declares that when he directs such exchange it shall be with the district judge of an adjoining district, and the other three districts each composed of Dallas County can hardly be said to *adjoin*, in the ordinary sense of that word, either of the other three districts of the county.

The question is at least involved in some doubt, and in order to remove that doubt from the two cases in which Judge Muse has certified his disqualification, I respectfully advise that such district judge as you may designate to exchange with Judge Muse and to try those cases be from some district outside of and adjoining Dallas County.

Respectfully,
WM. E. HAWKINS.
Assistant Attorney General.

PUBLIC PRINTING—STATE OFFICERS.

Commissioner of Agriculture not authorized to give contract for printing bulletins of Department for distribution to any other than the State contractor.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 9, 1909.

Hon. Ed R. Kone, Commissioner of Agriculture, Austin Texas.

SIR: We are just in receipt of your leter of this date, which is as follows:

"Please advise this Department if I have any authority under the contract existing between the State Printing Board and the Von Boeckman-Jones Co. to permit the printing of any of the bulletins issued by this Department by any outside firms of this State.

"That you may understand more fully the reason for this inquiry, I am enclosing you a letter from J. C. Hooper & Company. Houston, Texas, making request that this Department authorize the printing at Houston of a large number of a forthcoming report to be published by this Department."

From the letter to which you refer it appears that J. C. Hooper & Company have, in writing, requested your permission to print at Houston for general circulation perhaps a million copies of the forthcoming report of Mr. H. Harold Hume to your Department concerning orange industry in Texas. I understand from you that under their contract with the State for doing the public printing, Von Boeckman-Jones Company are publishing said report for your Department and are to supply you with such number of copies thereof as you may order officially, and that such proposed publication of such report at Houston has no connection whatever with said official publication of said report; consequently the simple question presented is have you or have you not statutory authority for giving permission for such unofficial publication of such report.

I am of the opinion that this question should be answered negatively. Such proposed unofficial publication appears to be a matter entirely outside of the duties of your office, and not within contemplation of the statutes.

On the other hand, I do not know of any statute which forbids such unofficial publication of said publication and circulation of such report, after same shall have been officially published and circulated by your Department.

Respectfully,
WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—GAME LAW.

Game killed in Mexico may be transported into Texas.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 10, 1909.

Hon. R. W. Lorance, Chief Deputy Game Warden, Capitol.

DEAR SIR: We have your letter of the 3rd instant, in which you

request the opinion of this Department as to "whether or not it is a violation of the Game Law for an express company, transportation company or any other common carrier to receive and ship into this State for the purpose of supplying hotels and restaurants such game and birds as are protected by the Game Law of this State, such game having been killed in the Republic of Mexico."

The provision of the law making it an offense for any express company, railroad company or other common carrier, etc., to receive or transport game is contained in Section 10 of Chapter 144 of the Acts of the Thirtieth Legislature. Said Section, so far as it is necessary to quote, is as follows:

"It shall be unlawful for any express company, railroad company or other common carrier, or the officers, agents, servants or employes of the same, to receive, for the purpose of transportation, or to transport, carry or take beyond the limits of the State, or within this State, except as hereinafter provided, any wild animal, bird or water fowl mentioned in Section 1 of this Act, or the carcass thereof, or the hide thereof * * * ."

Section 1 of said act, to which reference is made in the provision quoted, is as follows:

"All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or pratridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants or chachalaca, and all other wild animals, wild birds and wild fowls found within the borders of this State, shall be and the same are hereby declared to be the property of the public."

It will be noted that the game named which is declared to be the property of the public is that found within the borders of this State. It is believed that the Legislature in this section has stated the subject of the succeeding sections of the act and that that subject is the wild birds and animals named in said section and found within the borders of this State. The language of the caption also bears out this view, which is:

"An act to preserve and protect the wild game, wild birds and wild fowl of the State, to provide adequate penalties for the violation of this act, and the unlawful taking, slaughter, sale, purchase or shipment thereof; and * * * ."

Section 5 of the act provides:

"Whoever shall sell or offer for sale, have in his or her possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase any wild deer, wild antelope or wild Rocky Mountain sheep, killed in this State * * *, or who shall sell or offer for sale or have in his possession for the purpose of sale * * * any of the game or game birds mentioned in Section 1 of this act, killed or taken within this State, shall be deemed guilty of a misdemeanor, etc."

It will be seen that having game in possession not killed within this State is not made an offense. Neither is it an offense to sell or pur-

chase such game. It will also be noted that the language of Section 10 is:

"To transport, carry or take beyond the limits of the State or within this State."

There is no express prohibition of bringing game into the State from without the State.

It is the opinion of this Department that there would be no violation of the Game Law upon the part of an express company or other common carrier bringing into the State or transporting within the State game killed in the Republic of Mexico or elsewhere than in the State of Texsa.

A similar statute of the State of New York received a similar construction in the case of People vs. Buffalo Fish Co., reported in 52 L. R. A., page 803.

Yours very truly,

R. E. CRAWFORD.
Assistant Attorney General.

CONSTRUCTION OF LAWS—FIRE RATING BOARD LAW—CONTRACTS, IMPAIRMENT OF OBLIGATION OF, ETC.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, December 16, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Chairman of State Fire Rating Board, Capitol.

DEAR SIR: In response to your inquiries concerning the legal effect of Chapter 18 of the General Laws of the Thirty-first Legislature, (acts 1909, pages 311-316), providing, among other things, for the regulation and control of rates of premium on fire insurance, I beg to say:

I am of the opinion that said statute was not intended to impair and it does not impair the validity of existing fire insurance contracts and that such contracts may continue in force without any change whatever until their stipulated dates of expiration, regardless of new rates on risks covered by such policies to be filed or fixed in conformity with the requirements of said statute.

However, I am, further, of the opinion that if, after the filing by the insuring company of its schedule of rates, as required by said statute, there be made in such pre-existing contracts, by endorsement upon the policy of otherwise, any change which would affect the rate, whether because of a change in the hazard of the risk or otherwise, such contract of insurance would thereupon become and would thereafter be subject to the provisions of said statute concerning rates to be subsequently charged and collected.

In other words, the rate applicable to such changed contract, after such change therein, would be the same as under a new policy of insurance and in conformity to the requirements of said statute.

But changes in such pre-existing contracts of insurance, not involving a change in conditions affecting rates,—such, for instance,

as endorsements relating merely to change of ownership, additional insurance, attachment of mortgage clause, etc., would not require any change in rates or amounts to be thereafter charged or collected under such pre-existing contracts.

In short, I am of the opinion that said statute requires a change in rates to be charged and collected under such pre-existing contracts in all instances wherein there shall be made any change whatever in the contract of insurance involving conditions affecting rates, but not otherwise.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CORPORATIONS—STATE BANKS—MARRIED WOMAN, A STOCKHOLDER.

A married woman may legally become a stockholder in State bank, but not a director.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, December 31, 1909.

Hon. Thomas B. Love, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In reply to your inquiry as to whether or not, in our opinion, a married woman may legally become a stockholder and a director in a State bank, I beg to say:

I am of the opinion that a married woman may legally become a stockholder, but she can not legally become a director, in a State bank.

In this connection I beg to call your attention to a decision of our Supreme Court in Southern Texas Ry. Co. vs. Harle, 105 S. W. Rep., 1107.

In order to avoid misapprehension I beg to add that in my opinion a married woman can not legally become an incorporator of a State bank.

Respectfully,

WM. E. HAWKINS,
Assistant Attorney General.

CONSTRUCTION OF LAWS—SIXTEEN-HOUR LAW.

Where employes of railway company are required to report for duty thirty minutes before departure of train, said thirty minutes held to constitute a part of the sixteen hours of that particular day.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 18, 1910.

Hon. Joseph Myers, Commissioner of Labor Statistics, Austin, Texas.

DEAR SIR: We are in receipt of your favor of the 29th ult., from which we quote the following questions:

"Section 1 of Chapter 101 of the Acts of the Regular Session of the Thirty-first Legislature, known as the Sixteen-Hour Law, makes it unlawful for any railroad company or receiver, to require or permit any conductor, engineer, fireman or brakeman 'to be or remain on duty for a longer period than sixteen consecutive hours.' All the railroad companies operating in this State, so far as I am advised require by their rules that engineers and firemen shall be at their engines at least thirty minutes before the time fixed for the departure of their trains, or the time called for the train to depart. It is the duty of such employes during this thirty minutes to see that proper supplies, such as tools, oils, fuel, water, etc., in sufficient quantitiees for the trip have been placed on the engine; to thoroughly oil its parts, and to see that there is sufficient fire under the boiler and steam pressure to move the train at the time fixed for its departure.

"In computing the sixteen-hour period, beyond which it is unlawful to require continuous labor, as above referred to, should this thirty minute period be included? Or does the sixteen-hour period begin with the departure of the train?"

Section 1 of Chapter 101 of the acts of the Thirty-first Legislature, provides in part as follows:

"That it shall be unlawful for any railroad company * * * to require or permit any conductor, engineer, fireman or brakeman to be or remain on duty for a longer period than sixteen consecutive hours."

The solution of your question depends upon the construction to be given the phrase "to be or remain on duty, etc."

It is well settled that where services are rendered by one in the employ of another, even upon request, the presumption is that they were rendered under the contract of employment, unless the contrary is shown. (Cooper vs. Brooklyn Trust Co., 109 N. Y. App. Div., 216). It appears from your statement that the rules of the company require the engineer and fireman to be on hand thirty minutes before the time for the departure of the train, and to perform certain preliminary duties strictly in line with their employment, and such as appear to be necessary to be performed. It is work which the employe, as the servant of the company might be directed to do; and having performed the labor, at the company's request, and in compliance with rules requiring such service, it logically follows that he is "on duty" at the time he begins to perform the service, or at which he is required to be in readiness to perform service. (Bee vs. S. F. & H. B. Ry. Co., 46 Cal., 255).

The Congress passed a sixteen-hour law in 1907 from which many of the provisions of the Texas statute seem to have been copied. The language of our statute under discussion is practically in identical terms. The Interstate Commerce Commission in an administrative ruling and opinion construing said act held that, "the term 'on duty' includes all the time during which the employe is performing service, or is held responsible for performance of service. An employe goes 'on duty' at the time he begins to perform service, or at which he is required to be in readiness to perform service, and goes 'off duty' at the time he is relieved from service and from responsibility for performance of service."

It is my opinion that the construction placed upon the language by the Interstate Commerce Commission is sound, logical and reasonable, and in harmony with the decisions of our courts. We therefore, hold that the sixteen hours begins at the time the employe reports for duty under the rules or requirements of the company and is not measured from the time the train actually begins its journey.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

DISTRICT ATTORNEYS— HABEAS CORPUS FEES—COUNTY ATTORNEY—DISTRICT JUDGE.

Granting of the writ is within discretion of district judge. In all cases where there is an actual trial or hearing, district attorney is entitled to fee prescribed by statute.

ATTORNEY GENERAL'S DEPARTMENT.

STATE OF TEXAS.

AUSTIN, TEXAS, January 21, 1910.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: You have referred to this Department a letter addressed to you by Honorable C. T. Freman, county attorney of Grayson County, dated January 5, "1909", to which is attached an account of Mr. Freeman for three habeas corpus cases. We have also received a letter from Honorable R. E. L. Roy, county attorney of Tarrant County, enclosing a letter from you to Mr. Roy relating to the same subject matter.

It appears that you desire the further advise of this Department upon the questions involved. Mr. Freeman quotes from your letter as follows:

"The Attorney General has held that where a case is bailable, per se, and the trial had during term time, that a motion in court will accomplish same as the Habeas Corpus trial and fees can not be allowed for such trials, with three exceptions, viz:

"1. Where a trial is had to reduce excessive bail.

"2. When the law under which the defendant is indicted is unconstitutional.

"3. When the grand jury by which the defendant was indicted was illegal. The question must show the purpose of the trial.

"If these three trials grew out of the same transaction, were held at the same time, had the same witnesses, etc., and could all have been inquired into at the same investigation, you can only be allowed one fee for the three cases."

Your letter to Mr. Roy is substantially the same. Now, we presume that your ruling in those matters is based upon an opinion rendered to you by Hon. Claude Pollard, of the Attorney General's Department, on October 6, 1905, which is not necessary to set out here, but which, in effect, is in accordance with your ruling. You will perhaps remember that on October 23, 1905, the previous opinion of Mr. Pollard was modified in passing upon the account of Hon. Samuel J. Styles, district attorney for a large number of habeas corpus fees. I will also state that upon yesterday Mr. Pollard being in the city and visiting this Department, I talked over with him the question of the correctness of his first named ruling, and after a full discussion of the same and the grounds therefor, Mr. Pollard agreed that his opinion was probably incorrect as a matter of law.

In order to correctly determine the validity of these accounts, it would be well to review the statutes relating to writs of habeas corpus, the duties of county attorneys with reference thereto, and the fees of such officers.

Article 1, Section 12, of the Bill of Rights is as follows:

"The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual."

Article 5, Section 8, of the Constitution, provides:

"The district court shall have original jurisdiction in all criminal cases of the grade of felony, * * * and said court and the judges thereof shall have power to issue writs of habeas corpus. * * * ."

These are the only constitutional provisions that we find pertaining to the inquiry.

Article 150, Code of Criminal Procedure, provides:

"The writ of habeas corpus is the remedy to be used when any person is restrained of his liberty."

Article 151 is as follows:

"A writ of habeas corpus is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restarint, commanding him to produce such person, at the time and place named in the writ, and show why he is held in custody or under restraint."

Article 155 provides:

"* * * The district courts, or any judge thereof, * * * have power to issue the writ of habeas corpus and it is their duty upon proper application, to grant the writ under the rules herein prescribed."

Article 165 provides:

"The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest by the statement of the petition therefor, or some document annexed to it, that the party is entitled to no relief whatever."

Article 166 provides:

"A judge of the district court * * * who has knowledge that any person is illegally confined or restrained in his liberty within his district, may, if the case be one within his jurisdiction, issue the writ of habeas corpus without any application being made for the same."

There are a number of other statutory provisions relating to the procedure in habeas corpus cases, but we find none which puts a limitation upon the power of the district judge to grant the writ when within his jurisdiction and when in his sound discretion it should be issued. It is true that in note 1 to Article 150, Code of Criminal Procedure, (Wilson's Texas Criminal Statutes), a number of decisions by our Court of Criminal Appeals are collated, most of them relating to the writ of habeas corpus in the three specific classes of cases named by Mr. Pollard as constituting the exceptions in which habeas corpus fees should be allowed; but we fail to find either in the Constitution, statutes or these decisions any authority for the proposition that habeas corpus fees can be allowed only in these three classes of cases, in cases bailable, per se, and where the trial was had during term time. The granting of the writ seems to rest in the sound discretion of the district judge, and by Articles 31, 32 and 189, of the Code of Criminal Procedure, it is made the duty of the county attorney, in counties where there is no district attorney or in his absence, to appear and represent the State in all habeas corpus proceedings in felony cases. There is no limitation upon this duty of the county attorney, confining the performance of the same to that class of cases only to which you refer in your letter to Mr. Freeman, but his duty is absolute in all felony cases where the writ of habeas corpus has been granted and the case set for trial.

Article 1077e, Code of Criminal Procedure, (Wilson's Texas Criminal Statutes), provides:

"The district or county attorney shall receive the following fees:

"* * *.

"3. For representing the State in each case of habeas corpus where the defendant is charged with a felony, the sum $16.00."

Now, this provision of the statute is plain and unambiguous and does not restrict the right of the prosecuting officer to a fee in certain specified cases of habeas corpus only, of the felony grade, but is without any qualification whatever, save that he must represent the State, that the case must be one of habeas corpus, and that the defendant must stand charged with a felony.

Of course if the county attorney does not actually appear and represent the State, or if there is neither a trial nor hearing of the habeas corpus proceeding, the prosecuting attorney could not, legally claim any fee.

From the constitutional and statutory provisions cited, it seems perfectly clear to us that the construction should be given that when

a writ of habeas corpus is granted by a district judge in any felony case and the same is set down for hearing and there is an actual trial or hearing of the cause in which the county attorney appears and represents the State, he would be entitled to the fee prescribed by the statute. His fee could not be denied him because the defendant might have resorted to some other remedy for his release or for reduction or fixing of bail. The exercise of the discretion of the district judge, in ordering the writ to issue and setting the case for trial, precludes, in our judgment any inquiry into the question whether the writ should have been granted, unless for the exceptional cause of fraud or collusion, a thing not conceivable in Texas, between our district judges and prosecuting officers.

There is a further question to be determined and that is the rule stated by you in your letter to Mr. Freeman, namely:

"If these three trials grew out of the same transaction, were held at the same time, had the witnesses, etc., and could all have been inquired into at the same investigation, you can can only be allowed one fee for the three cases."

We have been unable to find any opinion of this Department which sustains this proposition, and we doubt its correctness. However, Article 1082, Code of Civil Procedure, (Wilson's Texas Criminal Statutes) provides as follows:

"If there be more than one defendant in a case and they are tried jointly, but one fee shall be allowed the district or county attorney. If the defendants sever and are tried separately, a fee shall be allowed for each trial in accordance with the provisions of the preceding article, except in habeas corpus cases, in which cases only one fee shall be allowed without regard to the number of defendants or whether they are tried jointly or separately."

Doubtless your ruling was occasioned by the provisions of this article, and according to the construction that should be given the same, in our opinion, said article, as applied to habeas corpus cases, should read, "if there be more than one defendant in a case, in *habeas corpus* causes, only one fee shall be allowed without regard to the number of defendants or whether they are tried jointly or separately."

Each county attorney's account should show whether the provisions of this article have been complied with, and but one fee should be allowed, although two or more defendants in a case sue out separate writs of habeas corpus or jointly sue out the writ.

Further than this requirement, we find no authority in the law for requiring the county attorney to show the number of defendants and their joint or several relations to the habeas corpus cases in which the fees are claimed.

Because of the importance of these questions and the fact that a contrary ruling had heretofore been made in this Department, we have given this matter very careful consideration, but feel that there is no doubt of the correctness of the construction we have given, and am glad to say that Mr. Pollard agrees with the legal conclusions reached. Perhaps his ruling embodied a sound practical policy, but we consider it the duty of this Department to rule upon all ques-

tions submitted for its advice according to the construction that it is believed the courts will put upon the law, rather than our views of policy for such, after all, is a matter committed entirely to the Legislature.

Trusting that the above ruling will suffice for your guidance in this and future matters, I am,

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

AVAILABLE SCHOOL FUND—SCHOOL DISTRICTS.

When available school fund is apportioned to counties any school district of the county is entitled to have its warrant paid, when warrant properly drawn and money in the depository, provided the payment of such warrant will not exceed amount apportioned to such school district.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 26, 1910.

Hon. F. M. Bralley, State Superintendent, Capitol.

DEAR SIR: I am in receipt of your letter of the 18th instant, enclosing a letter from the County Superintendent of Williamson County and also a letter from the Coutny Depository of said county, relative to the disbursement by such County Superintendent and County Depository of the State Available School Fund of that county.

As I understand from their communications they desire to know whether or not said funds shall be disbursed and school warrants paid when properly drawn whenever there is a balance on hand in said fund to the credit of the county, or whether they can pay warrants drawn in favor of some particular district only when there is cash on hand in said depository to the credit of that particular district sufficient to pay such warrants though there may be an abundance of funds in the depository to the credit of the county school fund.

It seems the Comptroller is required by law to keep separate account of the Available School Fund of the State arising from every source and shall report the same to the State Board of Education on or before the first day of August of each year. (Acts of the Thirty-first Legislature, Second Called Session, Chapter 17, Section 1.)

The Comptroller is also required on the first day of each month to certify to the State Superintendent of Public Instruction the total amount of money collected from every source during the preceding month and on hand to the credit of the available school fund and shall draw his warrant upon the State Treasurer and in favor of the Treasurer of the available school fund of each county, city or town for the amount stated. (Acts of the Thirty-first Legislature, Second Called Session, Chapter 17, Section 2.)

The county superintendent or county judge, who is ex officio county superintendent, upon the receipt of such certificate issued by the Board of Education for the Available School Fund belonging to his county, shall apportion the same to the several school districts of his county, according , of course, to the scholastic census of each district. (Acts of the Twenty-ninth Iegislature, Chapter 124, Section 94, as amended by Chapter 106, Thirtieth Legislature.)

The county treasurer or county depository upon receiving notice from the State, Superintendent of the amount apportioned to the county shall report the same to the county superintendent after which he is to make the apportionment above referred to. (Acts Twenty-ninth Legislature, Chapter 124, Section 34).

I also find this provision in the last above quoted Act referred to:

"It shall be the duty of the county treasurer (depository) to keep a separate account with each district, showing the amount apportioned according to the certificate of apportionment and the amount paid out to each school and district; provided in no case shall the county treasurer (depository) pay out any part of the school fund without the approval of the county superintendent."

In other words, it appears from the acts of the Legislature hereinbefore referred to that the State available school fund is apportioned to the various counties of the State according to their scholastic population. The State Superintendent is so notified of such apportionment and he certifies to the county treasurer or county depository the amount of funds for that particualr county, and the county treasurer or county depository notifies the county superintendent of such certificate, when the county superintendent in accordance with such certificate apportions the amount certified for that county to the various school districts of his county. When this apportionment has been made on the certificate of the proper officer no cash at that time had been received form the State by such county, but the funds are simply apportioned to be transmitted to the county when they have been collected by the proper officer and by the proper warrant upon the State Treasurer are transmitted to the county depository on the first of each months and placed in the county depository to the credit of the available school fund of the county. I find no law requiring this fund to be appartioned among the districts and placed to the credit of the district, but is placed to the credit of the county.

So far as the State Available School Fund is concerned, I find no law requiring the county depository to keep a cash account with the school districts of his county .

The county depository is required by law to keep the amount apportioned to each county as shown by the apportionment and never pay warrants drawn in favor of any particular district if the amount, when paid, will exceed the amount which the district is ultimately to receive from the fund for that particular scholastic year; otherwise it is not necessary to keep an account with the district. He keeps an account with the county for the available school fund and should, and in my opinion, ought to pay all warants properly drawn in favor of any district of the county whenever there are State available school funds to the credit of the county sufficient to pay the same.

regardless of the amount any district may have drawn, provided the amount so drawn does not exceed the apportionment for the district. In other words, if the county has available school fund in the depository, any district of the county, in my judgment, is entitled to have its warrant paid when properly drawn, provided the payment of such warrants will not exceed the amount which has been apportioned to the district, as there is no law requiring the cash in the county depository to be apportioned as fast as collected among the districts and then paid out only according to the amount to the credit in each district.

Yours truly,
J. T. SLUDER,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION — CITY OF FORT WORTH CHARTER—BONDS— LEGISLAURE—SUSPENSION OF CONSTITUTIONAL RULE.

When a quorum is shown to be present it only requires a vote of four-fifths of those present to suspend rules requiring bills to be read on three several days.

ATTORNEY GENERAL'S DPARTMENT.

AUSTIN, TEXAS, February 8, 1910.

Mr. G. Wallace Tibbetts, Secretary Exchange Trust Co., 33 State Street, Boston, Mass.

MY DEAR SIR: I beg to acknowledge receipt of your esteemed favor of Febreuary 1st from which I quote as follows:

"The City of Fort Worth, Texas, has offered to sell us four issues of bonds aggregating $300,000.00 which we have agreed to purchase 'subject to legality.'

"The banking interests of New England consider Messrs. Storey, Thorndike, Palmer & Thayer the highest authority to pass on municipal questions, particularly bond issues. To them we have submitted papers relating to the aforesaid bond issue of Fort Worth.

"In the course of their examination the question has arisen as to whether or not the bill creating the new charter of Fort Worth, passed by the Legislature of 1909, and appearing in Special Laws of 1909, page 227, was legally passed by said Legislature.

"They are informed there were 132 members elected to the House, that the bill creating the charter passed under the suspension of rules, and contained an 'imperative public necessity,' or emergency clause, and they believe the constitutional rule requiring the bill to be read upon three several days was not properly suspended, and that the bill was not properly enacted * * *.

"Thus far we understood there have been no decisions by the Supreme Court of Texas construing the phrase 'Four-fifths of the House' to mean four-fifths of the members present at any particular meeting. Under ordinary conditions the phrase 'four-fifths of

the House' would mean four-fifths of all the members elected.

"In this particular case it is the opinion of the attorneys, that at least 106 members should have been present and voting in order properly to meet the requirements of Article 3, Section 32."

Under the law, rules and customs long established for the government of this department it does not fall within its province or duties to construe the laws affecting transactions between private institutions and city governments. But inasmuch as you have called into question the constitutionality of an Act of the Legislature, which affects the welfare of one of our most prosperous cities, and the officers thereof have joined in your request for my opinion, I deem it just and proper, on account of the issues involved, to vary the rule in this instance.

I have the pleasure of personal acquaintance with two members of the firm referred to in your letter, having met them in other litigation and from my knowledge of their ability I am constrained to believe their opinion in this case is not based upon such an exhaustive examination of the question, as they will make before affirming the tentative opinion expressed to you.

The Act of the Legislature granting a special charter to the City of Fort Worth carried what is known as an emergency clause, which declared an imperative public necessity for the suspension of the constitutional rule, requiring bills to be read on three several days in each House (Constitution, Article 3, Section 32), and also declaring an emergency that the bill take effect from and after its passage (Constitution, Article 3, Section 39). You will observe that two provisions of the Constitution are involved in the emergency clause. Article 3, Section 32 reads as follows:

"No bill shall have the force and effect of a law until it has been read on three several days in each House, and free discussion allowed thereon; but in cases of *imperative public necessity* (which necessity shall be stated in a preamble, or in the body of the bill), *four-fifths of the House* in which the bill may be pending may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journals."

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

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

You will observe that in the first section quoted, the rule requiring the bill to be read on three several days may be suspended by *"four-fifths of the House,"* while in the second section, in order to put the bill into effect at any time prior to ninety days after adjournment it requires a vote of *"two-thirds of all the members 'elected' to each House."*. The significance of the difference in the language used in the two sections is apparent, but will be treated more fully hereafter.

The Act of the Legislature under discussion as published in the Special Laws of Texas, Thirty-first Legislature, page 302, contains the following notation added by the Secretary of State:

["Note: The enrolled bill shows that the foregoing Act passed the House by the following vote, yeas 90, nays 0; was referred to the Senate, amended and passed by the following vote, yeas 28, nays 0; and the House concurred in the Senate amendments by the following vote, yeas 94, nays 0."]

The figures used in your letter show that you used the vote here recorded for the assumption that the constitutional rule requiring the bill to be read on three several days had not been suspended by a four-fifths vote of the House.

You are respectfully advised that under the custom under vogue in this State, the enrolled bill does not show upon its face the vote by which the last mentioned constitutional rule is suspended. The notation refers only to the vote cast upon the final passage of the bill in order to advise the Secretary of State whether a sufficient vote had been cast for the bill in each House to put it into effect prior to ninety days after adjournment of the Legislature in accordance with the provisions of Article 3, Section 39 of the Constitution.

You will observe the distinction between the rule requiring a bill to be read on three several days and the rule providing that no law shall take effect until ninety days after adjournment unless the Legislature shall by a vote of two-thirds of all the members elected to each House, otherwise direct.

The Legislature might refuse to suspend the rule requiring the bill to be read upon three several days, and upon the passage of the bill by a two-thirds vote of all the members elected to both Houses put the bill into immediate effect.

The vote set forth in the notation as above stated only has reference to the vote upon the final passage of the bill and does not allude to the number of votes cast upon the suspension of the rules requiring to be read on three several days. (See House Journal Thirty-first Legislature, pages 760-761.)

The Supreme Court of Texas has decided that after the passage of a bill, if it be signed by the presiding officer of each House and is submitted to the Governor and receives his approval, that it should afford conclusive evidence that the act had been passed *in the manner required by the Constitution*. (Williams vs. Taylor, 83 Texas, 673.)

The Court says:

"Such being the rule of Common Law, we think, in the absence of something in the Constitution expressly showing a contrary intention, it is fair to presume that it was intended that the same rule should prevail in this State. * * * There could never be any assurance of the validity of any statute until the journals had been examined and it had been found that the procedure prescribed in the Constitution had been followed. It seems to us that such a rule should lead to inextricable confusion."

We could well afford to stop here and rest the validity of the bill upon this decision of the Supreme Court, "that the enrolled bill as signed and approved should be taken as conclusive evidence of the law."

Texas is not the only State that has adopted this rule, as you will see by an examination of the following authorities:

State vs. Swift, 10 Nevada, 176.
Stephens vs. Board Comrs. Lobetee Co., 98 Pac., 790.
Sherman vs. Storey, 30 Cal., 253.
Lafferty vs. Hoffman, 99 Ky., 80.
Ex Parte Wren, 63 Miss., 512.
Pac. Ry. vs. Governor, 23 Mo., 353.
Pangborn vs. Young, 32 N. J. Law, 29.

The same doctrine has been laid down by the Supreme Court of the United States affecting acts of Territorial Legislatures.

Field vs. Clark, 143 U. S., 649.
Hardwood vs. Wentworth, 162 U. S., 547.

Under this authority the bill in question imports absolute verity and indulges the presumption that all constitutional requirements prerequisite to its proper passage have been complied with. The vote recorded in the note shows that it received more than two-thirds of the votes of the members elected to each House and thereafter became effective from and after its passage. While the rule in this State is that you can not look behind a properly authenticated bill, to the journals for the pupose of invalidating an act, yet for the purpose of answering all objections, legal or otherwise, that might be urged, we will look to the journals also.

House Journal, pages 760-761 show that upon motion of Mr. Fitzhugh the constitutional rule requiring bills to be read on three several days and the bill passed on its second reading and passage to engrossment was adopted by 89 yeas, nays 0, present not voting 3, absent 39. The rule was waived and the bill placed upon its third reading and final passage by identically the same vote.

This question arises, was the 89 votes cast in favor of the suspension of the rule sufficient to satisfy the constitutional provision requiring a vote of "four-fifths of the House?".

Article 3, Section 10, of the Constitution provides that "two-thirds of each House shall constitute a quorum to do business * * *."

In Texas two-thirds of the House of Representatives consist of 88 members and when this number are present they constitute a quorum and may transact any business and are clothed with all the constitutional powers residing in the aggregate membership.

A quorum possesses all the powers of the whole body, and may exercise every right, privilege and power as fully as when the entire membership is present.

In Re. Runn, 19 L. R. A., 525.

The House become vitalized and clothed with constitutional authority when two-thirds of its members present themselves together.

When a quorum assembles the power of the House or Senate arises, and the right to exercise all the authority vested by the Constitution in either body becomes a fundamental right of such quorum which can not be thwarted by the action of any single member or fraction of a majority present or absent.

This proposition has been clearly established by the Supreme Court of the United States in the case of United States vs. Ballin, 144 U. S., 5. Therefore, it is my opinion that when a quorum is shown to

be present it only requires a vote of four-fifths of those present to suspend the rule requiring the bill to be read on three several days. This view has been sustained in other States having similar constitutional provisions. The Supreme Court of Missouri, in the case of State vs. McBride, 4 Mo., 303, says:

"In the Twelfth Article of our Constitution it is provided that the General Assembly may, at any time, propose such amendments to the Constitution as two-thirds of each House shall deem expedient * * *

"The question to be solved is, what is the meaning of the word 'House,' as used in the Constitution; does it mean all the members elected, or does it mean any number sufficient to constitute a quorum?

"In the Seventeenth Section of the Third Article of the Constitution the word 'House' is mentioned as consisting of all the members elected. 'A *majority* of each House shall constitute a quorum to do business.' * * * The word 'House,' as used in the Constitution, may then either be the whole number elected to that House or a majority of its members.

"The most common meaning of the word, then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the Senate having voted for this amendment, and seven against it, two being absent, it was passed by the required number of votes."

Again, where a constitutional provision required that the Legislature should pass no act of incorporation unless with the assent of at least two-thirds of each House, the word "House" was held to mean members present and doing business, being a quorum.

Zeiler vs. Central Ry., 84 Md., 304.

Southworth vs. Palmyra, 2 Mich., 287.

The Supreme Court of Louisiana in the case of Prellsen vs. Mohan, 21 La. Anm., 103, says:

"We can see no room for doubting as to what is meant in Article forty-two of the Constitution by 'four-fifths of the House' * * * by the terms 'each House' and 'the House,' in Article forty-two must be meant the quorum necessary to do business."

Your attention was called at the beginning of this opinion to the difference in the language used in the two sections of the Constitution quoted herein. Section 32, Article 3, uses the phrase "four-fifths of the House," while Section 39, Article 3, employs the term "two-thirds of all the members *elected* to each House."

The framers of the Constitution evidently had in mind the distinctions under discussion. The use of the term "two-thirds of all the members elected to each House" in that section carries with it the logical negation that it was the intent and purpose of the framers of the Constitution that the same rule should apply in construing the other section where no reference is made to *members elected.*

I deem the authorities cited sufficient to settle the objections raised by your counsel, but should they fail to satisfy them that the constitutional rule requiring the bill to be read on three several days had been legally suspended, I then make the further point that the Journals of the House show that the bill was actually read in the House on three separate and distinct days.

House Journal, page 703, shows that on March 3rd, 1910, the bill was read first time and referred to Committee on Municipal Corporations. Page 760 shows that it was read second time and passed to engrossemnt; on same day the constitutional rule was suspended by vote of 89 to 0 and the bill read the third time and finally passed by a vote of 90 to 0. Page 870 shows that on March 6th the House recalled the bill from the Senate for correction. Page 892 shows that on March 8th the vote by which the bill was passed was rescinded and the bill was read again and passed by a vote of 111 yeas, nays 2.

The bill was amended by the Senate and returned to the House. On page 915 the Journal shows that the Senate amendments were concurred in by a vote of 94 years, nays 0.

It is, therefore, clear from a reading of the Journal that the bill was in fact read on three several days in the House, and whatever view you may take of the question as to whether the constitutional rule was legally suspended, the provisons of the Constitution have been literally complied with.

I have discussed this question at length on account of its importance and because of our desire to remove some of the prejudices existing in the East against our laws and the methods employed by our Legislature in enacting laws.

I trust that the discussion will clearly satisfy the mind of your counsel that this bill has been legally passed with all the forms and solemnities required by the Constitution of this State. Such is the judgment of this Department, which is upheld by the decisions of the Supreme Court of this as well as of other States.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

Commissioners court has authority to redistrict county into commissioners' precincts, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 4, 1910.

Hon. H. Hamilton, County Clerk, Stanton, Texas.

DEAR SIR: We have your favor of the 21st ult., which is as follows:

"Has the commissioners court a right to re-district a county into new commissioners precincts, and if so, would it be legal for one commissioner to live in one precinct and serve as commissioner in another? For instance; If, after re-districting a county, it throws one of the old commissioners in another precinct, can this same commissioner serve for the same precinct he formerly served? And would it be legal for the same old commissioner to appoint, or select voting places for these different precincts, and judges and presiding judges, etc? Has the county judge a right to appoint commissioners to serve for these new precincts, and re-districted by the commissioners court?"

Answering your first question, you are respectfully advised that a very similar question was passed upon in the case of the State vs. Rigsby, 43 Southwestern Reporter, page 271, and a writ of error was denied by the Supreme Court. In that case there was involved the right of a county commissioners court to make a new division of justice precincts, already established, and the court held that it was within the power of the commissioners court, both under the Constitution and statute, to make such new division. The reasoning of the court there seems to us strongly applicable to the question of division of commissioners precincts, since the Constitution uses this language, immediately after the provision regulating division of justice precincts, viz:

"Each county shall *in like manner* be divided into four commissioners precincts," etc. (See Section 18, Article 5, of the Constitution).

This language seems clearly to refer not only to the original division into commissioners precincts, but to be applicable also to any subsequent division thereof. We are inclined to the opinion that it is the law, and that our courts would so hold that the Constitution confers ample authority upon commissioners courts to make a new division of commissioners precincts.

As to your second question, we answer that if the re-districting of commissioners precincts should throw the residence of one of the old commissioners into a new precinct, we think the result to be that such commissioner would continue to serve for the remainder of his precinct, together with such additional boundaries, if any, as may be added thereto. This, we think, results from the fact that such commissioner has been elected by the qualified voters of his precinct, and by the Constitution and statutes his term of office is fixed for two years, and until his successor is elected and qualified. The office of county commissioner is taken by the holder thereof, subject to the power of the commissioners court to alter the territory of his precinct, but not subject to any authority of said court to abolish the office entirely, either directly or by indirection.

Although not decided by any case as far as we know, we are inclined strongly to the opinion that Article 1810b, Revised Statutes, relating to the issuance of certificates of election to officers, applies to county commissioners, and requires that such officers must have resided in the State for twelve months, and must have been an actual bonafide citizen of his county and his precinct (district), next preceding his election. If a county commissoner has possessed the aforesaid residence qualifications, at the time of his election or appointment to such position, we do not believe that a redivision by the commissioners court, which alters the boundaries of his precinct would operate to deprive him of office. He would continue to serve, we think, in his old precinct, according to its original number, and with its new boundaries.

We see no legal reason why the commissioners court, as constituted when the precincts are finally re-districted, should not appoint and select voting places for the different precincts, and judges, etc. In cases of vacancies, the county judge has the right and it is his

duty to appoint a county commissioner who resides in the precinct wherein the vacancy exists.

We believe this fully answers your questions, and trust it will be sufficient for your purpose.

Yours very truly,

Assistant Attorney General.

CORPORATIONS—REDUCTION OF CAPITAL STOCK.

If a corporation desires to reduce its capital stock instead of paying in the unpaid portion (50 per cent thereof being paid upon filing of charter), this must be done within two years from date of filing, and no reduction of capital stock will be allowed thereafter.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, March 19, 1910.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: We are in receipt of your favor of the 15th inst., in which you request the construction of this Department of Section 2 of Chapter 166 of the Acts of the Thirtieth Legislature. You desire to know whether a corporation which has paid in only 50 per cent of its capital stock can, after the lapse of two years from the date of filing its charter, reduce or decrease its capital stock without first paying in the same fully.

Section 1 of this act provides that all corporations incorporating under the provisions of Chapter 2, Title 21, Revised Statutes, shall be required in good faith to subscribe the full amount of its authorized capital stock and to pay 50 per cent thereof before such corporation shall be chartered. This section further provides that corporations created under Sections 21, 29, 37, 53, 54 and 61 of the General Incorporation Law are exempt from the provisions of this section.

Section 2 of this act provides that the stockholders of all corporations chartered as provided in Section 1, "shall within two years from the date of the filing of such charter by the Secretary of State, pay in the unpaid portion of the capital stock of such company; proof of which shall within said time be made to the Secretary of State in the manner provided in Section 1 for the filing of charter; and in case of the failure to pay the same and to make proof thereof to the Secretary of State within two years from the date of the filing of the charter shall because thereof forfeit the charter of said company, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations the word forfeited,' giving the name and date thereof."

It is further provided in this section that it is the duty of the Secretary of State to notify corporations where the charer has been

forfeited of the fact of such forfeiture. Immediately following this notice occurs this proviso:

"Provided, that the stockholders of any such corporation whose charter has been forfeited as above provided who shall within six months from the date of such forfeiture, and not thereafter, pay in full the unpaid capital stock of such company and furnish to the Secretary of State proof of such fact as required herein, and in addition shall pay the Secretary of State as fees belonging to his office the sum of five ($5) dollars per month for each month and fractional part thereof between the date of forfeiture and settlement, the company shall be relieved from such forfeiture, and said officer shall write on the margin of said ledger the word 'revived,' * * *; provided, however, the stockholders of any such company shall have the right, *at any time within the two years given to make payment of the unpaid portion of the capital stock*, to reduce the same so that by reduction, or reduction and payment, the full amount of the capital stock authorized by such reduction shall be paid, and thus avoid a forfeiture of the charter."

It is evident from the provisions of this act that where a corporation which is subject to the provisions of Section 1 fails to pay in the unpaid portion of its capital stock within two years, or which fails to reduce its capital stock within the two years given, so that by reduction, or reduction and payment, the full amount of the capital stock is paid, can not, thereafter, reduce the same, but must pay in the full amount thereof within the six months after notice received by the Secretary of State of the fact of the forfeiture of the charter of such corporation.

If a corporation desires to reduce its capital stock instead of paying in the unpaid portion, this must be done within two years from the date of the filing of its charter. At the expiration of the two years, it is the duty of the Secretary of State to enter the forfeiture, and the failure of such officer to enter such forfeiture would not authorize the reduction of the capital stock.

Where the two years will elapse before proof of payment of the unpaid portion of the capital stock, the right of forfeiture accrues and the corporation must then within six months after the forfeiture is entered and after notice is received by them from the Secretary of State, pay in the entire amount of the unpaid capital stock, together with the penalty of five dollars per month from the date of the forfeiture to the time of settlement. If a corporation desires to take advantage of the reduction of its capital stock, in order to avoid the paying in the unpaid portion thereof, it must do so within two years from the date of the filing of its charter, and not thereafter.

You are, therefore, respectfully advised that in the case submitted by you, you should enter the forfeiture upon the ledger kept in your office relating to such corporations, and issue the proper notice of the fact of forfeiture to the corporation in question, which forfeiture can only be avoided by the payment in full of the unpaid portion

of the capitol stock, together with the penalty of five dollars per month from the date of forfeiture to the time of settlement.

Yours very truly,

C. A. LEDDY,
Assistant Attorney General.

CORPORATIONS—ARTICLES OF INCORPORATION—GUARANTY COMPANIES.

All corporations incorporating under Subdivision 37 of Article 642, including fidelity and guaranty companies, must file original articles with Secretary of State.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, April 20, 1910.

Hon. W. B. Townsend, Secretary of State, Capitol.

DEAR SIR: You desire in your recent inquiry the opinion of this Department as to whether a corporation which seeks to incorporate as a fidelity and guaranty company under Subdivision 37, Article 642, Revised Statutes, should file its original articles of incorporation with the Secretary of State or with the Commissioner of Insurance and Banking.

Article 3028, Revised Statutes, provides:

"Any number of persons desiring to form a company for the purpose of transacting an insurance business shall adopt their articles of incorporation and submit the same to the Attorney General; and if said articles shall be found by him to be in accordance with the laws of this State and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the Commissioner of Insurance."

Some of the purposes mentioned in Subdivision 37 are within the term "insurance:" that is to say, a corporation under said subdivision is organized to do a fidelity and guaranty insurance business. The mere fact that a corporation obtains its authority from the general incorporation act and not from Title 58, which provides for the incorporation of insurance companies, would not in itself prevent it from being compelled to file its original articles of incorporation with the Commissioner of Insurance and Banking. State vs. Burgess et al., 109 S. W. Rep., 922. The Legislature, however, in 1897 enacted a special act applicable to fidelity and guaranty companies, containing among others the following provisions:

"That such compnay (fidelity and guaranty) to be so qualified to act as surety or guarantor must comply with the requirements of every law of this State applicable to such company doing business therein; * * **must file with the Commissioner of Insurance and Banking a certified copy of its certificate of incorporation, written application* to be authorized to do business under this act, etc."

This act clearly has reference to both domestic and foreign companies organized for the purpose of conducting a fidelity and guar-

anty insurance business. The provision that these companies must file with the Commissioner of Insurance and Banking a certified copy of its certificate of incorporation, evidently presupposes that the original articles of incorporation have therefore been filed with the Secretary of State, as it would be absurd to require a company which had already filed its original articles of incorporation with the Commissioner of Insurance to procure a certified copy of such articles and file them with the Commissioner of Insurance and Banking.

Under this special act applying to fidelity and guaranty companies it was evidently the purpose of the Legislature that all such companies incorporated under Subdivision 37 of Article 642 should file their articles of incorporation with the Secretary of State; that such company would not be authorized to do business until it files with the Cimmissioner of Insurance a certified copy of its articles of incorporation. The view that companies organized under Subdivision 37 should file their articles of incorporation with the Secretary of State is strengthened when we refer to the acts of the Thirtieth Legislature, (acts of 1907, page 39), which requires all corporations organized under Chapter 2, Title 21, to make proof before the Secretary of State that the full amount of its authorized capital stock has been subscribed and 50 per cent thereof paid in. This act contains the following proviso:

"And provided further, that corporations created under Sections 21, 29, 37, 53, 54 and 61 of Article 642, Revised Statutes of this State, are exempt from the provisions of this section."

This act was evidently intended to apply to corporations that were required to file their articles of incorporation with the Secretary of State. However, this official has nothing to do with receiving proof as to the paid up capital stock of companies which are required to deposit their articles of incorporation with the Commissioner of Insurance.

It is therefore apparent that the reason for the provision exempting corporations organized under Subdivision 37 from making necessary proof required from other corporations whose charters are filed with the Secretary of State is that such corporations are required by Chapter 165, acts of the Twenty-fifth Legislature, to make proof to the Insurance Commissoner and to obtain from him the permit to transact business in the State.

We are, therefore, of the opinion that the Legislature has made a special provision with reference to surety and guaranty companies, which relieves such companies from filing their original articles of incorporation with the Commissioner of Insurance.

You are, therefore, respectfully advised that all corporations incorporated under Subdivision 37 of Article 642, must file their original articles of incorporation with the Secretary of State, properly executed, and obtain from him a certified copy of such articles of incorporation to be presented to the Insurance Commissioner, with a written application to be authorized to do business in this State, and by complying with the further provisions of Chapter 165, Gen-

eral Laws of the Twenty-fifth Legislature before they will be authorized to do business in this State.

Very truly yours,

JEWEL P. LIGHTFOOT,
Attorney General.

ELIGIBILITY TO OFFICE—OFFICIAL BONDS—COUNTY SUPERINTENDENT.

A woman who is a feme sole is eligible to hold office of county superintendent. Married woman not eligible because of disability to bind herself by bond.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 24, 1910.

Mr. E. C. Dunnam, Coryell, Texas.

DEAR SIR: In answer to your letter of the 17th inst., we beg to advise you that a woman who is a feme sole is eligible to the office of county superintendent of public instruction, but probably a married woman could not lawfully hold said office, for the reason that an official bond is required by the acts of 1905, page 274, and because of this disability of a married woman to bind herself by a bond or other contract. The Constitution and laws of this State do not require this office to be filled by a qualified voter; hence, the only disqualification that might exist against a woman filling this office would be the contractual disability of a married woman under our law. (Steusoff vs. State, 80 Texas, 428; Harkreader vs. State, 33 S. W. Rep., 117; State vs. Hostetter, (Mo), 39 S. W. Rep., 270).

In the above cited case of Harkreader vs. State, the Court of Criminal Appeals held that a minor could lawfully fill the office of *deputy* county clerk, but intimated that he could not hold the office of county clerk because of the necessity of giving an official bond and because of his contractual disability of minority. If that suggestion of the court is well taken, then the same reason would apply to a married woman and would disqualify her from holding any public office, the incumbent of which would be required to give an official bond.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—PORTER FOR STATE FIRE RATING BOARD.

Board may employ, at an additional salary, porter of Insurance Department, and who draws from that Department salary regularly appropriated by Legislture, without violating Section 33 of Article 16 of the Constitution.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, May 31, 1910.

Hon. William E. Hawkins, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We have your communication of this date, which is as follows:

"Do the Constitution and laws of the State of Texas permit the State Fire Rating Board to employ as its porter, at a salary of $10 per month, one who is at the same time porter in the Department of Insurance and Banking on a salary of $40 per month?

"The facts in this particular instance are that said Board is desirous of employing a colored man, Jim Wilson, who is porter in this Department to act as porter for said Board outside of his regular hours of duty as porter in this Department, if said Board can legally avail itself of his services.

"Please favor me with an early expression of your opinion on the point involved."

The proper answer to your question involves the correct interpretation of Section 33 of Article 16 of the Constitution, reading thus:

"The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation, as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit under this State or the United States, except as prescribed in this Constitution."

It is clear that the porter of the Deparment of Insurance and Banking is holding a position of profit under this State; and if, by accepting employment as porter for the State Fire Rating Board at the salary named, he is thereby constituted an agent, officer or appointee under this State it follows that the Comptroller could not lawfully draw a warrant in his favor nor could the Fire Rating Board legally employ him as porter for such Board. The whole question turns upon the meaning of the words *agents, officers or appointee* as used in the above constitutional provision. We think it too clear for discussion that the person employed by the State Fire Rating Board as porter would not by such employment be constituted either an agent or officer, and it only remains to inquire whether he should be considered an *appointee* under this State.

Bouver's Law Dictionary defines "appointment" as "the designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust." In the case of Brown vs. Oconnell, 4 Am. Reports, 92, the word "appointed" was held to mean "named" or "designated for" or "assigned to" an office. In the case of Wickersham vs. Brittain, 15 L. R. A., p. 108, the following definition of the word "appointment" was approved:

"Appointment to an office of trust implies the conferrng of the dignity by the act of one or more individuals having power to select the person appointed," and a similar view was taken by the court in the case of State vs. Squire, 39 Ohio State, 197.

From these approved definitions and according to the ordinary signification of the word "appointee" we are constrained to hold that its meaning, as here found in our Constitution, does not extend to a mere servant or laborer performing menial services in some department of the State government. We think its connection with the associated words "agent" and "officer" implies that it is used in a limited sense, and intended to embrace only such persons as hold appointive positions of less dignity than an office itself, and not having the special representative capacity of an agency, but nevertheless involving administrative responsibilities and duties. It may be and doubtless is, difficult to draw the line of demarcation; but nevertheless we can not conclude that this constitutional provision would deny the State Fire Rating Board the legal authority to employ as a porter one who is performing similar service in another department of the State government. Therefore, your question is answered in the affirmative.

Yours very truly,

JOHN W. BRADY,
Assistant Attorney General.

CONSTRUCTION OF LAWS—LIQUOR LAW—PERMIT TO APPLY FOR LICENSE.

Party has reasonable time after granting of permit by Comptroler to engage in retail liquor business, to apply to county judge for license. Where permits to apply for licenses have been issued (the total number allowed by law) to parties known to be opposed to the liquor traffic, for the purpose of preventing the establishment of saloons in the precinct, the Comptroller should refuse to renew permits.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN TEXAS, June 23, 1910.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have your letter of the 17th instant, which is as follows:

"On September 9, 1909, upon proper application made to this department. I issued permits to R. J. Rose, J. A. Umphries, J. C. Evans and M. F. Dickey to apply for liquor license at a point near Oakwoods, Texas, in precinct No. 3, Freestone County, said precinct being entitled to only three permits.

"I enclose herewith a letter from Hon. R. L. Williford, County Judge of Freestone County, in which he states that neither of the parties referred to above to whom permits were issued by me has ever applied to him for license.

"You will please advise me, first, do the permits mentioned above run for one year?

"Second. Under the conditions as stated above, would I be authorized to issue renewal permits upon a proper application from the above mentioned parties?"

In answer to your first question, we have to state that the statutes provide that a person desiring to engage in the buisness of a retail liquor dealer must, before applying for his license, make application for and obtain a permit from the State Comptroller; and provides further, that after obtaining such permit he may then file his application with the County Judge for a license to pursue such business. We find no specific provision as to when he shall make his application to the County Judge after having obtained his permit from the Comptroller. The courts might hold that this must be done within a reasonable time, but it is unnecessary to pass upon this precise question under the state of facts that are made to appear by your letter and the accompanying letter to you from Judge R. L. Williford. If the permit is duly followed up by an application for license and the payment of the required taxes and the issuance of the license, such license runs for a year and the permit upon which it is based is limited by the life of the license.

In answer to your second question, we are of the opinion that if persons who are well known to be opposed on principle to the liquor traffic apply for and obtain the total number of permits that the law allows to be issued in the precinct where they reside and file such permits away and take no steps for practically a year to make any use of such permits, such circumstances would, in the absence of explanation, afford strong reason to believe that the permits were not applied for with the intention of using them, but were obtained for the sole and only purpose of preventing others from engaging in the sale of intoxicating liquors in that precinct, and in that way indirectly enforcing prohibition in such precinct. Furthermore, we think that if you are satisfied that this was the motive of the persons holding these permits, and that they have the same motive in applying for the renewals of such permits you would be justified under the law in declining to grant them renewals and in granting permits to other persons who made application therefor in proper form and who really intended to follow up such permits by obtainng licenses and paying the State and county taxes and engaging in the business of retail liquor dealers.

However worthy the motives of persons in obtaining permits and using them for the purpose of preventing others from establishing saloons in certain districts may have been, we think the action of such persons is an evasion of the Robertson-Fitzhugh law, and produces a result that such law does not contemplate nor intend. If prohibition in the precinct in question is a desirable thing, the Constitution and laws of this State provide other means for putting it in force, and we do not think that it can legally be obtained in practical effect by the means here resorted to. We return you enclosures herewith.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

PARDON—REVOCATION OF, ETC.

A pardon procured by false and fraudulent representation is void, and the Governor has power to revoke, and the prisoner, if at liberty, may be taken into custody under proper legal process issued upon the judgment of conviction and may be compelled to satisfy such judgment.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, June 30, 1910.

Hon. Thomas M. Campbell, Governor, Capitol.

DEAR SIR: We have received from you certain papers and affidavits tending to show that the perdon heretofore granted by you to Felix Tacchini of Denison, Texas, was procured by representations to you as to Tacchini's physical and financial condition that were untrue. You ask the opinion of this department upon the question of whether or not a pardon granted as a direct result of fraudulent or untrue statements made by a prisoner or those seeking his pardon and made for the purpose of obtaining such pardon, and that influenced the pardoning power in granting such pardon will render the pardon so granted void.

We beg to advise you that if you were imposed upon by misstatements, whether made with actual fraudulent intent or not, of the facts concerning Tacchini's physical or financial condition and were thereby caused to issue a pardon that you would not have granted if such misinformation had not been given, then such pardon so obtained was void, and Tacchini, if at liberty, may be taken into custody under proper legal process issued upon the judgment of conviction, and may be compelled to satisfy such judgment. This proposition is sustained by the following authorities:

Rosson vs. State, 23 Texas Appeals, 287.

Ex Parte Rosson, 24 Texas Appeals, 226.

29 Cyc. of Law and Procedure, page 1566.

In the above cited case of Rosson vs. State a pardon was issued by the Governor and delivered to the attorney for Rosson, who in turn delivered it to the clerk in the office of the superintendent of the penitentiary at Huntsville, at which place Rosson was then confined. On the day of the delivery of the pardon to the penitentiary authorities and before the actual delivery of same by them to Rosson, and before the release of Rosson from the penitentiary, the Governor wired the superintendent of the penitentiary and caused the pardon to be returned to him, whereupon he undertook to revoke it by endorsing on it the following direction to the Secretary of State:

"Issue an order cancelling this as having been issued on misinformation."

The result was that Rosson was not released from the penitentiary, but remained a prisoner therein. He sued out a writ of habeas corpus alleging that the pardon had taken effect by delivery to his attorney and acceptance by his attorney, and that he was illegally restrained of his liberty. The Court of Criminal Appeals held that inasmuch as the pardon had been delivered and attempted revocation of it by the Governor was without authority, but that the par-

don procured by fraud was absolutely void; that the aforesaid endorsement on the pardon by the Governor was prima facie sufficient to show that this pardon was secured by fraud, and that in the absence of proof by the convict upon the habaes corpus trial that no fraud was committed, and the Governor was not impoesd upon, the pardon was to be treated as void. Accordingly the judgment of the lower court remanding Rosson to the custody of the penitentiary officials was reaffirmed. In the opinion the court said:

"It is unquestionably true that a pardon procured by fraud upon the pardoning power is void. Any suppression of truth or suggestion of falsehood in obtaining a pardon will vitiate it."

The doctrine of this case was adhered to in the case of Ex Parte Rosson, 24 Texas Appeals, 226. This was a subsequent habeas corpus proceeding brought by the same person. On the trial of this latter habeas corpus proceeding Rosson proved by the Governor and the attorney who had procured the pardon facts which showed the absence of any fraud or misstatement of facts in procuring the pardon. It was, therefore, held by the Court of Criminal Appeals that the pardon was in force, and taht Rosson was entitled to be released.

In 29th Cyc., page 1566, the following language is used:

"A pardon procured by false and fraudulent representations is void. and this is true ven though the person pardoned had no part in perpetrating the fraud. A mistake as to fact may render a pardon void."

Several decisions are cited to support the text, and among them the Texas case of Rosson vs. State, above referred to.

We return herewith the papers handed to us for our inspection.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

LIQUORS—LOCAL OPTION.

Disposition of stock of dealer after adoption of local option. Unearned license.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 6, 1910.

Hon. W. E. Murphy, County Attorney, Gainesville, Texas.

DEAR SIR: We have your letter of June 22nd, from which we quote as follows:

"There are several parties in a commissioners precinct recently gone dry who desire to dispose of their stock. Can they not sell this stock in bulk in wet territory without license?

"If yes, then what do you mean by bulk; that is, could it be sold in anything less than the entire stock, such as barrels and original packages which have not been broken for retail?

"Could a man whose license has not expired at time territory went dry transfer his license to party in wet territory along with

his stock, or is his license so nullified as that he has no other interest in same except to cash in for unearned time?"

We have given your quetsions careful consideration and our conclusion is that after the local option law has taken effect in a commissioners precinct in a county it is not at all clear that a retail liquor dealer having a saloon within said precinct may lawfully move his stock of goods to another subdivision in the same county where the local option law does not prevail, or to another county which ha snot adopted the local option law, and there sell out his stock of goods in bulk without first paying the wholesaler's tax under the Robertson-Fitzhugh law, or sell it out at retail without obtaining a new permit and license under said law.

The writer finds a difference of opinion on this question among the members of this department, and that admonishes him that the matter is involved in doubt and uncertainty, making it unsafe and undesirable for this department to advise you or for you to advise the liquor dealer in question that he may safely pursue this course.

It is clear that Section 33 of the Robertson-Fitzhugh law of 1909 has no application here. It merely allows a liquor dealer to dispose of his stock in bulk after his license has been forfeited in accordance with the provisions of that law for the forfeiture of licenses upon the grounds set forth in the act. The adoption of the local option law by a county or a subdivision of a county is not a forfeiture of the license within the meaning of Section 33. Neither does Section 7 of said law have any application to this case. It allows one voluntary assignment of the liquor license and allows the original licensee of his assignee to change the place of business designated in the license by applying to the County Judge and which has not adopted the local option law, and there sell out his nection with Section 9j, segregating the different cities or towns and justices precincts one from the other and regulating the number of permits and licenses that may be granted within a city or town or justice precinct, we think it is the clear intention of the law not to allow a retail liquor dealer or his assignee to change the place of business so as to remove it to a point outside of the original justice precinct, and thereby cause an additional saloon to be set up in some other justice precinct without the obtaining of a new permit in such other precinct; and perhaps resulting in a larger number of saloons in such other precinct than the law allows. In other words, we think that if the retail liquor dealer desires to move his place of business to another city or to another justice precinct, the only way he can legally do it is to apply to the Comptroller for a new permit at the new place and obtain his license there just as if he had not been in the business before.

Some of the members of this department take the view that the Robertson-Fitzhugh law does not prohibit a single sale without a license, but only prohibits engaging in the business of selling intoxicating liquors without a license. Others hold the view that said law not only forbids engaging in the business without obtaining a license, but prohibits the selling in any manner whatever of any intoxicants

without first having obtained the license required by said law. When we examine the language of the law itself we find that there is room for both contentions. Section 1 declares that there shall be obtaining authority so to do; but when this language is read in con- collected from every person selling intoxicants at retail a certain tax, and that there shall be collected from every person selling them in quantities of one gallon or more a certain tax. You will note that this law does not say that the tax shall be collected from every person engaging in the business of selling intoxicants at wholesale or retail; neither does it say that those who engage in the sale of such liquors shall first pay the tax required by law. It simply says that every person selling shall first pay this tax. Section 2, which deals more specifically with the case of a retail liquor dealer, declares that:

"Any person who sells intoxicating liquors in quantities of less than one gallon shall be governed by the provisions of this law and be required to take out license hereunder."

Now it is obvious that if the language just quoted means what it literally says, a single sale of less than one gallon of intoxicating liquor by one who had no intention whatever of pursuing the business would violate this law if the person making such sale had not first taken out a license. It may be that the intention of the Legislature was not as broad as the language used, and that a consideration of the entire act, keeping in view its general scope and purpose, would limit the effect of this language. However, you will readily see that this language makes the question one of such doubt that it would not be safe for us to advise that a single sale is not within the prohibitions of this law. You will also note that Sections 4 and 5 of the act denounce penalties against persons who shall directly or indirectly sell intoxicants without first having paid the required taxes and obtained licenses. In this connection see the case of Robinson vs. State, 75 S. W. Rep., 526, where similar language was construed by the Court of Criminal Appeals to forbid even a single sale without first procuring a license, and the case of Sneed vs. State, 117 S. W. Rep., 893, where the Robinson case was cited and followed.

The retail liquor dealer can, of course, under the circumstances stated in your letter, obtain a refund of the proportionate amount of the license tax for the unexpired term of his license. See Sayles Civil Statutes, Article 3398. Also, as you well know, he could lawfully sell out and dispose of his stock of goods between the time of the election at which the local option law is voted, and the date whn such law takes effect.

In view of the state of our statutes and decisions on this subject, we do not feel at liberty to advise that a liquor dealer could, under the circumstances mentioned in your letter, do anything under his license after the voting of the local option law except to obtain a refund of the unearned portion of his license or to dispose of his stock before the law actually takes effect, or do both.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTRUCTION OF LAWS—GAME LAWS.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 28, 1910.

Hon. J. T. Hamilton, Member of the House, Capitol.

DEAR SIR: We have your letter of the 28th instant, from which we quote as follows:

"Please give me the present status of the law on fishing and hunting in San Saba and McCulloch Counties.

"1. In inclosures of 2,000 acres or less.

"2. In inclosures of 2,000 or more.

"Does the owner or manager of less than 2,000 acres have to put up posting boards or notices to comply with the provisions of the law on 'posted lands?' "

The inquiry you submit is one that should be made of the respective county attorneys of the counties interested, and not of this department. However, since the inquiry comes to us from a member of the Legislature we will answer it as a matter of accommodation.

We have to state that the Legislature has dealt with this subject from time to time in such a way as to throw it into confusion and make it well nigh impossible for any one to say with certainty what the present state of the law is on the point. Article 804 of the Penal Code was amended by the acts of 1903, page 159, so as to read as follows:

"Any person who shall enter upon the enclosed land of another without the consent of the owner, proprietor or agent in charge, and therein hunt with firearms, or therein catch or take any fish from any pond, lake, tank or stream or in any other manner depredate upon the same, shall be punished by fine not less than ten nor more than one hundred dollars. Provided, further, that this act shall not apply to enclosures including two thousand acres or more in one enclosure."

Said Act of 1903 did not purport to amend Article 805, which deals with the same subject. It would seem that a mistake was made in the publication of Article 805 of the Penal Code of 1895, and instead of the language published as Article 805 the following language from the act of May 1, 1893, is the law and should have been published as Article 805.

"No one shall be liable to the penalty herein provided unless the owner or proprietor of such enclosure shall, at each entrance thereto, keep a board in a conspicuous place, with the word 'posted' plainly marked thereon, which shall constitute posting within the meaning of this act, or shall give notice in some newspaper published in the county where such enclosure is located, and cause a copy of such paper containing such notice to be kept on file in the County Clerk's office of the county where the enclosure is situated. Provided, if no newspaper is published in the county, then the notice may be published in a newspaper published nearest to such county; provided further, that this section shall not be so construed as to

prevent or restrict the right of any person to pass through such enclosure on any public or private road therein; and provided, that no prosecution shall take place or be instituted under the provisions of this act, except at the instance or upon the written request of the owner or owners of the land, or his or their agent."

"Section 2. That it shall be unlawful for any professional hunter to enter upon the inclosed lands of another without the consent of the owner, proprietor or agent in charge, and therein hunt with firearms or dogs or kill any game for the purpose of sale or market, and any person so offending shall be punished by a fine of not less than one hundred nor more than two hundred dollars. A professional hunter under this section is any person who kills any game for sale or market, or kills any game for the hide or hides thereof."

See Wilson's Penal Code, page 331, Note 1 under Art. 805.

We do not pass upon the question of whether or not said act of May 1, 1893, was rendered invalid by the following provision contained therein:

"And provided, that no prosecution shall take place or be instituted under the provisions of this act except at the instance or upon the written request of the owner or owners of the land or his or their agent."

Neither do we pass upon the question of what effect a holding that the said act of May 1, 1893, was invalid would have on the previous law on that subject. The law upon the subject of hunting upon the inclosed and posted lands of another consisting of 2,000 acres or more was enacted by the laws of 1899, page 173. By the acts of 1903, page 193, Section 6 of this act, was amended so as to exempt certain counties from the operation of the act, among which counties were San Saba and McCulloch. Therefore, in the present inquiry we need pay no more attention to that law affecting inclosures of 2,000 acres or more, because it does not apply in the counties you are interested in.

The laws first above mentioned are confined in their operation to inclosures of less than 2,000 acres, and apply in all counties. You will also note that Article 805 as inserted by the codifiers and as published in the Penal Code of 1895, and also the said act of May 1st, 1893, a part of which it seems should have been substituted for 805, as inserted by the codifiers, both require the posting of the inclosed lands in order to make it a penal offense for persons to hunt or fish in such inclosures.

Yours very truly,

R. M. ROWLAND,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—MUNICIPAL GOVERNMENT—COMMISSION FORM—LEGISLATURE.

Legislature has power to pass charter for city subject to ratification by voters of said city.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, July 30, 1910.

Hon. Chester H. Terrell, Member House of Representatives, Austin, Texas.

DEAR SIR: We are in receipt of yours of the 30th instant, in which you submit the following question:

"I would appreciate it if your department would give me a ruling as to wether or not it would be constitutional to pass a charter for a city which would be of no force and effect unless ratified by the voters of that city.

"Some of the citizens of San Antonio wish to change the form of government of that city to a commission form. I personally favor the form, but believe the people should have a vote on this matter."

We think it would be within the constitutional power of the Legislature to enact a special charter for the city of San Antonio, with a provision therein that it should be void unless ratified by a vote of the people of said city at an election to be held for that purpose. This identical question was recently passed upon by the Court of Civil Appeals for the Second District, in the case of Orrick vs. City of Fort Worth, 114 Southwestern, 677, and in which cases the Supreme Court refused a writ of error, thereby in effect making the opinion of the Court of Civil appears its opinion. The charter of the city of Fort Worth, enacted by the Thirtieth Legislature, contains the following provision:

"Sec. 164. It shall be the duty of the city council of the city of Fort Worth at a regular meeting or at a call meeting for that purpose within ten days after the passage of this act to order an election for the purpose of submitting the question to the qualified voters of the city of Fort Worth to determine whether or not the city of Fort Worth will accept and adopt this charter for the government of said city. And if for any reason the city council should fail too order said election within said ten days, then it shall be the duty of the mayor of the city of Fort Worth to at once order the same, and for such purpose he is hereby vested with the power and authority vested in the city council by this act to carry out the purposes of this section. Said order of the city council shall designate the date upon which said election shall be held, which date shall be not elss than twenty nor more than thirty days from the date of such order. And when such election shall have been ordered the city council shall cause twenty days' notice thereof to be given in one or more newspapers published in the city of Fort Worth, which notice shall state the purpose of said election. The said order of the city council shall also direct the printing of the ballots to be used in such election, and the same shall provide that the ballot of those favoring the adoption of this charter shall read, 'For the new charter,' and those opposing the adoption of the new charter shall read, 'Against the new charter.' The said election except as herein otherwise provided shall be held and the returns thereof made and canvassed in accordance with the provisions of laws applying to elections held within the

city of Fort Worth under the present provisions of its charter and of the laws of the State of Texas governing the same; and all requirements and penalties applying to general elections shall apply to said election. The expense for holding such election shall be paid by the city of Fort Worth, and if a majority of the votes cast at said election shall be in favor of the new charter, then the city council shall so declare and the same shall be in force from and after the date of the canvass of the returns by the city council, which canvass of the returns shall be made by the city council within five days after the date of holding said election, and if a majority of the votes cast at said election shall be against the new charter, then the city council shall so declare, and this act shall be of no force nor effect."

It was contended in that case that the charter was void because it delegated legislative power to the people of the State in contravention of the Constitution, but the court held otherwise. In the opinion it said:

"It is true that the act (Section 164) provides that 'if a majority of the votes cast at said election (the election provided for by the act) shall be against the new charter, then the city council shall so declare, and this act shall be of no force nor effect,' but this, in our judgment, is not to be construed as conferring upon the people the power of repeal, as appellant urges. When construed as a whole, a more reasonable construction is that the Legislature intended the act of 1907 to operate immediately, to the exclusion of all other conflicting laws, in so far as necessary or proper thereunder to elicit the will of the electors in reference to the new charter, and to declare the entire act, including the charter, of no further force or effect in event of the contingency of an unfavorable vote. The Legislature declared the repeal, if one, and if it may be so termed, merely submitting to the people the question of whether the new charter as contained in the act was acceptable. We find nothing in our Constitution forbidding such legislation, and it is of a charter very generally approved by the authorities."

To the same effect see:

Graham vs. City of Greenville, 67 Texas, 62.
Werner vs. City of Galveston, 72 Texas, 22.
San Antonio vs. Jones, 28 Texas, 19.
Johnson vs. Martin, 75 Texas, 33.

Mr. Dillon, in his great work on municipal corporations, in discussing the question involved here, said:

"But while the Legislature is not bound to obtain the acceptance of assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter."

Dillon on Munic. Corp., Sec. 44. (4th Ed.)
See People vs. Salamon, 51 Ill., 53.
Alacorn vs. Homer, 38 Miss., 652.

Commonwealth vs. Court of Sessions, 8 Pa. St., 395.
Smith vs. McCarthy, 56 Pa. St., 359.

In the case of Clark vs. Rogers, 81 Kentucky, 43, it is held that the General Assembly can not delegate its power to enact laws, but whether or not the law enacted shall become operative may be made to depend on the popular will. As stated by the Court of Civil Appeals in the case of Orrick vs. City of Fort Worth, *supra*, a familiar illustration of this principle may be found in our own legislation by referring to the local option laws. The laws are enacted and repeal all laws in conflict, but whether they shall operate in a given county or precinct depends entirely on the will of the qualified voters of such district.

Our Supreme Court, in the case of Graham vs. City of Greenville, in considering a statute of this State which provided that whenever the qualified voters of any territory adjoining the limits of any city accepting the provisions of the statute should vote in favor of becoming a part of said city, the city council might, by ordinance, receive them as a part of said city, held that while the Legislature was not bound to obtain the assent of the persons residing within the contiguous territory before annexing it to a city, it might do so, and provides that the annexation should not take place unless a majority of such persons should assent thereto in some manner prescribed by the Legislature. The court held that such statute was "in no just sense a delegation of legislative power, but merely a question of the acceptance or rejection of a charter."

In discussing an act incorporating the city of San Antonio our Supreme Court, in the case of San Antonio vs. Jones, *supra*, among other things, says:

"Nor is a statute, whose complete execution and application to the subject matter is, by its provisions, made to depend on the assent of some other body, a delegation of legislative power."

In the case of Werner vs. City of Galveston, 72 Texas, 27, the Supreme Court uses the following language:

"It is contended that the act of April 3, 1879, which authorized cities and towns by a majority vote of their qualified electors to take control of the public schools within their respective limits, is unconstitutional, because it is an abdication by the Legislature of its legislative functions in favor of the voters of the respective municipalities. It is a well settled principle that the Legislature can not delegate its authority to make laws by submitting the question of their enactment to a popular vote; and in the State vs. Swisher, 17 Texas, 441, this court held an act of the Legislature which authorized the counties of the State to determine by popular vote whether liquor should be sold in their respective limits to be unconstitutional. But it does not follow from this that the Legislature has no authority to confer a power upon a municipal corporation and to authorize its acceptance or rejection by the municipality according to the will of the voters as expressed at the ballot box. Mr. Dillon says: 'It is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants is in no just sense a delegation of

legislative power, but merely a question as to the acceptance or rejection of a charter.' 1 Dillon on Mun. Corp., Sec. 44, and cases cited. See especially Alcorn vs. Homer, 38 Miss., 652. That such legislation is not unconstitutional is expressly decided by this court in the case of Graham vs. City of Greenville, 67 Texas, 62."

It is a general rule, of course, that the power conferred upon the Legislature to make laws can not be delegated to any other body or authority, but it is equally well settled that it is not always essential that a legislative act should be a completed statute which must in any event take effect as a law at the time it leaves the hands of the legislative department. A statute may be made conditionally and its taking effect may be made to depend upon some subsequent event.

See Brig Aurora vs. United States, 7 Cranch., 382.

Bull vs. Read, 13 Gratt., 78.

In discussing the question which we now have under consideration, Mr. Cooley in his woork on constitutional law, says:

"As the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of State policy, or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual."

See Bull vs. Read, 13 Gratt., 78.

Corning vs. Greene, 23 Barb., 33.

State vs. Wilcox, 45 Mo., 458.

The question that you submit is so well settled by the authorities, especially our own courts, that we deem it useless to pursue the subject further.

Yours very truly,

JAMES D. WALTHALL,
Assistant Attorney General.

CONSTRUCTION OF LAWS—LIQUOR LAW—TAX COLLECTOR—LICENSE TAX—DRUGGISTS.

Tax collector should refuse to issue licenses for sale of intoxicating liquors, whether to be drunk on premises or not, unless all the provisions of the Robertson-Fitzhugh law are complied with. Druggists exempt from the provisions of act other than payment of tax imposed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 1, 1910.

Hon. F. S. Schleicher, County Attorney, Cuero, Texas.

DEAR SIR: We are in receipt of yours of the 23rd ultimo, reply to which has been delayed because of unusually heavy official demands upon the entire office force of this department.

In your letter you stated that the County Tax Collector of DeWitt County is being presented with applications for licenses to sell spirituous, vinous and malt liquors in quantities of less than a quart, and not to be drunk on the premises: and you desire to know whether such persons are required to comply with the provisions of the Robertson-Fitzhugh law further than the payment of the annual occupation tax imposed thereby.

Prior to the enactment of the Robertson-Fitzhugh law and while the Baskin-McGregor act was in force, this department ruled that persons selling liquors not to be drunk upon the premises were not required to apply to the Comptroller for a permit to apply to the County Judge for a license, nor to enter into any bond, nor to comply with any of the restrictive provisions of said act. After the enactment of the Robertson-Fitzhugh law, which repealed the Baskin-McGregor act, this department ruled that under the provisions of this new act all persons desiring to engage in the sale of intoxicating liquors in quantities of one gallon or less, whether to be drunk on the premises or not, were required to comply with all the provisions of the act. The latter ruling was predicated upon the last sentence in Section 2 of the Robertson-Fitzhugh act. Said section reads as follows:

"A retail liquor dealer is a person or firm permitted by law, being licensed under the provisions of this act to sell spirituous, vinous and malt liquors, and medicated bitters capable of producing intoxication in quantities of one gallon or less which may be drunk on the premises. Any person who sells intoxicating liquors in quantities less than one gallon shall be governed by the provisions of this law, and be required to take out license hereunder."

After this opinion was given, Morley Bros., a wholesale and retail drug firm of Austin, brought suit for a mandamus against the Tax Collector of Travis County to require him to issue to them a receipt for the amount of the tax imposed upon retail liquor dealers in Section 1 of the Robertson-Fitzhugh law, and permitting them to engage in the sale of liquor not to be drunk on the premises. The District Court awarded the mandamus as prayed for, and upon appeal the Court of Civil Appeals at Austin affirmed the judgment and the Supreme Court denied an application for writ of error. This case is styled Kirk vs. Morley Bros., and is reported in 127 S. W. Rep., page 1109. An examination of the opinion in that case shows that the principal part thereof was devoted to demonstrating the proposition that one of the provisos contained in Section 1 of the Robertson-Fitzhugh law exempted druggists from the provisions of that act, except as to the payment of the tax imposed by said section; said proviso being as follows:

"Provided further, that nothing in this article shall be so construed as to except druggists who sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication on the prescription of a physician, or otherwise, from the payment of the tax herein imposed.".

The reasoning in this case is chiefly directed to sustaining the contention of Morley Bros. that druggists, as a class, were exempted from all the provisions of said act, except the requirement for the payment of the tax and the concluding paragraph of the opinion shows that such was the only question actually decided by the court.

The further question, as to whether the various restrictive provisions of the act are applicable to all persons other than druggists engaged in selling intoxicating liquors in quantities of one gallon or less, whether to be drunk on the premises or not, was not decided by the court: although the question was pressed in argument by the attorneys from this department and a decision thereon invited.

There are certain expressions contained in said opinion tending to declare the view of that court to be that not only druggists, but all other persons selling intoxicating liquors in quantities of one gallon or less, *not to be drunk on the premises*, were required only to pay the tax provided in Section 1, and that the various restrictive provisions of the law applied only to those who sell liquor to be drunk on the premises. However, this precise question was, as stated, presented in the Morley case, but the court did not pass upon the question, which leads us to assume that there exists some question in the minds of the court on this phase of the case; so much so that we are unable to advise that they would, in a case where the party was not a druggist, hold that he was exempt from the provisions of the act other than a payment of the tax imposed.

We are free to confess that the opinion in the said case leaves the matter involved in much doubt, and the only way it can be definitely settled is to have some party other than a druggist, who wishes to sell, not to be drunk on the premises, to mandamus the County Tax Collector to issue him a license for that purpose. Therefore, we must advise the County Tax Collector to refuse to issue licenses for the sale of intoxicating liquors, although not to be drunk on the preimses, unless all the provisions of the Robertson-Fitzhugh law are complied with. If any applicant feels that the law is otherwise, and that he is entitled to pursue said business upon merely paying the tax, there is an adequate and speedy remedy at law, and this vexed question may be tested. We offer this suggestion in view of the conceded doubtfulness of the quetsion.

Yours very truly,

JEWEL P. LIGHTFOOT,
Attorney General.

CONSTITUTIONAL CONSTRUCTION—MEMBER OF LEGISLATURE—VACANCY—APPOINTMENT TO ANOTHER OFFICE—CONFIRMATION.

Member of Legislature, after resignation, not disqualified to accept appointment to another office, appointment to which is subject to confirmation by Senate.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 3, 1910.

Senator Robert E. Cofer, Chairman of Committee, Austin, Texas.

MY DEAR SENATOR: We are in receipt of your favor dated August 1st, from which I quote the following:

"His Excellency, Hon. T. M. Campbell, has sent to the Senate with request for confirmation, the names of Hon. C. H. Jenkins as Judge of the Court of Civil Appeals and Hon. John Mobley as Assistant Attorney General.

"Both of these gentlemen were members of the present Legislature, but have resigned. The question has been raised as to whether or not they are eligible to these respective offices."

You direct attention to the following provision of Article 3, Section 18 of the Constitution of Texas:

"No member of either House shall, during the term for which he is elected, be eligible to any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature."

You state further that the Senate has appointed a committee, of which you are the chairman, to take the advice of this department upon the point at issue for the information of the Senate.

You are respectfully advised that in so far as my researches have extended, this provision of our Constitution has never been construed by the courts of this State. However, constitutional provisions of at least two other States containing similar language have been construed by their courts.

Article 4, Section 9, of the Constitution of Minnesota, provides as follows:

"No Senator or Representative shall, *during the time for which he is elected*, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster."

A member of the Legislature of that State, after qualifying and serving for about five months, resigned, and was appointed to the public office of Inspector of Boilers for the Fourth Congressional District of his State. The legislative session during which he served as a member terminated prior to his resignation. The court held that under the terms of that provision no Senator or Representative could, during the term for which he was elected, hold any other office under the authority of the State of Minnesota.

State ex rel. Childs vs. Sutton, 30 L. R. A., 630.

The conclusion was predicated upon the well settled rule that where the language of the Constitution is plain and unambiguous and its meaning obvious, if the words embody a definite meaning,

which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed.

The same court quoted approvingly the following from a New York case:

"It must be very plain, nay, absolutely certain, that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

People vs. Rathbone, 145 N. Y., 434.

The court finally concluding that the phrase: "during the time for which he was elected" meant the entire contsitutional term of two years for which he was elected, and whether he resigned during that time or not, he was not permitted to hold any other office during such term.

The next strongest authority construing similar language of which I am aware is a California case.

In People vs. Burbank, 12 Cal., 378, it was decided that "Constitution, Article 6, Sections 15 and 16, providing that the compensation of judges shall not be increased or diminished 'during the term for which they shall have been elected,' means during the time or period for which the officer is elected. When the Constitution says, 'The judge shall hold his office for six years' it means that this period of six years is the term of his office; it is the quantum of time assigned to him by the Constitution as his right to the enjoyment of the office, and this quantum may not improperly be called a 'term.' If A is elected District Judge, and enters on the office or accepts it for a day, he is disqualified for other office during the whole period of six years, and so after his election it would not be competent for the Legislature to change the compensation."

The first impression after an examination of these cases would naturally be that they are so directly in point, that they may be safely accepted as authority for deciding the question against the eligibility of Messrs. Jenkins and Mobley to hold the offices to which they have been appointed by the Governor.

The decisions are indeed clear enough in logic and reason to be accepted as a correct statement of the law in any State having a Constitution with the same history and containing similar provisions.

There is nothing in either case to indicate whether either of these States have changed these provisions since their organization as States, and I think it may be safely assumed that they have not done so. Under similar conditions I believe our courts would not likely approve and follow these decisions. But the attitude of the people of this State on this question, as expressed in the several Constitutions heretofore adopted, has shifted and changed so frequently as to involve the real meaning of the language quoted by you from our present Constitution in real doubt and renders it questionable whether the Minnesota and California cases can be safely accepted as authority for refusing the confirmation of these

appointments. When the meaning of a word or phrase in a Constitution or a statute is of doubtful meaning the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischief intended to be remedied, the extraordinary circumstances and the purposes intended to be accomplished by it to determine its proper construction.

Rathbone vs. U. S., 175 U. S., 414.

Sutherland Statutory Construction, Vol. 2, Sections 450 and 452.

Mr. Sutherland, a recognized authority on constitutional and statutory construction, says at Section 452 that:

"The propriety of comparing repealed statutes with those remaining in force, or subsequently enacted, for the purpose of construing the latter, is not to be questioned in the absence of any reference to them in the statute under consideration."

The Executive Department of the State, through the Governor, has heretofore appointed and the Senate has confirmed the appointment of officers who had been elected to the Legislature and who during the term of their office resigned their seats to accept such appointment. These acts amounted to executive and legislative construction of that provision of the Constitution now under consideration, which has long been acquiesced in and followed by numerous distinguished officers of this State, famed for their patriotic devotion to the Constitution and laws of this State.

The action of the Senate in calling into question the eligibility of the two officers named therefore renders it necessary to review the provisions of the several Constitutions of this State upon this subject in order to determine whether a member of the Legislature who has resigned his seat is disqualified, during the term for which he was elected, from holding other office, the appointment to which is made in whole or in part by the Senate.

Article 3, Section 24, of the Constitution of 1845, contains a provision in exact terms with our present Constitution as follows:

"And no member of either House of the Legislature shall, during the term for which he is elected, be eligible to any office or place, the appointment to which may be made in whole or in part, by either branch of the Legislature."

The same provision in identical language was carried forward in Article 3, Section 24, of the Constitution of 1861.

Subsequent to the adoption of the Constitution of 1861, the Governor and the Legislature doubtless construed this provision so that if a member of the Legislature resigned his seat he was not disqualified from accepting any such appointment, and that the phrase "during the term for which he is elected" did not relate to a person who had resigned.

The limited time at my disposal has not afforded opportunity to search the records of that period, but I dare say if it were done it would disclose the facts that persons who had served during a term of the Legislature were subsequently appointed to official positions in this State.

This construction doubtless influenced the Constitutional Convention of 1866, or if not, then for some unexplained reason they amended the provision to read as follows:

"And no member of either House of the Legislature, during the term for which he is elected, *although he may resign his seat as such member, shall* be eligible to any office or place, the appointment to which may be made in whole or in part by either branch of the Legislature."

They also added the same significant clause to another provision of the same section as follows:

"Nor shall members of either House vote for a member of their own body, *though he resign his seat in the same*, for Senator in the Congress of the United States."

These provisions remained a part of the organic law of the land until 1869, and rendered a member ineligible though he resigned his office.

The Constitutional Convention of 1869 struck both the foregoing provisions out of the Constitution of that year and left no such restrictions against a member of the Legislature. (See Article 3, Section 29, Constitution 1869). Then for a period to 1876 we had no constitutional restrictions of the character under discussion.

What inference is to be drawn from the change in phraseology in 1866 and its entire elimination in 1869?

Mr. Sutherland on Statutory Construction, Vol. 2, Section 401, quoting from numerous decisions, lays down this well settled principle:

" 'It has been a general rule,' says Blackburn, J., " 'for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning; and it would be as well if those who are engaged in the preparation of acts of parliament would bear in mind that that is the real principle of construction.' "

Hadley vs. Parks, L. R. 1 Q. B., 457.

Dickenson vs. Fletcher, L. R. 9. C. P. 8.

"Whether the change be by omission, addition or substitution the principle applies."

Yarbrough vs. Collins, 91 Texas, 306.

United States vs. Bashaw, 50 Fed., 749.

Lawrence vs. King, L. R. Q. B., 345.

Eliot vs. Himrod, 108 Pa. St., 569.

"Where changes have been introduced by amendment it is not to be assumed that they are without design."

Duff vs. Karr, 91 Mo. App., 16.

The Constitutional Convention of 1876, which adopted the present Constitution, when they came to treat with this subject, readopted the language employed in the Constitutions of 1845 and 1861 and eliminated all reference to members resigning their seats to accept appointment.

Mr. Sutherland again says that "in the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force."

"The Legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to intend that they should again have the same effect."

Sutherland Statutory Construction, Vol. 2, Sec. 403, citing long list of authorities, including our own Supreme Court.

In the case of Marsene Johnson vs. Hanscom, 90 Texas, at page 328, the Supreme Court, in discussing a re-enacted statute, and speaking through Mr. Justice Gaines, says:

"It is to be presumed that the Legislature knew of the construction that had been placed upon the text, and that if they were not satisfied with it they would have so changed the verbiage as to have shown clearly a contrary intention."

It has been decided that this same rule of construction applies to the re-adoption of constitutional provisions.

Morton vs. Broderick, 118 Cal., 474.

It is not necessary that the provision should be re-enacted in identical words in order that the rule may apply (as was done in Texas).

Barrett's appeal, 73 Conn., 288.

Grier vs. State, 103 Ga., 428.

Kelly vs. Trust Co., 190 Ill., 401.

State vs. Cornell, 54 Neb., 647.

It is sufficient if it is re-enacted in substantially the same words.

(Same authorities.)

The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it.

Bloxham vs. Consumers Electric Co., 36 Fla., 519; 29 L. R. A., 507.

Commonwealth vs. Grand C. B. & L. Ass'n., 97 Ky., 325.

The Supreme Court of Nebraska says:

"Where the Legislature in framing an act resorts to language similar in its import to the language of other acts which have received a practical construction by the Executive Departmetns and by the Legislature itself, it is fair to persume that the language was used in the latter act with a view to the construction given the earlier."

State vs. Moore, 50 Neb., 88.

Our own Supreme Court, in the case of H. & T. C. Ry. vs. State, 95 Texas, 521, again speaking through Mr. Justice Gaines, uses this significant alnguage:

"And in view of the fact, as found by the trial judge, that this has been the construction acted upon by the Governor and other officers of the State, whose duty it was to execute the law, we are of opinion that such construction ought now to prevail. Especially after a long lapse of time and after the claims of innocent third parties may have intervened, it is only in a very clear case that the courts would be justified in overriding the action of successive administrations in issuing certificates and granting patents to public lands."

Now let us see what constructon has been placed upon this constitutional provision by the Executive and Legislative Departments of Government since 1876. The limited time allowed me has not sufficed for a thorough investigation of the records, but sufficient data has been secured to show that for at least twenty years the

officers charged with the duty of enforcing this provision of the Constitution have given it the same construction which obtained prior to 1866 when it existed in the Constitution in its present form: that is to say, that if a member of either House resigned his seat during the term for which he was elected, he was not ineligible to appointment to another office whose confirmation might be required by the Senate.

No public officers in the history of this State ever won or enjoyed a more secure fame for the enforcement of the Constitution and laws of this State than ex-Governors Hogg and Culberson, both of whom were and are recognized as profound lawyers, and each of whom had served our State as Attorney General before being inducted into the office of Governor.

They evidently placed this construction upon said provision, as the records of the office of Secretary of State show that Senator L. A. Whatley qualified January 13, 1891. On April 13, 1891, Governor Hogg appointed him Superintendent of the State Penitentiaries and the Senate confirmed his appointment on the same day. He continued to serve as Senator for sixteen days, or until April 29, 1891, when he resigned and qualified for the other position on April 30th. Mr. Culberson was Attorney General at the time and among the Senators who were members at the time and doubtless voted for the confirmation may be found names famous throughout Texas for their learning as lawyers and patriotism as citizens, among whom I mention Honorables George C. Pendleton, Lieutenant Governor W. H. Pope, Marshall; John W. Cranford, Sulphur Springs; Cone Johnson, Tyler; H. M. Garwood, Bastrop; C. S. Potter, Gainesville; John H. Stephens, Montague; M. M. Crane, Cleburne; A. M. Carter, Fort Worth; W. W. Searcy, Brenham; Geo. W. Tyler, Belton; and Marcus F. Mott, Galveston.

Hon. T. J. Brown, Associate Justice of the Supreme Court of Texas, who has no superior as a lawyer, either in or out of Texas, and who, through a long and faithful service on the bench has added luster to the judiciary of this State, doubtless placed the same construction upon this provision. He was elected as Representative from Grayson County, November 4, 1890. He resigned during the term for which he was elected on September 5, 1892, some two months before the expiration of his term and was appointed District Judge five days after, September 10, 1892, by Governor Hogg, and qualified September 12, 1892. The following year he was appointed Chief Justice of the Court of Civil Appeals at Dallas on May 18, 1893, and a few days later, on May 31, 1893, succeeded to the Supreme bench. His resignation and appointment as District Judge was clearly within the term for which he was elected.

Governor Culberson doubtless placed the same construction upon this provision and if the same was not approved we find no objection recorded by Hon. M. M. Crane, who was Attorney General during his administration.

Hon. O. R. Morrison was elected as Representative from Hamilton County November 6, 1894; resigned May 1, 1895, and was appointed State Revenue Agent May 1, 1895, by Governor Culberson. Was re-

appointed January 22, 1897, and resigned April 30, 1898.

Hon. O. B. Colquitt, the Democratic nominee for Governor of Texas, the record shows was elected Senator, November 6, 1894, and on April 21, 1898, was appointed State Revenue Agent by Governor Culberson.

Hon. Thos. B. Love was elected Representative from Dallas County November 6, 1906; resigned August 31, 1907; appointed Commissioner of Insurance and Banking by Governor Campbell August 31, 1907.

There are probably other cases in point if time afforded an opportunity to investigate the record, but this list of distinguished officers and citizens suffices to show that for at least twenty years the Executive Department of the Government concurred in in some instances by the Legislative Branch, have construed this provision as not applying to members of the Legislature who resigned their seats to accept other appointments. I do not believe that the language of the section would justify the Senate in confirming the nomination of any such appointee who had not resigned before his confirmation arose, but in view of the history of this legislation and the construction it has received, unquestioned for a long score of years by eminent lawyers and patriotic legislators and officers, I am not prepared to advise you that these nominations should be rejected on the ground of ineligibility.

Both officers have resigned their seats and their successors have been elected and have doubtless qualified. To charge that the Constitution has been violated in this instance, would be to challenge the judgment and acts of such men as Hogg, Culberson, Brown, Crane, Campbell, Colquitt, Morrison, Davidson, Love and Whatley, besides many others whose standing as lawyers and whose devotion to the Constitution of the State cannot be successfully questioned.

Again, a distinction might be drawn and supported by authority, distinguishing between an appointment made during the session of the Senate and a vacation appointment made to fill a vacancy. In the latter case it is questionable whether the Governor is not clothed with ample power to vest all the rights and powers of an office in a vacation appointment and whether the functions of the Senate in confirming such appointee is more than a censorship in behalf of the people and that confirmation by the Senate clothes them with no additional powers than they possessed before receiving that grace at the hands of that distinguished body.

However, it is unnecessary to go into that phase of the case. The only question is one of eligibility after resignation to qualify. A favorable construction has been given this provision extending over a long period of time and as Mr. Justice Gaines very aptly said in the case quoted above "it is only in a very clear case that courts would be justified in overriding the action of successive administrations."

Trusting that this discussion of the law and the question will suffice to aid you in solving the problem before you, I beg to remain,

Yours very truly,

JEWEL P. LIGHTFOOT,

Attorney General.

MATRIMONY—FOREIGN CONSULS.

British consul may solemnize marriage contracts under Texas law, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 20, 1910.

Hon. S. W. Barnes, Acting Consul, Care British Consulate, Galveston, Texas.

DEAR SIR: I have your letter of the 16th instant, which is as follows:

"I am instructed by His Majesty's Government to inquire whether the law in force in the State of Texas is to be understood as prohibiting the solemnization of marriages by a British Consular Officer, first, where both parties to the marriage are British subjects; and, second, where one party is a British subject and the other party is a subject or citizen of a State other than the State concerned."

The validity of an attempted marriage is governed by the law of the place where the transaction occurs. See Rice vs. Rice, 81 Texas, 174. Articles 2954 to 2958 of the Revised Civil Statutes of Texas provide for certain formalities for entering into the marriage state, and said Article 2954 authorizes regular licensed or ordained ministers of the gospel, Jewish rabis, judges of the district and county courts and justices of the peace to celebrate the rites of matrimony, but there is no statutory declaration that a marriage entered into without said formalities is null and void. Accordingly, the courts of Texas sustain the validity of what are called "common law marriages," and hold that when a man and woman, competent to contract marriage, agreed then and there to be husband and wife and thereupon consummate such agreement by cohabitation, they are legally married, though they omit some or all of the statutory formalities of a marriage. See Chapman vs. Chapman, 41 S. W., 533; same case 38 Texas, 641.

Therefore, in view of the liberality of the laws of Texas on the subject of marriage, I am strongly of the opinion that our courts would not deny validity to a marriage solemnized on Texas soil before a British Consular Officer between two British subjects or between a British subject and a non-citizen of Texas not permanently domiciled in Texas. The argument in favor of the validity of such marriages will be strengthened somewhat if the laws or customs of England permit them and if a practice of celebrating them has become prevalent among British Consular Officers.

The Congress of the United States has attempted to confer a similar power upon the consular officers of our Government in foreign countries. Art. 4082 of the Revised Statutes of the United States is as follows:

"Marriages in presence of any consular officer of the United States in a foreign country between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States, and such consular officers shall, in all cases, give to the parties married before them a certificate of such marriage,

and shall send another certificate thereof to the Department of State there to be kept; such certificates shall specify the names of the parties, their ages, places of birth and residence."

The only court decision I have been able to find on this subject is the case of Loring vs. Thorndiqe, 5 Allen (Mass.), 257, which involved a marriage solemnized before a consular officer of the United States in the Free City of Frankfort-on-the-Main, but not domiciled there. The marriage in question occurred long before the enactment of the United States statute above quoted. The laws of said Free City of Frankfort-on-the-Main regulated the subject of marriage quite fully and prescribed certain formalities for entering that relation. The contention was made that the marriage in question was void because not in compliance with said laws: but the Supreme Judicial Court of Massachusetts held it valid. This case is very much in point upon your inquiries, and I have no reason to doubt that the courts of Texas would render a like decision, should the question come before them.

Yours very respectfully,
JEWEL P. LIGHTFOOT,
Attorney General.

CONSTRUCTION OF LAWS—BANK GUARANTY LAW

Bond guaranty banks, advertisements of, etc.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, August 22, 1910.

Hon. Frederick C. von Rosenberg, Commissioner of Insurance and Banking.

DEAR SIR: Your favor of the 17th instant encloses us a blank check which was issued by the First National Bank of Clifton, Texas. This bank has printed on the check as an advertisement relative to the guaranty of its deposits the following language:

"The Shield of Security.
"Guaranty Bond Bank.
"Deposits guaranteed under the Guaranty Bond System.
"Absolutely safe."

You desire the opinion of this Department as to whether this advertisement is in violation of Section 31, Chapter 15, Acts of the Second Called Session of the Thirty-first Legislature.

That portion of Section 31 with reference to the advertisement that is permitted to be used by bond guaranty banks is as follows:

"All bond guaranty banks provided for in this Act are hereby authorized and empowered, if they desire to do so, to publish by any form of advertising which they may adopt, or upon their stationery, the following words: 'The deposits of this bank are protected by guaranty bond under the laws of this State.' Said banks are authorized to use the terms * * 'Guaranty Bond Bank' * * * but

they are hereby prohibited from describing said form of guaranty by *any other terms or words than herein named.* Any * * * bond security bank or any officer, director, stockholder or other person, for any such bank who shall write, print, publish or advertise in any manner by any means or permit any one for them or for said bank to write, print, publish or advertise any statement that the deposits of any such bank are secured otherwise than as permitted in this section * * * shall be deemed guilty of a misdemeanor, etc."

From a consideration of the entire provisions of this Section, it is apparent that the evident purpose and obvious intent of the Legislature was to guard against advertisements by State banks calculated to mislead and confuse the general public in regard to the Bank Guaranty System. The Legislature could have adopted no better plan for preventing such advertisements than to specify the identical wording to be used by those desiring to advertise this system, and at the same time inhibit the use of any other language descriptive of such system. We believe, therefore, that the language "otherwise than is permitted in this section" evidently was intended to relate to the words, "who shall write, print, publish or advertise," and not to the words "are secured."

To hold that the provisions of this section only required a substantial compliance with its terms would render the same difficult, if not altogether impossible of enforcement, as there would be no fixed rule by which it could be determined when a bank had in its advertiesment exceeded the authority given by the provisions of the Act describing the bank guaranty system.

You are, therefore, respectfully advised that the language used in the advertisement of the First National Bank of Clifton, Texas, does not comply with and is in violation of the provisions of Section 31 of the Acts of the Thirty-first Legislature providing for the guaranty of bank deposits, and that any advertisement of this or any other bank descriptive of the guaranty system which does not use the specific form of advertisement set forth in Section 31 is not in compliance therewith.

Yours very truly,
C. A. LEDDY,
Assistant Attorney General.