OFFICIAL OPINIONS

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

OPINIONS RELATING TO BANKS AND BANKING.

Op. No. 2752, Bk. 63, P. 20.

BANKS AND BANKING—LIQUIDATION.

1. When a bank has been closed by the Commissioner under Article 369, Revised Statutes, 1925, the Commissioner is entitled at his option either to follow out through the Attorney General the court receivership provided for in Articles 370 and 371, or if he pleases, liquidate the insolvent bank himself through a special agent upon the plan provided for in Articles 451 et seq.

Construing the Banking Laws of 1905 and 1909 as codified in 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 26, 1928.

Honorable James Shaw, Banking Commissioner, Capitol, Austin, Texas.

DEAR SIR: By your letter of the 23rd instant you state that the Yoakum State Bank was closed by you under Article 369; that it was hopelessly insolvent and could not resume business, and desire to know whether you have authority under the law to liquidate it through a special agent, or whether on the contrary it must be liquidated by a receiver appointed by the court.

You are respectfully advised that you have the power to liquidate the bank independent of a court receivership.

The case of Hall vs. Tyler County, 247 S. W. 582, by the Beaumont Court of Appeals squarely determines this question in favor of your power to liquidate independent of the court. It was, however, decided in 1923 under the law as the Legislature enacted it, and not under the present status thereof as found in 1925 Code.

The court, after quoting the articles at length, said:

"* * * that the proper construction of Articles 453 and 523 (1911), leaves it optional and discretionary with the Commissioner of Insurance and Banking of this State, as to which of such methods of liquidation of a state bank he should adopt—whether by liquidating it through a special agent as provided in Article 453, or by causing the Attorney General of the State to apply for a receiver."

Though it is true that in this opinion much stress is naturally laid upon the alternatively permissive language of Article 453 to the effect that when a bank shall come into the hands of the Commissioner, either voluntarily or otherwise, he may proceed to wind up its affairs either through a receiver or through some competent person,—which language has been lost in the 1925 codification; yet, we are not persuaded that the decision hinges upon this provision, but is rather more broadly founded upon the general intent and purpose of the bank liquidation law of 1909 as controlling.

As far as former Article 453 is concerned it has largely dis-

solved away. No part of it is embraced in present Article 371—notations in the Code to the contrary notwithstanding. The requirement of a bond from a special agent was in Article 372, Revised Statutes, 1925, but was repealed by Chapter 284, Acts of 1927, because of its being a duplication of Article 349. The only remnant left of former Article 453 is found in the notice provision of present Article 451.

The court in the Hall case, besides demonstrating that the proviso that a bank shall not continue in charge of a special agent longer than sixty days, which on codification was eliminated from the law, has no restraining effect, and after reconsidering many other provisions of the 1909 banking law, which are now substantially the same, says:

"It is observed that such acts as the foregoing articles authorize on the part of the Commissioner are usually performed by court receivers, but the Legislature of this State has provided that, in cases of *insolvent State banks*, these things are to be done by the Commissioner of Insurance and Banking, who is a State officer."

Perhaps not enough stress is in this opinion laid upon the proposition that Articles 451-474, Revised Statutes, 1925, are parts of the 1909 Act, and in so far as any conflict existed, they would by implication modify and amend the already existing laws comprised in Articles 369-371, Revised Statutes, 1925.

Articles 451 and 453, Revised Statutes, 1925, are perhaps most significant in their implications that liquidation of an insolvent bank may be had under the Commissioner. The designation of "insolvent" is not appropriate to a bank which may be either solvent or insolvent and has simply *voluntarily* turned over its business to the Commissioner under Article 450. The latter article is more or less complete in itself as to the Commissioner's handling of a bank that voluntarily surrenders itself, and it might be added that it had its origin in the Banking Act of 1905, being repeated in the more complete Banking Act of 1909, appearing as Articles 484-485 and Article 523 in the Revised Statutes of 1911. Neither in the 1909 act nor the 1911 Code is it thrown in the illogical conjunction in which it is now found in the 1925 Code,—that is to say, followed by provisions as to the liquidation of insolvent banks.

We have not been able to find any legislative origin, aside from the 1925 Code, for the concluding terms of Article 371, to the effect that if a bank comes voluntarily into the hands of the Commissioner, no receivership shall be appointed but he shall appoint a competent person in lieu thereof. However, there is no reason to suppose that this does more than simply bar the option of a receiver in the event of voluntary surrender. Article 371, besides this feature, is entirely from the 1905 and not the 1909 Act.

It is true that our construction is based upon legislative implication, which is less clear now than it was at the time of the decision in the case of Hall vs. Tyler County. Yet we believe that decision sound and further believe the doctrine stated in

G. C. & S. F. Ry. Co. vs. F. W. N. O. Ry. Co., 68 Tex. 107, and exemplified in the case of Capley vs. Hudson, 286 S. W. 581, to be correct, same being expressed in Judge Stayton's language, as follows:

"The Revised Statutes substantially enacted the former laws upon this subject. If it had been the will of the Legislature to abrogate the rule established in the case cited, it is to be presumed that in revising the laws they would have clearly expressed that intention in some special provision upon the subject."

To summarize our construction of the law we believe that under Article 539 a solvent bank may wind up its business through its own board of directors as provided in that and the succeeding article; that under Article 450 any bank may place its affairs under the control of the Commissioner by simply posting notice to that effect upon its front door, in such instances no receiver ever being appointed, but the Commissioner instead appointing a competent person to liquidate as provided in Article 371; that when a bank has been closed by the Commissioner under Article 369, Revised States of 1925, the Commissioner is entitled at his option either to follow out through the Attorney General the court receivership provided for in Articles 370 and 371, or if he pleases, liquidate the insolvent bank himself through a special agent upon the plan provided for in Articles 451 et seq., in the latter event, eventually calling a meeting of the stockholders of the bank to determine whether he shall be elected by them for that purpose, as provided in Article 468.

As stated by the court in the case of Hall vs. Tyler County, supra,—

"Considering the several articles of our statute above mentioned, we cannot escape the conclusion that it was the intention of our Legislature to vest the exclusive right and authority in the Commissioner of Insurance and Banking of this State to liquidate and wind up the affairs of an insolvent state bank, and that, where that officer has proceeded, as in this instance, to do so, he cannot be interfered with by any court at the instance of a creditor of the insolvent bank by displacing the commissioner through the appointment of a receiver."

Statutes of similar kind have been held to exclude the ordinary function of the court in the appointment of a receiver, and have been upheld.

State vs. Norman, 206 Pac. (Okl.) 522.
Abbott vs. Morris, 132 S. E. (W. V.) 372.
Hanson vs. Sogn, 208 N. W. (S. D.) 228.
Koch vs. Missouri Lincoln Trust Co., 181 S. W. (Mo.) 44.

There can be no objection that a special agent under the Commissioner is appointed by an executive officer.

Bushnell vs. Leland, 164 U. S. 684.
Jeffries vs. Brown, 135 Pac. (Kans.) 582.
Kerry vs. Giles, 9 Ga. 253.
Erwin vs. Davenport, 56 Tenn. 44.

Very truly yours,
C. W. TRUEHEART,
Assistant Attorney General.

Op. No. 2759, Bk. 63, P. 70.

BANKS AND BANKING.

A bank incorporated under the laws of Texas is without authority to pledge any of its assets to secure a deposit.

March 4, 1929.

Honorable James Shaw, Banking Commissioner, Capitol.

DEAR SIR: This department acknowledges receipt of your letter of February 25th reading as follows:

"One of our State banks contemplates taking a deposit from a National bank in the same town, and the National bank will require the State bank to put up certain bonds, now owned by the State bank, as additional security.

"Will you please advise me whether or not the aforementioned State bank is within the law in pledging its assets to secure the above mentioned deposit?"

Article 393 of the Revised Civil Statutes, among other powers, authorizes banking corporations to receive money on deposit and allow interest thereon. This article does not authorize a bank to pledge any of its assets to secure a deposit. In Commercial Bank & Trust Company vs. Citizens Trust Company, 156 S. W. 160, the Court of Appeals of Kentucky held that the pledging of assets to secure a deposit is not necessary for the conduct of the bank's business of "receiving deposits and paying interest thereon."

Article 515 limits the amount of indebtedness of a bank to the amount of its capital stock, excepting certain demands among which is money deposited with the bank.

Article 517 prohibits any bank from hypothecating or pledging as collateral its securities to an amount greater than fifty per cent of the amount borrowed upon bills payable, certificates of deposit or otherwise.

We see therefore that the general statute sustaining the powers of banking corporations does not authorize the pledging of its assets to secure deposits. The only specific provision that we find authorizing the pledging of its securities for deposits is in Article 2547 as amended by both the Fortieth and Forty-first Legislatures authorizing pledging of securities when acting as county depository.

Since the Legislature specifically limits the amount of the securities that a bank may pledge for the amount of money borrowed, we believe that it was not the intention of the Legislature to authorize the pledging of securities merely for deposits.

In the case of Commercial Bank & Trust Company vs. Citizens Trust Company, 156 S. W. 160, above mentioned, the courts specifically held that a bank has neither expressed nor implied power to secure the payment of a depositor by pledging its assets, and that a pledge thereof was ultra vires and illegal. We quote at length from this case as follows:

"It would be a dangerous implication to deduce from the words of the statute, which should rather be construed strictly, for the benefit of the

stockholders and protection of the depositors. The exercise of such a power is therefore clearly beyond the terms of the law, or any reasonable or necessary implication which the court would be authorized to deduce from the language of the statute, and would tend to lessen the usefulness of banks as great public institutions by destroying public confidence in them. Such a practice, if indulged and authorized, might work great injustice and inflict financial loss, not only upon the depositors, but upon the stockholders as well. Large depositors, if secured, might absorb the greater part of the assets of the bank, and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law contemplates, and was evidently framed to insure, fair and uniform dealings by the banks with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference. Public policy will not, therefore, tolerate a practice which might, sooner or later in the event of financial trouble with the bank, enable it to pay and protect the favored few at the expense of the equally deserving many. If the fact was known that a bank had secured some one or more of its depositors and left the others unsecured, no prudent person would deposit with it. No bank would advertise that it engaged in such a practice, because depositors, who were not provided for, would be driven away. The very fact that the transaction is one that will not stand the test of publicity is a strong argument against its legality, as well as its necessity. Banks publish statements of their assets, and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits, when its assets were secretly pledged.

* * * * * * * * * *

"Counsel for appellee also cites and relies upon Bolles on Modern Law of Banking, p. 479, Morse on Banking (4th Ed.), par. 47, and Pratt's Digest of National Banking Laws, p. 11, to the effect that among the implied powers of a bank is that to secure deposits. This statement of the law is not elaborated upon by any one of the authors, and we are constrained to believe and hold that the authors used this expression in its limited sense, and that it was meant to apply to that class of cases where, by express statute, a particular deposit was to be secured before it could be placed in bank. Under such circumstances, the bank, before receiving it, would necessarily have the right to execute the bond, but this would not, by any means, justify the claim that the bank had the right to secure other deposits simply because it had the right to secure a particular deposit which the law expressly required to be secured before it could be deposited. But, whatever meaning these distinguished authors may have intended should be given the statement referred to, we are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors. There being no express authority given to a bank to secure a deposit by pledge of its assets, and it being apparent that such a practice would have a tendency, and pave the way to the perpetration of fraud, by putting it in the power of the officers of a bank to give a preference to favored customers, it cannot successfully be maintained that a bank has the implied right or power to do so. Banks undoubtedly have the right to do many acts and things not expressly authorized by their charters, or specifically designated in the general laws adopted for their organization, regulation, and government. These are termed implied powers, but such powers are those found necessary to enable the banks properly and expeditiously to carry out and enjoy the powers, rights, and privileges expressly given them. Before a bank should be adjudged entitled to exercise any power not expressly given, it should be clearly established that such power is essential to the proper conduct of its business, and necessary to enable it properly to enjoy, use, and carry out its express powers. When

such test is applied to the claim of right, on the part of a bank, to prefer one of its depositors over another, it is apparent that the right should be denied. The exercise of such a power would necessarily be fraught with great possibilities for the perpetration of fraud, and would undoubtedly have a tendency to destroy the faith of the depositing public in banking institutions."

The court also discusses several other decisions which are relied upon as contrary to its views, but distinguishes these cases and holds that the same are not contrary to its opinion.

In a note to 45 L. R. A. (N. S.) 950, it is said that little direct authority upon the question has been found, but states that the above opinion seems to be well reasoned, and the conclusion therein reached to be sound, although a different conclusion has been reached under the statutes and upon the facts and circumstances involved in review of other cases most nearly in point.

It is our opinion, however, the decision in the Kentucky case above quoted is sound and we believe that the same should be followed, and you are accordingly advised that a State bank is without authority to pledge its assets to secure a deposit, except where specially provided by statute.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2762, Bk. 63, P. 86.

BANKS AND BANKING—STATUS OF PROTECTED DEPOSITS IN GUARANTY FUND BANKS FAILING BEFORE INSOLVENCY OF GUARANTY FUND.

1. Guaranty fund claims for deposits in banks failing before insolvency of guaranty fund, should be paid in full if suit was filed prior to such insolvency of the guaranty fund occurring September 29, 1926.
2. Otherwise, such guaranty fund claims should be paid only upon a pro rata basis.

March 14, 1929.

Honorable James Shaw, Banking Commissioner, Capitol.

DEAR SIR: By your letter of the 12th instant you ask to be advised as to whether deposits of guaranty fund banks failing prior to the insolvency of the guaranty fund occurring September 29, 1926, which deposits have been established by final judgment of a court of competent jurisdiction, as guaranty fund claims, should be paid by you in full or only on a pro rata basis with protected deposits of banks failing after September 29, 1926.

Claims for these protected deposits would be of two kinds—First, those on which suits had been filed prior to September 29, 1926, and second, those on which suits were not filed until subsequent to that date. In our opinion those of the first variety should be paid in full and those of the second variety only on a pro rata basis. The obvious reason for this distinction is that the first have been diligent in pressing their rights and should

not be prejudiced by the fact that the Banking Commissioner, as ascertained by judgment of the court, improperly denied their claims as guaranty fund claims.

On the other hand, those who have not been diligent in pressing their claims in the manner provided by law are in no better attitude than the banks failing during solvency of the guaranty fund with respect to the unused part of their contributions to such fund (Article 445), which was held to be recoverable only upon a pro rata basis when the banks had failed to seek enforcement of their rights until after the insolvency of the guaranty fund on September 29, 1926. Lydick vs. State Banking Board, 12 S. W. (2nd) 954.

Little more can be added to the above conclusions except to say that the pro rata basis of distribution held to obtain in Lacey vs. State Banking Board, 11 S. W. (2nd) 496, was predicated upon the insolvency of the guaranty fund, and the holding was made with respect to protected depositors of banks failing after the insolvency of the guaranty fund. It may be conceded that the Lydick case is not as clear as it might be in making a distinction between a mere failure to pay and the more crucial failure to press payment by remedies available under the law; but the distinction above made is found in the facts of the case, and we know of no provision of law or principle of equity that would warrant the Banking Board in paying protected depositors of a particular bank in full because their claims were allowed by the Banking Commissioner against the guaranty fund, and refusing like payment to protected depositors of the same bank because the Banking Commissioner improperly refused and chose to litigate payment.

Yours very truly,
C. W. TRUEHEART,
Assistant Attorney General.

Op. No. 2766, Bk. 63, P. 103.

BANKS AND BANKING—VISITORIAL POWER OF BANKING COMMISSIONER.

Senate Bill No. 232, Chapter 275, Acts of the Fortieth Legislature, construed to come within the provisions of Articles 1520-1524, Revised Civil Statutes of 1925, authorizing the Banking Commissioner to make annual examination of corporations created under the provisions of Chapter 275, Acts of the Fortieth Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 27, 1929.

Honorable James Shaw, Commissioner of Banking, The Capitol.

DEAR MR. SHAW: This department is in receipt of your favor of March 26, in which you ask for an opinion as to whether concerns organized under Senate Bill 232, Chapter 275, of the

Fortieth Legislature, come under the supervision of your department.

Article 1520, Revised Statutes, 1925, reads as follows:

"This subdivision shall embrace corporations created for any or all of the following purposes: To accumulate and lend money, purchase, sell and deal in notes, bonds, and securities, but without banking and discounting privileges; and to act as trustee under any lawful express trust committed to them by contract and as agent for the performance of any lawful act. No such corporation shall act as agent or trustee in the consolidation of or for the purpose of combining the assets, business or means of any other persons, firms, associates or corporations, nor shall such corporation as agent or trustee carry on the business of another. No such corporation shall be authorized to engage in or carry on any such business unless it shall have an actual paid in capital of not less than ten thousand dollars."

Article 1522 reads as follows:

"The Banking Commissioner shall examine or cause to be examined, such corporation annually. Said corporation shall pay the actual traveling expenses, hotel bills, and all other actual expenses incident to such examination, and a fee therefor not exceeding one-eighth of one per cent of its actual paid in capital."

The foregoing Articles 1520 and 1522, as originally enacted, authorized the creation of corporations to act as trustee and agent, to accumulate and lend money, purchase, sell and deal in notes, bonds and securities, without banking and discounting privileges; and provided that the Commissioner of Insurance and Banking should annually examine such corporations.

It will be noted from the foregoing that the codification of 1925 made a change in the law as originally enacted. Article 1520, as it now stands, does not authorize the creation of corporations for the purposes set out in said article, but now provides that this subdivision, referring to the subdivision styled "Loan and Brokerage Companies," shall embrace corporations created for any or all of the purposes enumerated in said present Article 1520. The authority for the creation of corporations provided in the original act of 1919, was by the codifiers, inserted in the law as Subdivision 40 of Article 1302, Revised Statutes, 1925. Article 1522 is listed under the subdivision of Loan and Brokerage Companies conjunctively with said Article 1520.

Black on Interpretation of Laws (2nd Ed.), page 590, says:

"The provisions of a code or revision are primarily to be interpreted in and by themselves alone."

We must, necessarily, conclude from the form and language of the Articles 1520 and 1522, as passed under the codification and revision of 1925, that the Legislature intended Articles 1520 and 1522 not as an authority for the creation of particular corporations, but as regulatory of the particular classes of corporations enumerated in said Article 1520. The article, as it now stands, is of general import and would give to the Banking Commissioner the duty of making annual examination of corporations

created for any or all of the purposes particularly set forth by said Article 1520.

Senate Bill No. 232, Chapter 275, Acts of the Fortieth Legislature, authorized corporations to be formed, and used the following language:

"A private corporation may be formed for any one or more of the following purposes, without banking or insurance privileges: to accumulate and loan money, to sell and deal in notes, bonds and securities; to act as trustee under any lawful express trust committed to it by contract, and as agent for the performance of any lawful act; to subscribe for, purchase, invest in, hold, own, assign, pledge and otherwise deal in and dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities or obligations, contracts and evidences of indebtednesses of foreign or domestic corporations not competing with each other in the same line of business, to borrow money or issue debentures for carrying out any or all purposes above enumerated."

It will be noted from a reading of this act, that a corporation formed under the authority of this act, would have the following purposes which are absolutely similar to the purposes which Article 1520 provides shall be included by its provisions, towit: to accumulate and loan money, to sell and deal in notes, bonds and securities, to act as trustee under any lawful express trust committed to it by contract, and as agent for the performance of any lawful act; without banking or insurance privileges.

It will, perhaps, be contended that said Senate Bill No. 232, authorizes the creation of private corporations for particular and special purposes, and as special authority for such corporations, and therefore would not be subject to the provisions of Articles 1520 and 1522. Having heretofore concluded that Article 1520 was of general import, we think, therefore, that the special law or authority for forming corporations provided by said Senate Bill No. 232, must necessarily be read in connection with the provisions of Article 1520. Endlich on Interpretation of Statutes, Section 56, page 71, says:

"But it is obvious that statutes granting special privileges are in one sense to be read together and construed in conformity with general statutes laying down universal rules applicable to the class of corporations to which the one claiming under the special act, belongs. Thus, it has been held in Pennsylvania that a railroad company incorporated by or under special acts, are subject to the regulation of the general railroad laws, * * * except in so far as such regulations are especially altered by the special acts, or are so inconsistent herewith as to evince design to supersede them."

Articles 1520 and 1522 were in force and effect at the time of the passage of Senate Bill 232, Chapter 275 of the Fortieth Legislature. Said act of the Fortieth Legislature in no way evinced an intention on the part of the Legislature to exempt corporations organized by the authority of said act, from the operation of Articles 1520 and 1522. None of the provisions of Senate Bill No. 232 are inconsistent with the terms and conditions of Articles 1520-1522. We are, therefore, of the opinion that corporations organized under the provisions of Senate Bill 232, which carry any of the purposes enumerated by Article 1520 are subject to

visitation and annual examination by the Banking Commissioner. The theory has been advanced that there are corporations already existent in this State organized by authority of Senate Bill No. 232, that include as their purpose clause all and entirely the various purposes set out in Senate Bill No. 232; that there are several purposes authorized for the formation of corporations by Senate Bill No. 232, which are not set out or included by Article 1520, and that, therefore, a special kind of corporation has been created that would not be subject to the provisions of Articles 1520-1522. We can not agree that this state of facts would exclude the Banking Commissioner from visitation and examination of said corporations so created. The purposes of Articles 1520 and 1522, in creating a regulation and supervision of corporations created for the purposes enumerated in said articles, could not be defeated by the mere fact that a corporation was formed with further and additional purposes than those enumerated by Article 1520. It may be that if the books of a corporation created for all the purposes contemplated by Senate Bill 232, were separately kept as to the business transacted under the authority of the additional purposes, that the Banking Commissioner could only examine the books and business transacted under authority of the purposes enumerated by Article 1520, but if the corporation did not see fit to do this, and handled the entire business of the corporation together, we must again say that we do not think this would be sufficient to defeat the regulatory and supervisory powers given to the Banking Commissioner over corporations having powers as enumerated by Article 1520.

The question submitted by your letter, applies only to corporations organized under Senate Bill 232, Chapter 275, Acts of the Fortieth Legislature, and it will be understood that this opinion covers only such corporations, and does not pretend to pass upon this question as regards corporations organized for the purposes enumerated by Subdivisions 48, 49 and 50, of Article 1302, Revised Statutes of 1925.

Trusting that this gives you the information desired by you, I am,

Very truly yours,
W. DEWEY LAWRENCE,
Assistant Attorney General.

OPINIONS RELATING TO CORPORATIONS.

Op. No. 2788, Bk. 63, P. 282.

CORPORATIONS—STOCK—COMMON—PREFERRED.

In the absence of a provision in the charter or by-laws of a domestic corporation authorizing the issuance of preferred stock, said corporation has no authority to issue preferred stock without the unanimous consent of all common stockholders.

Authorities considered:
Corpus Juris Corporations, Vol. 14.
Fletcher Cyc. Corps. Stock and Stockholders, Vol. 6.
Reagan Bale Co. vs. Heuermann, 149 S. W. 228.
Kent vs. Quicksilver Min. Co., 78 N. Y. 159.
Ingraham vs. National Salt Co., 130 Fed. 676.
Campbell vs. Zylonite Co., 11 L. R. A. 596.
Ernst vs. Elmira Municipal Imp. Co., 54 N. Y. S. 116.
Craety vs. Peoria Law Library Assn., 76 N. E. 707.
Knoxville R. Co. vs. Knoxville, 37 S. W. 883.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 3, 1929.

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

DEAR MADAM: Your letter of August 24th addressed to the Attorney General has been referred to the writer for attention. In said letter you request an opinion from this Department as to whether or not a domestic corporation chartered under the laws of Texas, said charter providing for common stock only, may amend its charter so as to issue preferred stock.

A corporation is an artificial being, existing only in contemplation of law. Being a creature of the law it possesses only those properties and privileges which its charter confers upon it. Its existence, powers, and liberties are fixed by its charter. If a corporation is formed and the charter authorizes the issuance of common stock only, the purchaser of that common stock has a right to assume that no other kind or class of stock will be issued by the corporation. This common stockholder has a vested right in the earnings while in existence and the property and assets of the corporation upon dissolution. The stock is a contract between the corporation and the stockholders of which the charter or articles of incorporation are a part. The stockholder has a right to assume that this contract will not be impaired or changed in any of its fundamental or basic particulars without his consent. Of course, if the superior law or the charter authorizes the majority to amend the articles of incorporation the minority is bound by the change, but this power must be expressly given in the charter. In such case no vested right is destroyed or impaired, because the stockholder is charged with notice of the provisions of the charter which are in existence at the time he purchases the stock. The rule seems to be that the majority may not bind the minority as to certain fundamental

changes in the absence of specific authority by charter provisions to do so; one of these fundamental changes is the issuance of preferred stock where the charter provides for common stock only.

It is, however, possible for a corporation, before offering its stock for sale, and before any stock is subscribed by the stockholders, to provide in its by-laws for the issuing of preferred stock, and then offer its stock for subscription. In such instance the subscribers will know what can be done and will contract with this knowledge and be bound accordingly.

Where the stock is divided into equal shares of a specific kind and is issued and subscribed for, no right to create preferred or a different class of stock being reserved, the subscriber or purchaser has acquired a vested right to share in the earnings of the corporation and its property upon dissolution, and this right can not be impaired without his consent. Where the rights of the common stockholders have become fixed, preferred stock can not be issued thus changing and prejudicing the vested rights of such common stockholders without unanimous consent.

You are, therefore, advised that it is the opinion of this department that if a domestic corporation, when it issues common stock, is not expressly authorized to issue preferred stock by its charter, and if there is no provision for such stock in its articles of association, it can not afterwards issue the same without the unanimous consent of the holders of the common stock.

Very truly yours,

JACK BLALOCK,
Assistant Attorney General.

Op. No. 2792, Bk. 63, P. 302.

CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS—AMENDMENT OF BY-LAWS SO AS TO CHANGE VOTING POWER OF STOCKHOLDERS.

1. The statutory power of a building and loan association to amend its by-laws is subject to the following limitations: The amendment must be reasonable and consistent with the law of the land, the charter of the association and the statute under which it was created, and is further subject to the limitation that it must not contravene the principle of mutuality which is basic in associations of this character, and provided also it does not interfere with vested rights.

2. Subject to the above limitations the voting power of the various classes of shareholders could be defined in an amendment to the by-laws.

3. The particular amendment submitted and passed upon in this opinion is such that there is doubt as to its reasonableness and as to whether it does not contravene the principle of mutuality, but since the Banking Commissioner has the power of approval or disapproval, the department cannot say, as a matter of law, that the amendment is unreasonable or contravenes the principle of mutuality.

4. Even with approval of the Banking Commissioner the amendment could not be adopted without unanimous consent of all shareholders since it would interfere with the vested rights of present shareholders. Neither could such amendment change the voting rights of shareholders where the statute fixes them.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 22, 1929.

Honorable James Shaw, Banking Commissioner, Capitol.

DEAR SIR: Attorney General Bobbitt is in receipt of your inquiry of the thirteenth instant reading as follows:

"The American Home Savings and Loan Association, Fort Worth, Texas, proposes to amend its by-laws and provide for the sale of permanent reserve fund stock, provided the holders of reserve fund stock can have greater voting privileges than the holders of other classes of stock. They want to have Article 4, Section 5, of their by-laws read as follows:

"Section 5. Voting Rights.—Each investment or loan member in good standing shall be entitled to cast a vote or votes in the election of directors or by transaction of business at regularly called shareholders' meetings, whether said shares are wholly or partially paid up, in accordance with the following schedule, namely: Fully paid and advance paid shareholders shall be entitled to one vote per share. Regular installment and loan shareholders shall be entitled to one vote for each ten shares. Reserve fund stockholders shall be entitled to five hundred votes for each share. No member shall be entitled to vote installment stock who is delinquent, in payments due 30 days or over, nor any investment stock that carries a collateral loan with the association which has run over six months. A plurality of all votes cast shall be sufficient to elect any director. In case of a tie between candidates it shall be decided by lot. The members present shall constitute a quorum. Absent members may vote by proxy assigned to another member. All elections of directors shall be by ballot, excepting the first election, and the polls for voting shall be kept open from one to four o'clock p. m., unless the board of directors change the hours and give the proper notice of said change. Prior to such election, the secretary shall appoint three (3) shareholders to be the judges thereof, any two of whom may hold and conduct same. The decision of the majority of the election judges shall be final as to the voting rights of the members."

"We will thank you to advise if they can legally adopt the proposed amendment."

It may be stated that at present under the by-laws all shareholders of the above association have equal voting power, one vote for each share.

The Building and Loan Association Law (Chapter 61, Acts Second Called Session, Forty-first Legislature) expressly provides in Section 2 that every such association before proceeding to do business shall adopt and have approved by the Banking Commissioner of Texas by-laws for the regulation and management of its business, "not inconsistent with the conditions herein provided."

The statute in Section 32 also expressly authorizes building and loan associations to amend their by-laws by certain vote.

It is also a rule of law even if the statute were silent that building and loan associations, like other corporations, have authority to make by-laws to carry out the purposes for which the corporation is created. 4 R. C. L., page 344; 9 C. J., page 925.

However, the statutory authority to make and amend by-laws is not without its limitations. Such by-laws, in order to be valid, must be reasonable and must be consistent with the law of the land, the charter of the association and the statute under which such association was created. Also, they must not con-

travene the principle of mutuality which is basic in associations of this kind. 9 C. J. 925. See also 4 R. C. L., pages 344-345.

It is also a rule of law that the power to amend the by-laws is subject to the same limitations as the power to make them in the first place. As stated in 14 C. J., page 357:

"The power of alteration or amendment is subject, however, to the same limitations as the power to adopt, and alterations must therefore be reasonable and they must not interfere with the rights which have become vested under the operation of the original by-laws or otherwise."

By-laws cannot interfere with vested rights. 9 C. J., p. 926. Mr. Endlich, in his work on Building Associations, page 234, says:

"A by-law cannot become effective without the consent of the member substantially to alter the right he acquired under a former state of the rules, in reliance upon which presumptively he assumed the membership relation, and entered into the contract of membership."

See also 14 C. J., page 188; 14 C. J., p. 852.

However, assent to the change in by-laws binds the assenting stockholders. We quote the following from page 289 of 14 C. J.:

"Under any theory stockholders or members who assent to an amendment of the charter are bound."

On the question of vested rights, 14 C. J., p. 358, says:

"Notwithstanding that the trustees have the authority to amend the by-laws, yet, they have not the right to so amend them as to deprive the stockholders of those fundamental powers by which they control the officers of the corporation."

The contract or certificate of shares made by a building and loan association to a person constitutes that person a member and a shareholder; and these certificates, together with the by-laws, constitute the agreement between the parties and the standard by which the rights and liabilities are to be determined. 4 R. C. L., p. 349.

It is a general rule of corporation law that voting power may be lawfully separated from particular shares, and it is competent for instance for a corporation, in issuing certificates of preferred stock to stipulate therein that the holders shall not be entitled to vote the same at stockholders meetings. 14 C. J., p. 901.

But it has been held that the rights conferred on individual stockholders to vote in a certain proportion is vital to such stockholder and cannot be taken from him by all of the other stockholders even with the cooperation of the directors and officers. The following language is taken from 14 C. J. 902:

"It has been held that the rights so conferred on the individual stockholder to vote in proportion to the number of his shares is vital to him and cannot be cut off or curtailed by the action of all the other stockholders even with the co-operation of the directors and officers."

To the above effect are the following cases: Stokes vs. Continental Trust Company, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969; Witherbee vs. Bowles, 201 N. Y. 427, 95 N. E. 27.

Changing the method of voting at corporate meetings is one of the things that have been expressly held to be so fundamental as to require unanimous consent. 14 C. J. 189. In re Newark Library Association, 64 N. J. L. 217, 43 A. 435; Loewenthal vs. Rubber Reclaiming Co. 52 N. J. Eq. 440, 28 A. 454.

It seems clear that the foregoing authorities sustain the proposition that while the voting rights of shareholders may be dealt with in by-laws and amendments thereto, yet the power to change the voting rights of the shareholders is subject to the limitation that the amendment, under all circumstances, must be reasonable and consistent with the law of the land, the charter of the association and the statute under which such association was created, and subject to the further limitation that the amendment cannot contravene the principle of mutuality, which, under the authorities, is basic in associations of this kind, and subject further to the limitation that any amendment changing the voting power cannot interfere with vested rights of the shareholders. We are of the opinion also from the authorities cited, and in reason, that the right to vote on the part of the shareholders is a vital and fundamental right that is vested in the shareholder when he joins the association and that it cannot be taken away from the individual shareholders without unanimous consent.

As a matter of course, the amendment, if adopted, would be invalid in so far as it conflicts with the voting power of the shareholders as conferred by statute. For instance, in Section 55 of the building and loan statute, certain authority is given to be approved by two-thirds of all the shares of all members. This voting power could not be taken away by the by-laws.

The particular amendment submitted and passed upon in this opinion borders on unreasonableness and also is such that there is doubt as to whether it does not contravene the principle of mutuality. However, the department must resolve the doubt in favor of the validity of the amendment subject to the various limitations mentioned herein, particularly in view of the fact that power resides in the Banking Commissioner to approve or disapprove the by-laws of these associations. If, in his discretion, he reaches the conclusion that this amendment should not be approved and disapproves the same, we are of the opinion that no court would interfere with his action.

It will be noted from the authorities discussed and quoted from that power to amend by-laws does not include the power to interfere with vested rights and, further, that the right to vote is of such a vital and fundamental nature as to be a vested right which cannot be taken away without unanimous consent.

Therefore, since this amendment materially and radically changes the voting rights of the shareholders, it would have to be adopted by unanimous consent of the shareholders in order to bind those who are members of the association prior to the adoption of the amendment.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

OPINIONS RELATING TO DEPOSITORIES.

Op. No. 2756, Bk. 63, P. 46.

DEPOSITORIES—COUNTY DEPOSITORY—TAX COLLECTOR.

1. A county depository is liable to the State and county for interest on all credits given to the collector's account from the date that the credit is given, even though the credits may be represented by checks or drafts drawn on other banks.
2. A county depository may accept from the tax collector checks and drafts for collection only, and not credit the account until the cash is actually received.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 14, 1929.

Honorable S. H. Terrell, State Comptroller, Austin, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 13th instant. You ask to be advised whether a county depository may deduct from the interest due the State and county on the tax collector's account an amount to take care of what is commonly called "float." By this term is meant those items credited to the account of the tax collector not represented by cash but by checks or drafts drawn on banks other than the depository, and on which the depository may not realize the actual cash until several days after the credit is given to the tax collector. This department has heretofore written you in a letter opinion that the bank should be allowed to make a deduction on the interest due for these amounts for which credit was given the collector and the actual money not received until several days thereafter.

However, since writing you on this matter, the Third Court of Civil Appeals at Austin has rendered a decision in the case of State of Texas et al. vs. A. R. Harvey et al., No. 7294, which opinion is not yet published. In this case the court held that in cases where the depository gave the tax collector credit for a draft which was later dishonored, the depository had no authority to charge the same back to the account of the tax collector. The court stated that the depository and the tax collector could have agreed that the collector's account should not be credited with the amount of a draft until the same was paid, and thus protect the depository, but that to permit and enforce a private agreement between the depository and the collector would be to disregard wholly the protection which the State has by statute placed about her public funds. The court further says that the depository acts in a dual capacity, (1) as an ordinary banking institution; and (2) as a duly appointed depository of the county, and that the various decisions dealing with collections and deposits made under ordinary banking transactions do not apply, but that a consideration of the depository statutes is of first importance. No motion for rehearing has been filed in this case

and the judgment of the same has become final. We are unable to find any opinion of the Supreme Court on this question, but in view of the finality of the judgment in this case, we believe that we should follow the same. We are unable to see any distinction between the liability for credit for an unhonored draft and the liability for interest from the date that credit is given.

You are advised, therefore, that it is our opinion that a county depository is liable for interest from the time that credit is given to the tax collector's account, even though some of the credits might represent checks or drafts drawn on other banks and the cash not actually realized by the depository until several days thereafter. If the depository does not desire to pay interest on such items, then it should take the same for collection only and not credit the collector's account until the cash is actually received.

Yours very truly,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2765, Bk. 63, P. 96.

COUNTY DEPOSITORIES—APPLICATION OF ARTICLE 2550 TO STATE FUNDS.

1. The terms of Article 2449 are applicable to depositories selected under Article 2550.
2. Article 2550 provides an alternative method of selecting county depositories, and the bonds of depositories selected under this article cover State funds placed there by the tax collector, pending his report and settlement.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 27, 1929.

Honorable A. R. Stout, County Judge, Waxahachie, Texas.

DEAR SIR: We are in receipt of your letter of March 12th inquiring as follows:

"On February 11th, after due hearing, the matter of awarding a contract for the county depository came on to be considered before the commissioners court of Ellis. The two highest bids were the same 2.05. None being the highest, the court declined all bids and then let these two selfsame banks have the award, on the bond system (the rem, the bonds themselves) one bank one-third and the other two-thirds. Each bank entered into the form contract, listing its bonds, both in the bond itself and in trust agreements attached thereto, which I am sure you are familiar with, the substance of these trust agreements, being that the bonds were to be held in some other bank (a safer place well equipped) subject to the order of Ellis County. The trust agreement attached to the bond of each bank states that such bank was duly selected as a 'County Depository.'"

"I have mailed these bonds to the Comptroller twice. The first time he sent them back saying that he could not approve them, as there were two, that only one bank could be the depository. I sent them back again and referred him to Article 2550, and he again sends them back to me, stating that since the depositories were selected under Article 2550, as if it provided some different form or procedure, he had nothing to do with the matter and was, therefore, returning them to me.

"Under such circumstances, which are as stated, I would like to know whether or not it is up to him to say whether or not the bonds should be approved, that is, should he approve them, if they are otherwise good, and what, if anything, are the consequences, if he does not approve them."

Articles 2544 through Article 2550 are involved by the point raised. These articles were listed as Articles 2440 to 2445, inclusive, in the Revised Statutes of 1911. In the Acts of 1917, page 16, there was passed an act amending the requisites of bonds of county depositories. Prior to the passage of this amendatory act the county tax collectors were required to remit to the State Treasurer, who in turn deposited State funds in State depositories of his own selection. The tax collector was on his own responsibility until the State funds in his hands were delivered to the State Treasurer.

The amendatory act of 1917 in its caption stated that its purpose was to amend Articles 2440 to 2445, inclusive, now Articles 2544 to 2550, inclusive. We quote Article 2444 (now Article 2549) as amended by this Act of 1917 italicizing the language which was by this act added to said article:

"As soon as said bond be given and approved by the commissioners court, *and the State Comptroller of Public Accounts*, 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, therefore, 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, *as well as all funds belonging to any district or other municipal subdivision thereof not selecting its own depository*, and immediately upon receipt of any money thereafter, to deposit the same with said depository to the credit of said county, *district and municipalities;* and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for ten 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. *And thereupon, it shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. The bond of such county depository or depositories shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such depository or depositories for ten per cent upon the amount not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions for all sums which would have been earned had this provision been complied with, which interests may be recovered in a suit by the State.*

"Upon such funds being deposited as herein required the tax collector and the sureties on his bonds shall thereafter be relieved of responsibility for its safe keeping. All moneys subject to the control of the county treasurer or payable on his order belonging to districts or other municipal subdivisions, selecting no depository are hereby declared to be 'county funds' within the meaning of this chapter and shall be deposited in accordance with its requirements and shall be considered in fixing the amount of the bond of such depository."

Article 2445 now Article 2550, although mentioned as being amended and carried into the amendatory act conjunctively with Article 2444 is nevertheless unchanged in language. The amending of Article 2444 changes the law so as to permit the tax collector to deposit State funds in the county depository, pending his making up of monthly report and remittance thereon, and also extends the provision of county depository bonds so as to protect State funds deposited in such county depository. From the joining of Article 2445, unchanged in language, into the amendatory act, we conclude that the Legislature intended and did treat Article 2445, now 2550, as being but an alternative method of selecting a county depository and, by this joinder signifies that a depository selected under said Article 2445 and the bond given in pursuance of such selection shall be as inclusive of State funds and of all provisions of Article 2444 as would be the depository selected in response to bids as provided by Articles 2440-2443, inclusive, now Articles 2544-7, inclusive.

As a further evidence that the present Article 2550 is but an alternative method of choosing depositories and that the language regarding the depositing of State funds and the protection of same, as provided in present Article 2549 are applicable thereto, we quote Article 2550 italicizing the portion thereof which to our mind supports the opinion herein advanced:

"If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker 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, then in any such case the commissioners court shall have the power, and it shall be their duty to deposit the funds of the county with any one or more banking corporation, association or individual banker, in the county or in adjoining counties in such amounts and for such periods 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 court and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer. *Any banker or banking concern receiving deposits under this article shall execute a bond in the manner and form provided for depositories of all funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern.*"

It will be noted from this language that the conditions and terms of the bond are made similar to the conditions and terms of the bond provided for depositories selected by bids in response to advertisement; the only difference between the depositories being in the method of their selection to meet various conditions or exigencies that might arise. Present Articles 2544-5-6 and 7 all deal with the selection of a single depository in response to bids, after notice by advertising. In none of these articles is there any method provided for the selection of but *one* depository. Only in Article 2550 will you find a provision for the use or selection of more than a single depository.

An examination of Article 2549, which provides for the placing

of State funds in the county depository, discloses this significant language:

"It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such *depository or depositories* as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the same rate as *such depository* or *depositories* have undertaken to pay for the use of county funds, * * * The bond of such county *depository or depositories* shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such *depository or depositories* for ten per cent upon the amount not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions * * *."

The use of the plural "depositories" is indeed conclusive of the point involved herein, because there is only one authority for the selection of two or more depositories, and that is Article 2550. It could not be said that the plural is used to cover depositories selected by districts or municipal subdivisions, independent of the county depository, for in that case the following language of Article 2549:

"It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, * * *."

would be meaningless.

We conclude, therefore, that the provisions of Article 2550 are but an alternative method of selection of depositories and that the provisions of Article 2549 are applicable to depositories selected by authority of Article 2550, as well as to a depository selected in response to advertisements for bids. This being so, we must answer your question to the effect that the Comptroller should approve the pledge contract and bonds submitted by you, as stated in your letter, of the county depositories selected by your county commissioners court if the same are in proper statutory form and are good and solvent.

We are transmitting a copy of this opinion to the Comptroller for his information, and trust that this may prove a solution of the difficulties heretofore encountered in this matter.

Yours very truly,

W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2785, Bk. 63, P. 268.

TRUSTEES INDEPENDENT SCHOOL DISTRICTS—ELIGIBILITY.

1. A stockholder or officer of a corporation acting as depository or treasurer of an independent school district is ineligible to serve as trustee of said independent school district.

OFFICES OF THE ATTORNEY GENERAL,
September 16, 1929.

Honorable S. M. N. Marrs, State Superintendent of Public Instruction, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of September 10th, addressed to the Attorney General. By this favor, you ask the opinion of the department as to whether a stockholder or director of a corporation serving as depository or treasurer of an independent school district would be eligible for appointment and qualification as trustee of said school district.

We are of the opinion that the two positions present such a conflict of interests as to prevent the holding of the two relationships at one and the same time. The trustees of an independent school district have as part of their duty the task of seeing that the treasurer or depository properly manages the fund and moneys of the school district. It is also incumbent upon the trustees to see that the school funds are properly protected by bonds and that the solvency of the bonds and also the solvency of the institution should be watched after to the end that the moneys may always be properly protected. Innumerable instances could be recounted where the pecuniary interests of a stockholder in a corporation would sway the trustee to an act of favoritism, at least that an unbiased and non-interested trustee would resolve against such depository or treasurer; without attempting to enumerate these various objections we conclude that upon the grounds of public policy the two positions are incompatible and that, therefore, we must answer your question by saying that a stockholder or officer of a corporation acting as a depository for an independent school district would not be eligible for appointment or election as trustee of said school district. All prior opinions of this department to the contrary are expressly overruled.

Yours very truly,
W. DEWEY LAWRENCE,
Assistant Attorney General.

OPINIONS RELATING TO ELECTIONS AND SUFFRAGE.

Op. No. 2784, Bk. 63, P. 260.

HOUSE OF REPRESENTATIVES—CONTESTED ELECTIONS.

1. House of Representatives has no power to delegate to a subcommittee of the House to hear and take evidence at some other place than the seat of government in a contest of a seat in the House of Representatives.
2. Hearings on a contest of a seat in the House of Representatives must be held at the seat of government.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 2, 1929.

Honorable Cecil Storey, House of Representatives, Austin, Texas.

DEAR MR. STOREY: I acknowledge receipt of your letter of January 30th, in which you, as Chairman of a Subcommittee on Privileges, Suffrage and Elections, submit to this department an inquiry as to the powers of such subcommittee. You state that the Committee on Privileges, Suffrage and Elections is composed of twenty-one members, and has before it a contest involving a seat in the House from Hidalgo County and that such committee has appointed a subcommittee composed of seven members to go to Hidalgo County and hear and take evidence in the contest.

You inquire as to whether or not the committee or even the House of Representatives has the authority to delegate such power and authority to such subcommittee.

Article 3, Section 8 of the Constitution provides that each house shall be the judge of the qualifications and election of its own members; "but contested elections shall be determined in such manner as shall be provided by law."

It is a general rule that the states, in creating offices, have the right to provide such agencies and mode of procedure as they deem fit to determine the result of the election to such offices without the intervention or interference by the courts. So that a constitutional provision that each house of the Legislature shall be the judge of the election returns and qualifications of its own members is an exclusive grant of power and constitutes each house the sole and ultimate tribunal to pass upon the election and qualifications of its own members. Under the general control which the Legislature has over the procedure incident to ascertaining the result of the elections, it is competent for that branch of the government to provide by statute for special means of determining contests, and it is acting within its constitutional rights where it creates a special tribunal for the settlement of such disputes. The power to determine the qualifications and election of its own members, coupled with the further power in the same section of the Constitution that contests shall be determined in such manner as may be provided by

law, brings into force when a law has been passed governing such contests the further rule of law that the statutory method must be pursued strictly and that the contests can be determined in no other way.

This statutory method is contained in Articles 3059 to 3065, both inclusive, of the Revised Statutes, 1925. I assume from your communication that all proper procedure has been followed by the contestant up to the point of trying the contest before the Committee on Privileges and Elections. The law as to this trial is that said "Committee" shall proceed without delay to fix "a time" for the hearing of said case, and after due notice to the parties shall investigate the issues, hearing all legal evidence that may be presented "to said committee," and shall as soon thereafter as practicable report their conclusions of law and fact to the House, accompanied by all the papers in the cause, and the evidence taken therein with such recommendations as may to them seem proper. It is the evident purpose of this statute as clearly expressed therein that the hearing of this contest must be before the Committee on Privileges and Elections at the seat of government, because it is given only the power to fix "a time" for the hearing and notify the parties. It is my opinion that this committee would have no authority to hold any hearing of such a contest at any other place than the seat of government. The purpose of the law is to bring about a speedy hearing of the contest before the duly constituted body which is the only authority authorized to hear it.

In Article 3064 the committee is given power to send for persons and papers, and the "chairman" of said committee is given power to issue process necessary to secure the attendance of witnesses the production of papers, ballot boxes, and other documents "before said committee." It is further provided that such process shall be executed by the sergeant-at-arms of the House in which the contest is pending, or by such other person as the "presiding officer of said house" may designate. There is nothing in this law that would indicate any intent that a contest for a seat in the House should be heard at any other place than at the seat of government, or before any other tribunal than the Committee on Privileges and Elections. This is evident from the fact that the chairman of said committee is the only person authorized to issue process for witnesses, and the sergeant-at-arms of the House in which the contest is pending is the only person authorized to execute such process unless some other officer is designated by the presiding officer of said house. It is a general rule of law in relation to the powers of the legislative committees that where an authority is granted to a particular committee which is personal in its nature, such authority cannot be delegated even to one or more members of said committee. (R. C. L., Vol. 25, paragraph 16.)

As stated by the court in the case of Stroughton vs. Baker (4 Mass. 522; 3 Am. Dec. 242):

"The authority given to the committee is by the terms of resolves to be

exercised by them or a major part of them. The exercise of this authority is personal and cannot be delegated. If it could be delegated it might be delegated to any other man as well as one of the committee."

The committee involved in the decision to which I have referred was one appointed under a resolution of the House, but the rule announced would be applied with stronger force to a regular committee of the house which has imposed upon it particular and specific functions, and especially should it apply to the Committee on Privileges and Elections which is, in a measure, the court instituted by the law under the authority of the Constitution for passing upon the right of a citizen to be a member of the house of which the committee is a part. As a general rule, committees have those powers only, and only those which are conferred upon them by the Legislature, and regardless of what other matters may be submitted to the Committee on Privileges and Elections, it, under the statute, has imposed upon it a specific obligation in the matter of passing upon the election and qualifications of the members of the house. Under this statute, any subcommittee which might undertake to act would have no authority to issue process necessary to secure the attendance of witnesses, production of papers, ballot boxes, etc., and would have no authority to appoint any officer to execute such process because the statute definitely fixes these powers and prescribes the officers who shall execute them.

Election contests were unknown to the common law, and are of purely statutory origin and regulation. Being special statutory proceedings a strict compliance with the law authorizing them is necessary, because they are governed in all particulars by the statutes applicable thereto. They are not civil suits, and each and every provision of the statute as to the mode and manner of the contest and the grounds on which it may be maintained must be complied with, and all proceedings must be according to the statutory provisions authorizing them. They are political proceedings and the fact that a judicial tribunal has been provided to hear and determine them does not render them less political.

These principles of law are established by almost universal authority throughout the country, and the following are a few only of the cases which clearly announce these principles, namely:

Turner vs. Allen, 254 S. W. 630.
McCall vs. Lewis, 263 S. W. 325.
Bassell vs. Shanklin, 183 S. W. 105.
Fowler vs. Thomas. 275 S. W. 253.
Robinson vs. Wingate, 80 S. W. 1070.
Wright vs. Fawcett, 42 Tex. 206.
Rogers vs. Johnson, 42 Tex. 340.
Norman vs. Thompson, 96 Tex. 250.
Brown vs. Vaile, 27 Pac. 945.
McCall vs. Tombstone, 185 Pac. 942.

Applying the principles above announced to the inquiry submitted, you are advised that the law having fixed the tribunal

which should try election contests for seats in the House of Representatives and prescribed the place at which, and the mode and manner in which such trials should be conducted, and having conferred this jurisdiction upon a Committee on Privileges and Elections, and upon it only, this committee has no authority to delegate to a subcommittee its jurisdiction or power, or any part thereof; nor would the House of Representatives have the authority to change in any manner the tribunal before which the contest should be tried, nor the method and manner in which the trial should be conducted. The jurisdiction and the power is given to the committee, and to it only. Therefore, a subcommittee, if it should go to Hidalgo County, would have no authority to issue any process for the attendance of witnesses, or to send for persons or papers, or ballot boxes, or any other documents, or to appoint any person to execute any process it might undertake to issue. In fact, it would be powerless in carrying out the express purposes of the law in the way and manner in which the statute prescribes they shall be executed.

In reaching the above conclusion, I have given careful consideration to the authorities presented to me by attorneys for the contestants, and the one upon which most reliance is had is that of Reed vs. County Commissioners of Delaware County, Pennsylvania, reported 21st Fed. Rep. (2nd Series), page 144, being an opinion of a United States District Judge in Equity, which was affirmed by the Circuit Court of Appeals and decision reported in the same volume at page 1018. In this opinion there was involved a provision of the Constitution of the United States, Article 1, Section 5, that "each house shall be the judge of the elections, returns and qualifications of its own members." This provision of the Constitution is not followed by the clause which is contained in ours, giving each house the power to judge the qualifications and election of its own members that "contested elections shall be determined in such manner as shall be provided by law." Our Constitution in the same section which makes the House the judge of the qualifications and election of its own members contains the exception to the general rule that might otherwise prevail to the effect that contested elections shall be determined in such manner as shall be provided by law. If the latter provision were not a part of our Constitution, and each house were given unlimited power to judge the qualifications and elections of its own members together with the additional power contained in Section 11 of the same article of the Constitution that it "may determine the rules of its own proceedings," a different question would be presented. Under such a situation the house would have the authority to designate a committee to hear the contest and probably authorize such committee to sit at such time and places as in its judgment might be found necessary or desired. In this connection, attention is called to the fact that the Federal statute regulating contested elections of any member of the House of Representatives expressly provides in Section 205, Title 2, Volume 44, Part I, United States Statutes at Large, that

"testimony in contested election cases may be taken at two or more places at the same time" and the entire purpose of the act regulating it is to give full and complete power to the committee to which such a contest is referred to sit at any time and place which it may deem advisable.

Our Constitution does not leave the matter in doubt as to how contested elections shall be tried, and the provision of it which gives each house the power to judge the qualifications and election of its own members must be construed in connection with and limited by its other provision that contested elections shall be determined as provided by law. A law having been passed under this authority and mandate of the Constitution all contested elections must be governed strictly by its terms.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2801, Bk. 63, P. 372.

ELECTIONS—PRIMARY ELECTIONS—POWERS OF COMMITTEES.

1. The statutes of Texas provide that every political party in this State, through its State executive committee, shall have the power to prescribe the qualifications of its own members and shall, in its own way, determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.

2. While not passing upon the extent of the powers of party executive committees to determine who shall vote or otherwise participate in party affairs (this opinion being confined strictly to the question propounded to the Attorney General) it is held that no party executive committee has power to bar any person from participating in a party primary, either as a candidate for office or as a voter, because such person has voted against a nominee of such party at an election heretofore held after participating in the primary conventions and primary elections of such party. This holding is based upon the inhibitions in the statute above mentioned which have the effect of prohibiting such committees from excluding persons from the party by reason of past political affiliations or beliefs.

ATTORNEY GENERAL'S DEPARTMENT,
January 30, 1930.

Honorable Thomas B. Love, Chairman, Federal Relations Committee of the Senate of Texas, Capitol.

DEAR SIR: Attorney General Bobbitt is in receipt of your communication of the twentieth instant, reading as follows:

"At a duly called meeting, today, of the Federal Relations Committee of the State Senate of Texas, of which committee I am chairman, the following resolution was duly adopted:

"'*Resolved:* That the Attorney General of Texas is requested, as early as practicable, to communicate to the Committee on Federal Relations of the Senate, for its information, his opinion as to whether any executive committee of any political party has the power, under the laws of this State, to bar any person from participating in a party primary, either as a candidate for office or as a voter, because such person has voted against

a nominee of such party at an election heretofore held, after participating in the primary conventions and primary elections of such party.' "

The Statute (Art. 4399, R. S. 1925) relating to the duties of the Attorney General, provides as follows:

"The Attorney General at the request of * * * committees of either branch of the Legislature * * * shall give them written advice upon any question touching the public interest, or concerning their official duties."

Pursuant to the provisions of this statute, this opinion is given in response to the request of your committee above quoted. You will, therefore, please communicate it to your committee for its information.

It is not necessary, in order to answer your inquiry, to determine the extent of the affirmative power of the State executive committee to prescribe qualifications of the members of the party or its candidates, our opinion being confined strictly to the question submitted.

It is a matter of common knowledge that the real question at issue is the power of executive committees of the democratic party to bar those who participated in the primaries and conventions in 1928 and then voted for Hoover, the republican nominee, instead of Smith, the democratic nominee. While you do not so state, we are assuming that your question relates to our major political parties governed and controlled by our statutes which relate to parties casting 100,000 votes or more at the last general election.

The question is, whether any executive committee of any such political party has the power, under existing laws of this State, to bar any person from participating in a party primary, either as a candidate for office or as a voter, because such person has is plain, and no rules of construction are necessary in order to elections of such party.

If any such committee has this power, it must have been granted to them, either by statute or by the party itself, in the absence of a valid statute; for committees are simply agencies voted against a nominee of such party at an election heretofore held, after participating in the primary conventions and primary

Article 3107 of the Revised Statutes of Texas of 1925 as enacted by the First Called Session of the Fortieth Legislature, Chapter 67, reads as follows:

"Art. 3107. Political Party May Prescribe Qualifications of Members.—Every political party in this State through its State executive committee the statutes in order to determine the power of such committees. shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; *provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.*"

Whatever authority this statute may confer, it certainly purports and intends to inhibit any party committee from denying

any person the right to participate in a primary in this State because of "former political views or affiliations or because of fore held after participating in the primary conventions and primary elections of such party, such attempt would be plainly contrary to the express provisions of this statute. The statute through which the party machinery functions. The State executive committee and other executive committees of political parties in this State are provided for by statute, and their duties are prescribed in detail. We naturally, therefore, look first to membership or non-membership in organizations other than the political party." If a committee should attempt to bar persons from voting or becoming candidates on account of the fact that they voted against a nominee of such party at an election heretodetermine its purpose and intent.

While this is true, a brief statement of the history of Article 3107 may be in order so that the legislative intent, particularly in reference to county committees, may be made plain. Article 3107 supersedes the statute which had a provision in it barring negroes from participating in primaries of the democratic party, which latter mentioned law had superseded what was formerly Article 3093, Revised Statutes of 1911, authorizing county executive committees of political parties to prescribe additional qualifications for voters in primaries not inconsistent with the statutes. Having repealed this former law conferring this authority on county committees and having enacted what is now Article 3107, the intention is plain to withdraw from both State and county executive committees authority to exclude persons from primaries because of former political views or affiliations.

The statute being plain as to its purpose and intent, the answer to your inquiry must be in the negative unless the statute itself is invalid. Is this statute invalid in so far as it contains this prohibition as applied to party executive committees? We are now dealing with the power of party *committees* and the power of the Legislature to pass a statute denying to *committees* authority to exclude from the party those who may have previously had other party views or affiliations. Since the committees are provided for and their duties prescribed by statute, it would seem to be within the province of the Legislature, by statute, to restrict their powers. It may be that the mere creation of a committee would give, by implication, certain powers in the absence of statute or party rule to the contrary, and in accordance with party usage, but certainly the implied power would not extend to power directly contrary to statute.

The best authority on this point is the decision of the Supreme Court of Texas in the case of Gilmore vs. Waples, 188 S. W. 1037. In that case the question involved was whether the State Democratic Executive Committee had authority to make a nomination for the party where none had been made by the party at the general primary election. A vacancy by death had occurred in the office of Railroad Commissioner after the primaries had been held, and while there was a vacancy in the office there was no vacancy in any nomination for the office. The statute con-

ferred authority upon the State Executive Committee to fill vacancies in nominations but expressly prohibited it from making nominations in any other instance. It was contended in the case that the State Democratic Executive Committee had this power notwithstanding the statute, since the statute had provided no means of making a nomination under such circumstances as then existed. The Supreme Court overruled this contention, however, and held that the State Democratic Executive Committee had no power to make the nomination because the statute deprived such committee of this power, saying, through Chief Justice Phillips:

"Vested as it was with the power of legislation upon the subject, it was clearly competent for the Legislature to provide for nominations by the committee in certain instances and to deny such authority in all others."

If the Legislature had power to prohibit the State Executive Committee from making a nomination where the law provided no method, we see no reason why it cannot enact a law depriving committees of the power to exclude from the party those who may have previously had other party affiliations or beliefs.

Another case that may be mentioned is Briscoe vs. Boyle, 286 S. W. 275, in which it was expressly held by the Court of Civil Appeals that a party executive committee was unauthorized to require a voter in a primary to make affidavit that he did not aid any other political party in that last general election. This court decision was handed down even before the present law was passed expressly denying such power to party committees. In prior years the statute, as before mentioned, provided that the executive committee of any party for any county might prescribe additional qualifications for voters in such primaries not inconsistent with the statutes. At the time of the decision of the case just mentioned, this statute had been superseded and the court held that there being no statute conferring such authority, the committee had no authority to exact such a pledge of party fealty in the previous election. The court said:

"The law does not purport to measure his eligibility by his past political performance but by his present intentions; not by what he has done or omitted to do in the past but what he promises and in honor obligates himself to do in the immediate future."

It may be noted in this connection that there is now not only no affirmative statute conferring the authority in question on committees, but there is a negative provision expressly denying this authority.

We think there can be no doubt, in view of this plain statute, that party committees do not possess the power in question. If any further evidence is needed than the plain wording of the statute, together with the decisions of the courts upholding the power of the Legislature to regulate and even restrict political parties, the action that was recently taken in the Legislature may be cited as strong evidence that the party executive committee is without this power. It will be recalled that there was recently introduced in the Legislature a measure commonly

known as the Wirtz bill, which sought to amend the present law (Art. 3107) so as to confer upon State executive committees of the several political parties the express power to determine who may vote, or otherwise participate in their respective primary elections and who may become candidates for their respective nominations, without any provision inhibiting such committees from ousting voters and candidates because of prior political views and affiliations. This bill was passed by both houses of the Legislature and was vetoed by the Governor. An examination of the journals of each branch of the Legislature, as well as the veto message of Governor Moody, discloses that the bill was passed on the conviction that the executive committee did not possess the power to bar voters and candidates on account of prior party affiliations, and that it was vetoed upon the same understanding. Thus, we have a clear legislative construction of our present law, and a legislative opinion as the power of party committees under existing laws. The Legislature clearly construed the law to mean just what it says, and construed it as being valid and effective for such purpose.

The intention of the statute being plain, its validity, of course, is measured by its reasonableness. We do not believe the courts would hold it unreasonable for the Legislature to deny this great power to party committees. Committees, of course, act as agents of the party. The party is composed of its members—the voters. It is a matter of common knowledge that in the last election a great portion of the membership of the democratic party voted for the republican nominee in the general election. That same membership had, through its conventions, selected the State Executive Committee. County executive committees were likewise selected by the party membership in the manner prescribed by law. Is it unreasonable for the law to prohibit committees from ousting the very members of the party who selected such committees? A party committee is just what the name implies,—a committee. It is somewhat analogous to the board of directors of a corporation. It is the machinery through which certain business of the party is transacted, but the power to oust from the party nearly fifty per cent of its membership on account of voting for a candidate on another ticket in the general election, and to deny to nearly fifty per cent of the party the right to be candidates for nomination in the primary, is a tremendous power even for the convention of a party to possess, much less a committee. Therefore, we cannot say that the statute in question goes beyond what is a reasonable regulation of party affairs in so far as its inhibition against committees is concerned. We cannot say that it is unconstitutional in so far as it denies this power to party committees. One of the prime purposes of a primary election is to permit the party to select candidates for the various offices. If the committee can eliminate a large per cent of the party's membership and disqualify them as candidates, then, to that extent, it is depriving the party itself from performing the main functions for which it was created. These considerations were, very probably,

in the mind of the Legislature when it enacted the statute and probably influenced it in determining that it was within constitutional bounds in enacting this law in so far as committees are concerned.

It is true that the Supreme Court of the United States held invalid a statute which expressly excluded negroes from the democratic party. Nixon vs. Herndon, 273 U. S. 536. However, this case is not authority to the contrary of our holding. In the Nixon case it was simply held that a statute prohibiting negroes from participating in a democratic primary election was invalid as violating the Fourteenth Federal Amendment. The question of the power of the Legislature to deny authority to party executive committees was, in no way, involved in that case.

It may be well for us to review, briefly, various cases in order to indicate the holdings of the various courts in reference to the power of the Legislature to regulate political parties and, also, to show that these cases do not hold contrary to the conclusion reached in this opinion.

In Robbins et al. vs. Thompson, 8 S. W. (2nd) 813, the Court of Civil Appeals held that a party committee cannot be forced to place on the ticket as a candidate, one who had never been a democrat and had fought the democratic party and who was unwilling to pledge his fealty to the party. Speaking of Article 3107, the court said:

"The statute may be able to force committees to allow republicans and others of different political faith to vote in democratic primaries, but cannot force the executive committees to place enemies of the party on its ticket to be voted for by loyal democrats."

In Scurry vs. Nicholson, 9 S. W. (2nd) 747, it was held that, there being no statute to the contrary, the county executive committee had authority to require members of the committee to take a pledge of party fealty.

In Grigsby et al. vs. Harris et al., 27 Fed. (2nd) 942, the court held that to exclude negroes from participating in party primary elections pursuant to the rule adopted by the State Executive Committee, was not in violation of constitutional right.

In Waples vs. Marrast, 184 S. W. 180, the Supreme Court of Texas held that the authority of the Legislature to require the holding of a primary election by political parties for the purpose of enabling their members to vote their choice for party nominees for elective offices, whether State or National, and likewise express their preference in the selection of party delegates to party conventions, is undoubted. We cite this case only for the purpose of showing that the Legislature has power to regulate nominations by political parties.

In Koy vs. Schneider, 218 S. W. 479, our State Supreme Court held that the Legislature has the power to regulate *and restrict* the right to vote in primary elections, the specific holding being that the Legislature had the right to extend the voting privilege in primary elections to women even before they were granted the right to vote in general elections.

In Morris vs. Mims, 224 S. W. 586, it was held by the Court of Civil Appeals that the Legislature can not forbide nominations being made by newly organized parties.

In Westerman vs. Mims, 227 S. W. 178, the State Supreme Court held that upon equitable principles a court will not issue the writ of mandamus to assist a candidate to have his name placed on the ballot as an independent candidate opposed to the regular party nominee where such independent candidate had participated in the primary and had taken the pledge to support the nominees of the primary. In that case, the question of prior party affiliations was not involved. The power of party committees to exclude from the party persons on account of their prior party affiliations was not involved. On the other hand, the candidate seeking the writ of mandamus had taken a pledge and he was asking the court to compel action which would assist him in breaking the pledge. The court declined to render such assistance by issuing the extraordinary writ of mandamus.

In the case of Beene vs. Waples, 187 S. W. 191, the Supreme Court of Texas held as follows:

"In the absence of constitutional or statutory restrictions upon their duties and powers, the duly existing authorities of a political party, such as State and county executive committees, in accordance with party usage, may make and enforce all reasonable regulations relating to nominations within such party including reasonable assessments against any and all candidates for such nominations."

In this case the court held that the party had the right, under the statute, to levy an assessment against candidates for party nominations to cover the expense of primaries.

In the case of DeWees vs. Stevens et al., 150 S. W. 589, it was held that mandamus will not lie in the Supreme Court to compel the vacation of an order by the district judge in which the latter mandamused the county chairman to certify the name of a nominee who was a republican, but had received the highest number of votes in a democratic primary, the court holding, however, that in a proper proceeding, the democratic candidate receiving the proper number of votes, would have had his remedy.

In the case of Love vs. Taylor, 8 S. W. (2nd) 795, it was held by the Court of Civil Appeals that one who took a pledge to support the democratic nominee for president and thereafter repudiated the obligation, and took a contrary stand, held not entitled to require the executive committee to include his name as a candidate in the democratic primary.

The statute providing for applications of candidates to go on the ballot in the general primary provides that "the request to have the name of any person affiliating with any party placed on the official ballot for a general primary as a candidate, etc.," shall be governed by certain regulations. This seems to require party affiliation in order to become a candidate. In view of the later enactment inhibiting the exclusion of persons on account of previous affiliations, this statute must be construed as contemplating present party affiliation and not previous affiliations.

Another statute that must be considered is Article 3093 re-

quiring each applicant for nomination for United States Senator to state in his application that "if he voted at the preceding election he voted for the nominees of said party." This must be considered as modified by the later statute (Art. 3107) providing that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations.

The statute being plain and unambiguous in so far as your inquiry is concerned, and it being the opinion of this department that it is valid for the purpose of restricting the power of committees in reference to the matter submitted, it is scarcely necessary to inquire what the power of committees would be in the absence of this negative statute.

However, we do not wish to be understood as holding that, in the event Article 3107 should be held to be unconstitutional, party committees would have this authority. Such committees would have such implied powers only as are in accordance with party usage. Beene vs. Waples (Tex. Sup.), 187 S. W. 191. We find no sanction in party usage in this State for such action by party committees. There have been defections in the ranks of the major party in the recent past, and it has never been the policy of the party to expel from the party those members who may have voted another ticket in the general election, nor to exclude them as candidates. On the contrary, they have been welcomed back for the sake of party harmony. Therefore, such power of party committees would not be held to be an implied or inherent power. No power is to be implied in such committees as against party usage.

It is not for this department to either condone party irregularity or condemn those who saw fit to vote for presidential nominees of another party in the last election. This opinion is confined strictly to the one question—which is a law question, though on a political subject—as to whether party committees have the authority in question.

In the light of the foregoing, you are therefore, advised that in the opinion of this department, no executive committee of a political party has the power to bar any person from participating in a party primary either as a candidate for office or as a voter, because such person has voted against a nominee of such party at an election heretofore held, after participating in the primary conventions and primary elections of such party.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

OPINIONS RELATING TO HIGHWAYS.

Op. No. 2750, Bk. 63, P. 8.

TAXATION—MOTOR BUS SEAT TAX—SCHOOL BUSES—ARTICLE 820, PENAL CODE, CONSTRUED.

1. Common or independent school districts owning and operating motor buses for the transportation of students to and from school are not liable for the four ($4.00) dollar seat tax imposed by Article 820 of the Penal Code, upon the owners of passenger motor vehicles, operating for hire.
2. Under certain stated facts, the owner of a motor vehicle operating under contract with a common independent school district for transporting students to and from school and which vehicle is not otherwise operated in the transportation of passengers for hire, is not liable for the four ($4.00) dollar seat tax imposed by Article 820 of the Penal Code upon the owners of passenger motor vehicles operating for hire.
3. This opinion is limited to the fact situation stated and does not purport to relieve from liability for the four ($4.00) dollar seat tax imposed by the terms of Article 820 those persons engaged in the transportation of students and/or others as a business and for profit.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 16, 1928.

Hon. Bascom Cox, Assistant County Attorney, Cameron County, Brownsville, Texas.

DEAR SIR: I have before me a number of letters from over the State from county officers, all presenting substantially the same questions. These questions relate to the liability of common or independent school districts, and persons acting under contract with such districts, for the four ($4.00) dollar seat tax imposed by Article 820 of the Penal Code of this State upon the owners of passenger motor vehicles operating for hire.

The first question presents little or no difficulty, for it is obvious that a common or independent school district which operates a motor bus for the transportation of its students to and from school is not the owner of a passenger motor vehicle operating for hire, but is simply furnishing transportation to its students. You are accordingly advised that common or independent school districts owning and operating motor buses for the transportation of students to and from school are not liable for the four ($4.00) dollar seat tax imposed by Article 820 of the Penal Code, upon the owners of passenger motor vehicles operating for hire.

The second question is more difficult of solution, and under a strict construction of the law, the owners of motor vehicles transporting students to and from school would be liable for the tax question. We are disposed to construe this statute with reference to the facts in question as liberally as may be. The transportation of students to and from the schools of this State is an important matter, and especially in our rural districts, presents at times a very difficult problem.

Obviously, Article 820 of the Penal Code was aimed at per-

sons engaged in the transportation of passengers for profit over the highways of this State. The facts which have been submitted to us negative the idea that the parties in question are engaged in such an occupation. As we understand the fact situation, certain individuals, living in the school community agree to utilize their privately owned motor vehicles for the transportation of students at a figure calculated merely to reimburse the owner for the depreciation of the vehicle and the expenses of operation.

We do not believe that the Legislature, when it enacted Article 820 of the Penal Code intended that the owners of motor vehicles so operated should be liable for the seat tax imposed by the terms of that article and you are accordingly advised that under the facts as stated, the owner of a motor vehicle operating under contract with a common independent school district for transporting students to and from school and which vehicle is not otherwise operated in the transportation of passengers for hire, is not liable for the four ($4.00) dollar seat tax imposed by Article 820 of the Penal Code upon the owners of passenger motor vehicles operating for hire.

We desire to point out, however, that the scope of this opinion is strictly limited to the fact situation outlined above. In the opinion of this department, parties engaged in the transportation of students who are engaged in such business for *profit* come within the legislative intent expressed in Article 820, Penal Code, and are liable for the four ($4.00) dollar seat tax imposed by the terms of that article. We further state explicitly that if the owner of a passenger motor vehicle who is engaged in the transportation of students under contract with a common or independent school district *not for profit*, should utilize the motor vehicles in question for the transportation of passengers other than the transportation of said students under contract, then, and in that case, such owners of motor vehicles are liable for the four dollar seat tax imposed by the terms of Article 820 of the Penal Code.

Yours very truly,

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

Op. No. 2802, Bk. 63, P. 386.

PUBLIC HIGHWAYS—MOTOR VEHICLES—REGISTRATION.

Every motor vehicle used upon any road or street not privately owned or controlled, over which the State has legislative jurisdiction under its police power, must register the same notwithstanding a part of said road is closed to traffic by the contractor improving or constructing the same.

Construing House Bill 6, Chapter 88, Acts of the Second Called Session of the Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 14, 1930.

State Highway Department, Austin, Texas.

Attention: Mr. Phares.

GENTLEMEN: I have before me your letter of the 8th instant informing us that there are certain contractors in this State operating motor vehicles only upon portions of roads under contract, and wanting to know whether such vehicles are required to be licensed.

You state to us that it is claimed that as long as such highways are closed to traffic they belong to the contractor. We know of no theory of the law under which such could be true. House Bill 6, infra, provides that:

A "commercial motor vehicle" is any motor vehicle, other than a motorcycle, designed or used for the transportation of property, including every vehicle used for delivery purposes.

"Vehicle" is every mechanical device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power used exclusively upon stationary rails or track.

"Road tractor" means every motor vehicle designed or used for drawing other vehicles or loads, and not so constructed as to carry a load independently or any part of the weight of the drawn load or vehicle.

"Public highway" includes any road, street, way, thoroughfare, or bridge in this State not privately owned or controlled, for the use of vehicles over which the State has legislative jurisdiction under its police power.

If an offense were committed upon one of these highways under construction, such as the damaging of the highway, certainly the person could be prosecuted. If this be true, any person operating a vehicle thereon must register it.

You are, therefore, advised it is our opinion that any such owner of a vehicle used or to be used upon the public highways of this State is required to have the same registered. See House Bill 6, Chapter 88, page 172, Acts of the Second Called Session of the Forty-first Legislature.

Very truly yours,
RICE M. TILLEY,
Assistant Attorney General.

Op. No. 2803, Bk. 63, P. 389.

AUTOMOBILES—PURCHASE AND SALE OF SECOND-HAND AUTOMOBILES—DEALER'S LICENSES.

Construing Article 1434, of the Penal Code as amended by Chapter 77, Acts of the First Called Session of the Fortieth Legislature; Article 6686, Revised Civil Statutes as amended by Chapter 211, Acts of the Regular Session of the Fortieth Legislature; certain sections of Chapter 88, Acts of the Second Called Session, Forty-first Legislature.

1. An automobile dealer may demonstrate a second-hand automobile on the highways of this State, provided he has attached to said automobile his dealer's license plate issued by a tax collector for the current year.
2. An automobile dealer may sell a second-hand automobile provided said dealer has in his actual physical possession at the time of sale the tax collector's receipt for the fee paid for dealer's license plate for the current year, and delivers an endorsed certfiied copy of said receipt to the purchaser.
3. Any person may purchase a second-hand automobile from an automobile dealer provided said purchaser demands and receives from the selling dealer a certified copy of the tax collector's receipt issued to said dealer for the fee paid for said dealer's license for the current year.
4. A purchaser of a second-hand automobile may, for a reasonable time, until said purchaser has had reasonable opportunity to register said car in the county of his residence, operate same upon the highways of this State provided he has attached to said car the selling dealer's cardboard number containing the original general distinguishing number issued to said dealer by the tax collector.

OFFICES OF THE ATTORNEY GENERAL,
March 18, 1930.

Honorable R. R. Donaghey, County Attorney, Wilbarger County, Vernon, Texas.

DEAR SIR: Your letter of February seventeenth, addressed to the Attorney General, has been referred to the writer for answer. In said letter you ask the following question:

"Can an automobile dealer demonstrate a second-hand car with the dealer's license attached? The statute seems to say not, but I understand that the Highway Department has construed that the dealer can do this."

You do not state in your letter what statute you refer to in your question. However, we presume that you have reference to Article 1434 of the Penal Code of 1925. Said article was amended by Chapter 77 of the Acts of the First Called Session of the Fortieth Legislature. The act, before the amendment, provided that it should be an offense for any person to sell or buy a second-hand automobile in this State unless the seller had in his actual physical possession the tax collector's receipt, for the license fee, issued for the year that said automobile was offered for sale. This provision of the article was changed by the amendment above referred to and now provides that it shall be an offense for any person to sell or buy a second-hand automobile unless the seller either has in his actual physical possession the tax collector's receipt, for the license fee, issued for the year said vehicle is offered for sale, or unless the seller has in his possession a certified copy of the tax collector's receipt for the fee paid for a *general distinguishing number.* This term "general distinguishing number" refers to a dealer's license number. Said article provides that the purchaser must demand and receive the certified copy of the tax collector's receipt for the fee paid for said general distinguishing number.

It therefore appears from said amendment to Article 1434 of the Penal Code that a dealer may sell a second-hand automobile, provided he has in his possession the tax collector's receipt for a dealer's license number, and delivers an endorsed certified copy

of same to the purchaser. It also appears that any person may purchase from a dealer a second-hand automobile provided the purchaser demands and receives a certified copy of the tax collector's receipt for the dealer's license number.

Chapter 211, at page 296 of the laws of the Regular Session of the Fortieth Legislature, in Article 6686a, provides that any dealer in motor vehicles in this State may, instead of registering each vehicle he may wish to show or *demonstrate* on the public highways, apply for registration and secure a general distinguishing number which may be attached to any motor vehicle which he sends temporarily upon the road. Said article defines a dealer as being any person, firm or corporation engaged in the business of selling automobiles who runs them upon the public highways or streets for demonstration for the purpose of sale.

Said article, in Section b, provides that any such dealer holding a dealer's license may issue temporary cardboard numbers using such dealer's number thereon, and that such temporary cardboard number may be used by any person purchasing a vehicle from such dealer until such purchaser has time to register said vehicle at the tax collector's office in the county of the residence of such purchaser.

You will observe that the last article referred to makes no distinction between new and second-hand automobiles and applies with equal force to both such classes of motor vehicles.

The latter part of Section 3 of Chapter 88 of the Acts of the Forty-first Legislature, Second Called Session, provides that any "new vehicle may be operated, temporarily, by a dealer under a dealer's license number or by its purchaser under a special dealer's cardboard number as provided in Chapter 211, General and Special Laws of the Regular Session of the Fortieth Legislature."

We, therefore, see that the Legislature, in its latest expression on this question, reaffirms the intention expressed in Chapter 211 of the Acts of the Regular Session of the Fortieth Legislature above referred to.

For your information, however, you will find that said Chapter 211 of the Acts of the Regular Session of the Fortieth Legislature contains amendments to Articles 6686 and 6688 of the Revised Civil Statutes of 1925. Section 16 of Chapter 88 of the Acts of the Second Called Session of the Forty-first Legislature repeals Article 6688, but leaves Article 6686 as amended in full force and effect.

The writer has deemed it expedient and advisable to review the history of this legislation, in detail, in order that the true intention of the Legislature may be determined.

You are, therefore, advised that it is the opinion of this Department that an automobile dealer is permitted, under the law, to demonstrate, upon the highways of this State, a second-hand automobile, provided he has attached to said automobile the general distinguishing number or dealer's license issued by the tax collector in the county in which said dealer resides for the year in which said second-hand automobile is being demonstrated.

You are further advised that said dealer may sell said second-hand automobile, without violating the law, provided he has, in his actual physical possession, at the time of the sale, the tax collector's receipt for the fee paid for said general distinguishing number or dealer's license for the year in which said automobile is sold, and delivers an endorsed certified copy of same to the purchaser.

You are further advised that any person may purchase a second-hand automobile from a dealer, without violating the law, provided said purchaser demands and receives from the dealer a certified copy of the tax collector's receipt for the fee paid for said general distinguishing number or dealer's license for the year in which said automobile is purchased.

You are further advised that any purchaser of a second-hand automobile from a dealer may, without violating the law, temporarily operate said automobile upon the highways of this State until said purchaser has had reasonable opportunity to register said automobile in the county of his residence provided said automobile has attached to it a cardboard number furnished by the selling dealer and containing the original general distinguishing number issued to said dealer by the tax collector.

It is to be expressly understood that in completing a sale of any second-hand automobile the parties to the transaction must, in addition to the above requirements, in each instance, comply with the provisions of Article 1435 of the Penal Code, which provides that the seller must deliver to the purchaser a duplicate bill of sale, an exact form for which is set out in said Article 1435 of the Penal Code.

It is, of course, understood that any person may sell or buy a second-hand automobile, provided said automobile has been registered, as provided by law, for the year in which the sale is made and provided said automobile has attached to it the license fee plates for said year, and provided the seller endorses and delivers to the purchaser the tax collector's receipt for the license fee paid on said automobile for the current year.

Yours very truly,

JACK BLALOCK,
Assistant Attorney General.

OPINIONS RELATING TO INSURANCE.

Op. No. 2779, Bk. 63, P. 216.

LIFE INSURANCE COMPANIES—INVESTMENTS.

Life insurance companies, organized under the laws of this State, are not permitted by law to invest their funds in the shares of Texas building and loan associations.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 26, 1929.

Honorable W. A. Tarver, Commissioner of Life Insurance, State Office Building, Austin, Texas.

Attention Mr. Vaughan.

DEAR SIR: This is in response to your recent request for an opinion of this department as to whether a life insurance company, organized under the laws of this State, could invest in the shares of stock of a building and loan association.

The classes of securities in which Texas life insurance companies are permitted to invest their funds are listed in Articles 4725 and 4766. By the terms of these articles the investments of such life insurance companies are strictly limited to the therein enumerated classes of securities. According to our construction of these statutes, Texas life insurance companies are prohibited by reason thereof from investing their funds in building and loan stock. The question directly presented at this time is whether the language hereinafter quoted, contained in Section 25 of the Building and Loan Act, passed by the Second Called Session of the Forty-first Legislature, has amplified said Articles 4725 and 4766 so as to permit the investment by Texas life insurance companies of their funds in building and loan shares of stock.

Section 25 of said building and loan act, in part, is as follows:

"* * * Any Texas corporation may invest in shares in any Texas building and loan association."

Section 77 of the same act is, in part, as follows:

"All acts and parts of acts in conflict herewith, be and the same are hereby repealed * * *"

Two familiar rules of statutory construction are these: Repeals by implication are not favored, and a subsequent general act does not repeal by implication a prior act special in its effect and scope. It will be noted that the language of Section 77, above set out, does not expressly repeal any law, but the repealing language is general in nature and effect. The rule, as we find it announced by the text writers and cases on the point, is that a general repealing clause, similar to the one above quoted,

does not operate as an express repeal of inconsistent acts, and adds nothing to the effect of the act in which it is contained in its repealing power, and that whether or not prior acts are repealed depends entirely upon whether the language of the later act is sufficiently definite and incongruous as to impliedly repeal the former act contended to be in conflict therewith.

Quoting from the Tennessee Supreme Court, in its opinion in the case of State vs. Yardley, 95 Tenn. 546, 34 L. R. A., 656 (672):

"If any former law is amended or revived by this act, that result is accomplished by implication alone; there is no express amendment or revival. No word indicating purpose to amend or revive any former law is used in any part of the act. With equal propriety and certainty it may be said that no express repeal was intended, and that any repeal actually effected was by implication simply. The words of the fourth section 'that all laws and parts of laws in conflict with this act be and the same are hereby repealed,' do not make it an expressly repealing act. Really, that section adds nothing of virtue or meaning to the act, and takes nothing from it. All prior conflicting laws and parts of laws were impliedly repealed by the former section of the act; and, as a consequence, no such laws or parts of laws were left for the fourth section to operate upon."

Assuming, therefore, that the general language of repeal adds nothing within itself or by itself to the repealing power of the act, we are then left to consider whether the subsequent general language of Section 25 of the building and loan act impliedly repeals the special enactment providing a definite and limited class of securities in which life insurance companies are permitted to invest their funds.

The following language which expresses our constructions upon this point, is taken from Volume 1, Lewis' Sutherland Statutory Construction, page 528:

"It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter although latest in date, will not be held to have repealed the former but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.

"* * * In many of the cases just cited there was a general repeal of all inconsistent acts and parts of acts. As a general rule the insertion of this general repealing clause does not add anything to the effect of the general act to repeal local or special laws."

"(Page 530) When the legislator frames a statute in general terms or treats a subject in a general manner it is not reasonable to suppose that he intended to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the general act shows a plain intention to do so."

"(Page 531) The general law can have full effect beyond the scope of the special law and by allowing the latter to operate according to its special aim the two acts can stand together."

Along this same line we may quote from the case of People vs. Jaehne, 8 N. E. 374 (378):

"Whether a subsequent statute repeals a prior one in the absence of express words, depends upon the intention of the Legislature, and one of the tests frequently resorted to to ascertain whether there is a repeal by implication, is to inquire whether the special and general acts may both be executed without involving repugnancy of rights or remedies. In some

cases the question has been solved by holding that the general act was intended to declare a general rule governing cases not already provided for and that a prior special statute on the same subject operating upon a single person or class of persons or within a limited territory should be treated as if specially exempt from the operation of the general law."

It will be noted that the Legislature in passing the building and loan act was dealing primarily with building and loan associations and it could be reasonably inferred that the insertion of the language "Any Texas corporation may invest in shares of Texas building and loan associations," was intended to assure corporations of Texas not already inhibited therefrom, that their acts of investment in Texas building and loan shares should not be *ultra vires*.

We therefore conclude that the special acts limiting the class of securities in which life insurance companies may invest their funds, is not affected or amplified by the building and loan act and that Texas life insurance companies are not permitted to invest their funds in the shares of Texas building and loan associations. This construction harmonizes the two laws and permits them both to stand as originally enacted.

Yours very truly,
W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2812, Bk. 63, P. 437.

WORKMEN'S COMPENSATION INSURANCE CARRIERS RESERVES—STATE INSURANCE COMMISSION.

1. The State Insurance Commission is empowered to make and enforce all reasonable rules and regulations for determining adequate reserves required to be maintained by insurance carriers writing participating policies under the Workmen's Compensation Law; and no dividend may be approved until such adequate reserve is provided.
2. The State Insurance Commission is empowered to require insurance carriers writing participating policies under the Workmen's Compensation Law, to maintain adequate reserves and reasonable surplus to insure solvency before dividends are declared to such policyholders; and such reserves and surplus may be required to be computed on the basis of a per cent of the premium.
3. Opinion No. 2714, Book 62, page 366, Opinions of the Attorney General, 1926-1928, page 174, is withdrawn.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, April 23, 1930.

Board of Insurance Commissioners, State Office Building, Austin, Texas.

GENTLEMEN: In your letter of March 14, 1930, addressed to the Attorney General you request a reconsideration of Departmental Opinion No. 2714, dated December 19, 1927, Book 62, page 366, Opinions of the Attorney General, 1926-1928, page 174.

We have carefully considered the opinion in the light of the actual conditions existing with respect to the plan of Workmen's

Compensation Insurance in Texas. It must be remembered that the Workmen's Compensation Law was enacted as a remedial law for the benefit of the worker, to the end that a sure, speedy and just settlement of claims for injuries suffered in industry might be afforded. At the same time, it must be remembered that the "subscriber," employer, is relieved of all common law liability for the payment of damages to injured employes on account of negligence. Such employees must look for compensation *solely* to the insurance carrier of the employer. They have no right of action against their employer or against any agent, servant or employee of their employer for damages for personal injuries sustained in the course of their employment. Art. 8306, Sec. 3, R. S. 1925.

It is provided by the terms of Article 4911, of the Revised Statutes:

"The Commission shall determine hazards by classes and fix such rates of premium applicable to the pay roll in each of such classes as shall be adequate to the risks to which they apply and consistent with the maintenance of solvency and the creation of adequate reserves and a reasonable surplus, and for such purpose may adopt a system of schedule and experience rating in such manner as to take account of the peculiar hazard of each individual risk, provided such rate shall be fair and reasonable and not confiscatory as to any class of insurance carriers authorized by law to write workmen's compensation insurance in this State. To insure the adequacy and reasonableness of rates, the Commission shall take into consideration an experience gathered from a territory sufficiently broad to include the varying conditions of the industries in which the classifications are involved, and over a period sufficiently long to insure that the rates determined therefrom shall be just, reasonable, and adequate rates. The Commission shall exchange information and experience data with the rate-making bodies of other States and shall consult any national organization or association now or hereafter existing for the purpose of assembling data for the making of compensation insurance rate."

Articles 4914 and 4915 read:

"Nothing in this chapter shall be construed to prohibit the operation hereunder of any stock company, mutual company, reciprocal or inter-insurance exchange, or Lloyd's association, to prohibit any stock company, mutual company, reciprocal, or inter-insurance exchange or Lloyd's association, issuing participating policies, provided no dividend to subscribers under the Workmen's Compensation Act shall take effect until the same has been approved by the Commission. No such dividend shall be approved until adequate reserve has been provided, said reserves to be computed on the same basis for all classes of companies or associations operating under this chapter, as prescribed under the insurance laws of the State of Texas."

"The Commission is hereby empowered to make and enforce all such reasonable rules and regulations not inconsistent with the provisions of this law as are necessary to carry out its provisions."

The last sentence of Article 4914, with respect to reserves, can only refer to Article 5036 or to 8308, Sec. 23. Article 5036 reads:

"No life, health, fire, marine or inland insurance company, organized under the laws of this State, shall make any dividend except from the surplus profits arising from its business. In estimating such profits, there shall be reserved therefrom a sum equal to forty per cent of the amount received as premiums on unexpired fire risks and policies, and one hundred per cent of the premiums received on unxpired life, health, marine or

inland transportation risks and policies, which amount so reserved is hereby declared to be unearned premiums. There shall also be reserved the amount of all unpaid losses, whether adjusted or unadjusted; all sums due the company on bonds, mortgages, stocks and book accounts, of which no part of the principal or the interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosures or collections has not been commenced, or which after judgment has been obtained thereon shall have remained more than two years unsatisfied, and upon which interest shall not have been paid. In case of any such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved. Any dividend made contrary to the provisions of this article shall subject the company making it to a forfeiture of its charter, and the Commissioner shall forthwith revoke its certificate of authority."

Section 23 of Article 8308 reads:

"The association shall set up and maintain reserves adequate to meet anticipated losses, carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and may be invested in such securities as are permitted to casualty companies organized under the general laws; and, for the protection of its reserves and surpluses against the liability herein imposed, shall have the same right to reinsure or be reinsured as casualty companies organized under the general laws."

Construing these articles of the statutes, when considered in relation one with the other, and all together, keeping in mind the plan for compensating injured workers in industry and at the same time relieving the employer of all liability for such injuries by substituting the Insurance Fund, we are of the opinion that the Commission is empowered to make and enforce all reasonable rules and regulations, consistent with the provisions of said articles of the Revised Statutes, for the approval of dividend payments to "subscribers," insured with participating policies. And in formulating such rules and regulations, we think the Commission not only may, but should require that a company be solvent, have a reasonable surplus, and an adequate reserve, before any dividend shall be approved for payment to a participating policyholder. The only limitations as to the authority of the Commission are that such rules and regulations must be reasonable, and the reserve to be maintained must be computed on the same basis for all classes of companies or associations operating under the provisions of the Workmen's Compensation Law.

Opinion No. 2714, aforesaid, is withdrawn, and in the opinion of this department the Commission may proceed to formulate such regulations as, in its judgment, may be determined to be just, fair and reasonable, taking into consideration all the elements enumerated in the quoted articles of the statutes and the nature of the Workmen's Compensation Plan.

Very truly yours,

W. A. WADE,
Assistant Attorney General.

OPINIONS RELATING TO PUBLIC LANDS.

Op. No. 2758, Bk. 63, P. 49.

PUBLIC LANDS—NAVIGABLE STREAMS.

1. Streams declared navigable by Article 5302 are on a legal parity with streams in fact navigable.
2. The State constructively reserves the waters and soil in both classes of navigable streams upon the making of adjacent grants.
3. Navigable streams, together with their beds and the minerals therein contained, embraced in patents or awards of land lying either across or partly across such navigable streams, have not been sold by the State under such patents or awards.
4. Navigable streams are part of the remaining one-half of the public domain appropriated to the permanent public school fund by the Constitution.
5. Navigable streams, even if not by the Constitution, were, at any rate by Article 5416, appropriated to the permanent school fund, and the Legislature was powerless thereafter to change their character.
6. Senate Bill No. 150, Regular Session of the Forty-first Legislature, undertaking to confirm and validate, or to relinquish, quitclaim, and grant awardees of surveys lying across or partly across navigable streams, a property right therein, is violative of Sections 4 and 5 of Article 7 of the State Constitution.
7. The State would have no way of necessity, either across the adjacent surveys, or out on to the river bed area affected by this bill, and is permittees handling sand and gravel would be trespassers.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 1, 1929.

Honorable Dan Moody, Governor of Texas, Capitol.

DEAR GOVERNOR: I acknowledge receipt of your letter of February 25th to which is attached copy of Senate Bill No. 150 and in which you propound several inquries as to the validity of the proposed law.

The act is very broad, in fact, coextensive with the limits of the State, in so far as its operation is concerned. It undertakes to validate all patents and awards issued on lands lying across or partly across watercourses or navigable streams and the beds and abandoned beds of watercourses and navigable streams if such patents and awards have been outstanding and uncanceled for a period of ten years. It is even broader in scope than this, in that it undertakes to relinquish, quitclaim and grant to patentees and awardees and their assignees, all of such lands and the minerals contained therein across such watercourses or navigable streams, and the beds or abandoned beds of such streams if such patents and awards are outstanding for a period of ten years.

The expression "watercourses" as used in the bill is meaningless, for the reason that if it is intended to include something different than "navigable streams," it could apply only to watercourses having less than an average width of thirty feet from the mouth up, and these watercourses and the beds of same and the minerals therein contained are already incontestably the

property of the patentees and awardees. If, on the other hand, it is intended to refer to watercourses, which do not continuously carry water, then the respective rights of the State and of the patentees are dependent upon whether such watercourses are navigable streams under the statute. Therefore, the act must be construed as though it dealt only with navigable streams. The use of this term, however, in all of the pertinent sections of the act indicates the unlimited extent and scope which the Legislature sought to give to the terms and provisions of the act, and, therefore at the very threshold we are faced with a direct assault upon the general policy of the State and of all other governments as to the ownership and control of the navigable waters and the beds thereunder by the sovereignty for the benefit of the public. This general policy has been, both in Texas and in other states, and almost universally in all countries, that the sovereign title and right of the State in its navigable waters and beds of same is one that can not be surrendered, alienated, or delegated, except for some public purpose or some reasonable use which can fairly be said to be for the public benefit. The power of the State, as the outcome of a general public policy that has always existed to grant land under its navigable waters to private persons or corporations, has always been subject to the qualification that such grant must be for a purpose that is useful, convenient or necessary to the public. So that aside from the constitutional questions involved, the proposed law is a direct assault upon this long established public policy of all governments. I am quite conscious of the fact that the subject matter of the bill has been acrimoniously discussed, the activities of this department in its effort to subserve the public interests and conserve the public free school land for the benefit of the permanent school fund not having escaped the condemnation of those interested in the passage of the act.

I am firmly convinced that there is a condition particularly in West and Southwest Texas of which some relief should be given and a more definite and certain definition of a navigable stream should be enacted into the law, and I have not hesitated to so express myself to many members of the Texas Legislature by a written communication to a member of the State Senate. I am also of the opinion that there should be a reasonable law of limitation as against the State as to actions for the recovery of vacant land which has been held under a claim of title and in possession for a long number of years, and that provisions should be made by the Legislature to locate and mark upon the ground all of the public land within its domain. These, in my judgment, would be wise enactments but the act under consideration does not attempt to do either of these things or in any way remotely relate to them.

In view of what I have said, it is with much reluctance that I reach the conclusion and so advise you that in my opinion the bill contravenes Section 4 of Article 7 of the Constitution which provides that the public free school lands shall be sold and which

would prohibit their being given away, and the further provision of the same section that the Legislature shall not have power to grant any relief to the purchasers of public free school lands, and that it is also in violation of the constitutional inhibition contained in Section 5 of Article 7 which prohibits the appropriation of any public school land which is a part of the permanent school fund to any other purpose than in the investment of bonds of a defined kind.

I will take up your questions seriatim giving my views as to each:

1.

"Does Senate Bill No. 150 contravene the provisions of the Constitution with reference to lands belonging to the public school funds?"

As hereinbefore stated, the term "watercourses" as used in the bill, has no distinctive meaning in so far as any purpose or intent of the act might be effected, and, therefore, it must be construed as though it used only the term "navigable streams."

Navigable streams are of two kinds:

(a) Those that are navigable in point of fact, and

(b) Those that are navigable in point of law only.

Much of the confusion that has arisen in regard to a proper conception of the proposed act has arisen by reason of the fact that in this State there are two distinct kinds of navigable streams as hereinbefore indicated. A stream may be navigable under the laws of this State though it may not be navigable in fact. Article 5302 of the Revised Civil Statutes of 1925 contains the following provision in relation to lands lying on navigable watercourses as a definition of navigable streams under the laws of this State:

"All streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams within the meaning hereof, and they shall not be crossed by the lines of any survey."

This statute was enacted in the year of 1837 and its effect according to the decision in the City of Austin vs. Hall, 93 Texas, 591, 596, is to give "to the streams described therein the character of navigable streams under the rules which govern the courts in determining that question, and a grant made upon a stream declared by the statute to be navigable would confer title only to the same extent as if the stream were navigable under the general definition given to such watercourses." It was further said:

"The result to the locator is the same as if the stream were navigable under the general rule of decision and he would take title limited to the water line the same as if the stream were navigable. * * * The apparent object of the Congress of the Republic in enacting the law and of the several Legislatures which have continued in force was to prevent locators upon the public domain from monopolizing the waters of the State. * * * In addition thereto, by declaring such streams to be navigable, the State reserved the title to the beds thereof which are subject to the control of the State."

The Supreme Court in State vs. Grubstake Investment Association, 297 S. W. 202, in holding that the bed of a stream did not pass out of the State under a Mexican grant of 1835 quoted the Hall case with approval, and also the following from Mass. vs. New York, 271 U. S. 89:

"The dominion of navigable waters and property in the soil under them are so identified with the exercise of the sovereign powers of government that a presumption against their separation from a sovereignty must be indulged in construing all grants by the sovereign of lands to be held in private ownership."

Again the Supreme Court in the case of State vs. Black Bros., 297 S. W. 213, held that the bed of a navigable stream was constructively reserved to the State under a grant made by the State of Texas and could properly be used by the sovereign for the purpose of developing minerals therein contained for the benefit of the school fund.

These clean cut decisions of our highest tribunal establish that streams navigable by Article 5302 are on a parity with streams in fact navigable, and that the State does not sell but upon the contrary constructively reserves the waters and soil as both such classes of navigable streams upon the making of adjacent grants. They further show that the latter rule is evolved from the civil law as we took it through Mexico and also from the common law as we took it from England. In other words, the principle is basic in the law of this State.

These cases, it is true, do not construe grants lying across or partly across navigable streams, but rather ordinarily riparian grants, but the difference in the law affecting the two is simply that the more stringent rule should be applied to the first than the second; for it has further been the law since 1837 under this same Article 5302 that navigable streams "Shall not be crossed by the lines of any survey," and with reference to that provision it was said by the Supreme Court in Landry vs. Robison, 219 S. W. 810:

"It was decided in Land Company vs. Thompson, 83 Texas, 179, that surveys astride Devil's River made in 1876 and 1877 constituted no appropriation of the land, to protect it from subsequent location, because forbidden by the statute, and therefore illegal."

And in that case, it was further said:

"Had there been no statutory reservation of the beds or the channels of navigable rivers, we do not think that such general language as 'other public lands' could be held to include the soil beneath navigable waters for our decisions are unanimous in the declaration that by the principles of the civil and common law, soil under navigable waters was treated as held by the State or nation in trust for the whole people. * * * Nothing short of express and positive language can suffice to evidence the intention to grant exclusively private privileges or rights in that used for the common use and benefit."

It may be added that navigable river beds abandoned through avulsion remain the property of the State. Siddall vs. Hudson, 206 S. W. 381. The relative rights of the State and its grantee

are apparently determined by the conditions of the stream in all respects as of the time of the grant.

As continued manifestations of the State policy in this regard, we have also Article 5338 expressly making "river beds and channels" subject to the general mineral permit law, and Article 4026, declaring that "all of the public rivers, etc., within the jurisdiction of this State, together with their beds and bottoms, and all the products thereof, shall continue and remain the property of the State of Texas."

Under the authority hereinbefore developed—and much more might be added—the conclusion is irresistible that navigable streams, together with their beds and the minerals therein contained, embraced in patents or awards of land lying either across or partly across such navigable streams, have not been sold by the State under such patents or awards. If such navigable streams were simply a part of the general public domain and did not belong to the school fund, the Legislature probably could, in the first instance, have given them away, and so doubtless by this act could ultimately relinquish them. But navigable river beds are part of the public school fund lands, and their disposition is, therefore, controlled by the constitutional provisions with reference to such lands.

I do not base my statement as to the school fund's property in navigable streams alone upon Article 5416, but rather upon the basic law of the land as found in Article 7, Section 2, expressly setting apart and appropriating to the school fund "one-half of the public domain of the State." The reason why navigable streams constructively reserved (as above shown) from general grants of land lying across or partly across such streams necessarily fall into that half of the public domain so broadly referred to in the Constitution is because our Supreme Court, in 1898, in the case of Hogue vs. Baker, 45 S. W. 1004, as against one seeking a homestead donation, held that the other half of the entire public domain having been then exhausted, all the remainder of such public domain necessarily fell within the constitutional appropriation to the school fund. That conclusion is summarized in these words by the court:

"The half of the public domain not dedicated to the school fund has already been exhausted, and what remains belongs equitably to that fund."

If there were any doubt about the application of this constitutional appropriation to the navigable streams, the same result, its appropriation to the school fund, would follow from Article 5416, enacted in 1900, which provides in part as follows:

"All lands heretofore set apart under the Constitution and Laws of Texas, and all of the unappropriated public domain remaining in this State of whatever character and wheresoever located, including any lands hereafter recovered by the State, except that included in lakes, bays, and islands along the Gulf of Mexico within tide water limits, is set apart and granted to the permanent school fund of the State."

Plainly, navigable streams do not come within the terms of

the exception, and are, therefore, by this provision, whatever their status as originally reserved, definitely appropriated to the school fund as "unappropriated public domain remaining in this State of *whatever character and wheresoever located.*"

In this connection it can make no difference that such appropriation was not had prior to the making of the original grants with their reservations, nor that such appropriation was made by the Legislature instead of the Constitution itself. The validity of the bill must be tested by the present status of the navigable streams as school fund land, and the Legislature having once made such dedication its action by virtue of the Constitution becomes irrevocable. As is said in Eyl vs. State, 84 S. W. 611:

"The Legislature could not by subsequent legislation change or destroy the character of these lands as public school lands."

The framers of our Constitution, in their good wisdom, have seen fit to afford a peculiar and special protection to our public free school by limiting the power of the Legislature to act upon public school lands. In the first place, by Section 4, Article 7, of the Constitution, a mandate is put upon the Legislature *to sell* public school lands. With respect to this mandate it is said in Smisson vs. State, 71 Texas, 222, 235:

"The effect of this is to withhold from the Legislature power to adopt a system for the ultimate utilization of the common school lands otherwise than through sales."

In addition, by the same section of the Constitution, it is said: "The Legislature shall not have power to grant any relief to purchasers thereof." The Comptroller is further therein directed to "invest the proceeds of such sales" in bonds of certain defined kinds, and in Section 5 it is said that "no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever." In this connection the decision in Imperial Irrigation Company vs. Jayne, 104 Texas, 395, 415, 417, makes it plain that in this non-diversion restriction the Constitution is referring to lands, proceeds of sale thereof, and bonds, as all included in the general designation "school fund."

It has been held that under the constitutional provision relating to the diversion of the University fund, similar in terms to that relating to the school fund provision, the Legislature could not even make oil royalties which are in their essential nature proceeds of the University lands; and, therefore, a part of the permanent fund, available for the building needs of the University to which only the "available fund" could be applied. State vs. Hatcher, 115 Texas, 332.

In the recent case of Greene vs. Robison, 8 S. W. (2nd) 655, the so-called "Relinquishment Act" was upheld upon the principle that it was not after all a "relinquishment act," or a gift or donation, but an exercise of the sovereign lawmaking power in enforcing from the State's purchaser of the oil and gas a

compensation to the owner of the soil for the damage done thereto. In this connection it is said:

"We can not agree with respondents, the Land Commissioner and his attorney, that the Legislature has authority to relinquish to the owner of the soil, *without payment of consideration therefor*, minerals reserved to the State prior to the sale of the land and withheld in his purchase thereof, or that the cases of Cox vs. Robison, 105 Texas, 426, and Greene vs. Robison, 109 Texas, 367, can be so construed."

Still, again, in the case of State vs. Post, 169 S. W. 406, it was said with respect to a law attempting to empower the Land Commissioner to resurvey lands already sold without necessary regard to their original survey lines that—

"The Legislature was positively prohibited by the Constitution from disposing of these lands, and from authorizing the Commissioner to do so at the time of such resurvey, except by selling the same. To include the lands in controversy in appellee's patented surveys by extending the lines thereof beyond their original location is not to sell such lands as required by the Constitution, but is to give them away."

As applied to the undertaking of this bill, to confirm and validate, or to relinquish, quitclaim and grant to patentees, awardees, and assignees of lands lying across or partly across navigable streams, a property right in such navigable streams originally reserved by the State is to relinquish to such awardees and patentees, "without payment of consideration therefor," "all of the lands and minerals therein contained" embraced in such navigable streams, is to extend such grants "beyond their original locations," is to permanently divert and withhold such school lands from sale, thus preventing the investment of their proceeds in bonds for the benefit of the school children of the State, is palpably to grant relief to purchasers, is "to give them away" instead of selling them.

The use of the terms "confirmed and validated" in the first section of the bill can not operate to make a confirmation or validation of what upon sale was reserved to the State, and though the Legislature might originally, by express language have sold the navigable rivers, it could not then, and, therefore, can not now grant away gratis such school fund land.

Validating or curative statutes presuppose the existence of an initial right, and an irregularity in its origin. It is upon such right and such irregularity that they operate by validating the right and curing the irregularity. If a law undertakes to give a right where none before existed, it certainly is not a validating or curative statute, but one wholly creative in its nature, vesting retroactively a right where there was none. Anything of value added by seller, whether state or individual, after consummation of a sale, is in its essential nature a gift.

All of the validation acts that have been upheld by our courts will be found, upon examination to be simply ratifications by the State as the principal, speaking through the Legislature, of the act of an unauthorized agent—never a retroactive grant of what

the Legislature, itself, in the first instance, could not have granted.

No force can be gained for these awards and patents to surveys lying across navigable streams from the action of the Governor or the Commissioner of the General Land Office with respect thereto. They were made in clear violation of Article 5302, and though there is every reason to believe that they should be upheld, except as to the navigable stream area itself, they can not take any efficacy out of the unauthorized acts of such officers. A leading case on this question is Day Land & Cattle Company vs. State, 68 Texas, 526, 540, where, as against a suit to recover unlawfully patented land, it is urged that the action of the Governor and the Commissioner of the General Land Office, in issuing the patents, was conclusive, and in overruling this contention it was said:

"All power that any officer of this State has is given by a written law directly or indirectly, and any act which any officer, from the Chief Executive of the State to the lowest officer in it, may assume to do in excess of the power thus given, is void."

The surveyor employed by the awardee to make such surveys is in the same situation, and he is indeed more accurately speaking "the agent of the claimant of the land, as the duty to have the survey made is imposed upon such claimant." Sullivan vs. State, 95 S. W. 645, 648.

As regards the proviso of the act to the effect that it shall not apply to "any number of acres of land in excess of the number of acres of land conveyed" originally, and the other proviso to the effect that the State's mineral reservation shall not be affected, it is apparent that the effect of the act, even with these limitations, is still to relinquish that which was not granted, merely putting it upon a parity of that which was granted. If the surveys affected by this bill are short in acreage without the inclusion of that which was reserved to the State upon sale, it is reasonable to suppose that the awardees or their assignees can, and probably have secured from the State refunds of purchase money proportional to the shortage.

If there is considered to be some measure of hardship in the situation of landowners now having their holdings divided by a ribbon of State property, still their compensation, if any considered due, can not by the Legislature be taken out of the school fund lands. Even the recompense of payment for duties performed in the military service has been consistently derived from the other half of the public domain—not that appropriated to the school fund.

2.

"What effect, if any, will this bill have upon pending litigation in which your Department is representing the State of Texas?"

We have pending at this time but one river bed suit, the same being No. 45,223, in the Fifty-third District Court of Travis County, Texas, being styled the State of Texas vs. C. W. Brad-

ford et al. This suit was filed prior to the extensive oil development that has since taken place in the area in Gray County immediately adjacent to the North Fork of the Red River, which is the area sued for. If Senate Bill No. 150 becomes a law, and if further I be mistaken in my advice as hereinbefore given as affecting its unconstitutionality, then the subject matter of the suit will have been relinquished and its purpose terminated.

3.

"Assuming that the survey lines in some instances cross the Brazos, Trinity and Colorado Rivers in the lower regions of these streams, what effect, if any, will this bill have upon passing title to such river beds to the assignee of the original patentees in such instances?"

Since the bill in unrestricted terms applies to "navigable streams" there can be no doubt that it applies both to those streams navigable in point of fact—such as those to which you refer—and also to those navigable only by virtue of the terms of Article 5302.

4.

"What effect, if any, will this bill have upon the rights of the State in handling the sand and gravel, and the right of ingress and egress for the purpose of removing and selling such sand and gravel?"

Though the bill abstractly protects "the State's title, right or interest in and to the sand and gravel," the want of an express grant to the State or its permittees of the right of ingress and egress for the purpose of removing and selling such sand and gravel, would leave the State without any effective reservation even as to such sand and gravel.

The probable effect of the bill is to reserve to the State itself sand and gravel in the river beds as personalty, while granting the subjacent realty to the patentee, awardee or assignee. So far as I know, no way of necessity has ever been held to be implied from a reservation of personalty left upon lands sold, but even if the sand and gravel because left in place be considered realty, the situation is no different from that existing in the case of State vs. Black Bros., 297 S. W. 213, in which the Supreme Court denied to the State a way of necessity for its mineral permittees across the riparian lands to the navigable river bed area operated by them under the State. It was said with obvious application to the situation here presented:

"We should be slow to extend this doctrine of implied reservation of a way of necessity to cases where the unity of title on which it rests can be found only in the sovereign. * * * If a sale or conveyance of one portion of such (the public domain) prevents access to another, it would seem to be a contingency which the government was bound to contemplate in making the conveyance."

Even abstractly "the State's title, right or interest in and to the sand and gravel lying within the bed of any navigable stream within this State, as defined by Article 5302, Revised Statutes, 1925," is protected that far and that far only. In other words,

the State's title to the sand and gravel is not undertaken to be protected in streams navigable in fact but not in law, nor in the beds of abandoned streams, though abandoned beds of watercourses would seem to be the main source of the sand and gravel supply.

Since the State would have no way of necessity either across the adjacent surveys or out onto the granted river bed area, it would follow that its permittees handling the sand and gravel would be trespassers in the eyes of the law. Among these trespassing permittees would be included the counties, road districts, cities or towns of this State taking sand or gravel without charge for highway construction work from the river bed areas involved. See Article 4054.

5.

"What effect, if any, will the provisions of this bill have upon the general policy of the State to appropriate the waters of navigable streams as the property of the general public, having reference to Section 59a of Article 16, Constitution of Texas, declaring the policy of the State in regard to streams?"

Section 59a of Article 16 declares as a public right and duty "the conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams for irrigation power, and all other useful purposes." This constitutional provision is substantially carried forward in the statutes as Article 7466, and by Article 7467—

"The waters of the ordinary flow and underflow and tides of every flowing river or natural stream * * * and the storm flood or rain waters of every river or natural stream * * * within the State of Texas, are hereby declared to be the property of the State and the right to the use thereof may be acquired by appropriation."

The bill undertakes to protect "the rights of the general public and the State in the waters of streams, or the rights of riparian and appropriation owners in the waters of such streams." Of course, the bill could not do otherwise, else it would be in conflict with the Constitution. As it is, there is perhaps no theoretical conflict; that is to say, the State will conserve and develop the waters in its rivers and streams and have a distinct property right therein and permit separate appropriation thereof at the same time it grants away the land under the water. Water in contemplation of the appropriation laws is itself realty, and the legal effect is a severance of horizontal estates, that in the water and that in the land under the water, somewhat similar to what has been done with respect to the mineral and surface estates in Texas. The severance in the latter instance has been the source of a great deal of practical interference between those using the one or the other estate, and has brought about trouble without end culminating in the decision of Greene vs. Robison, 8 S. W. (2d), 655. It is reasonable to suppose that the appropriation owner of the water can expect an experience of the same kind

that the owner of the soil or surface has suffered in this State in the past.

Thus it is more than probable that the general policy of the State, as pictured in the constitutional provision cited, will be largely frustrated by the bill in question.

This communication is unduly lengthy, but in justification of it I simply cite you to a few instances of its effect insofar as the navigable streams of Texas are concerned. If it becomes a law, the result will be that the State relinquishes all of its right, title and interest in ten miles of the main channel of the mouth of the Trinity River; in twenty miles of the main channel of the Brazos River in Brazoria County; in one hundred miles of the Canadian River which is the widest river in Texas; in all of the main channel of the Trinity River from Dallas to beyond Fort Worth. A very hurried investigation of the records of the Land Office discloses that this act will result in the State relinquishing its right, title and interest to portions of fourteen separate navigable streams in this State in forty counties in the State and in approximately four hundred original surveys.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2764, Bk. 63, P. 92.

PUBLIC LANDS—SALE OF MINERALS IN UNIVERSITY LANDS UNDER ACT OF 1925.

The Commissioner of the General Land Office has the power under the University Leasing Act of 1925 to effect a postponement of leases within the month of January by withdrawing offer to sell on Jannary 2nd through advertisement of like kind originally made, and fixing a later date during the month of January for such sales.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 28, 1928.

Honorable J. T. Robison, Land Commissioner, Austin, Texas.

MY DEAR MR. ROBISON: We have today in conference considered your letter of the 21st instant, wherein you request an opinion as to your power either to withdraw from sale oil and gas leases on 103,000 acres of University land advertised for January 2, 1929, or to postpone such sale until a later date in said month.

You are respectfully advised that in our opinion, although you do not possess the power to withdraw or postpone such sales beyond some date in January, you have the power to postpone such sales until a later date in said month.

Your question is predicated upon the fact that you have received some specific and many general requests for advertisement of University mineral land which are deemed by you to be a sufficient demand within the terms of Section 2 of the University

Mineral Leasing Act of 1925, requiring sales "when there is land in demand." Since there is land in demand, according to your letter, you are mandatorily required to sell, in compliance with the legislative prescription as to the times of sale. Considerations of expediency could not give rise to an implication of power in you to thwart the legislative intent that sales must be made not less than once each month when there is land in demand.

Your question is also predicated upon the fact that the Board of Regents of the University believe that the present economic conditions surrounding the production of crude oil will not be conducive to the University's getting a fair value for oil and gas leases sold on January 2, next. We assume also that there is reasonable prospect of improvement in conditions during the course of the month of January. We are of the opinion that upon this basis a postponement of sales to some later date in January is necessary to the proper execution of the purpose of the law and from such necessity is implied the power in you to postpone the sale.

The main purpose of the University Leasing Act of 1925 was doubtless to get the most from the oil and gas in the lands belonging to the University fund. It was a compliance by the Legislature with the constitutional direction that the University lands should be sold and that the Legislature should make provision as to the regulations, times and terms of sale. In doing this it did not usurp the executive function as to details with respect to regulations, times and terms of such sales. Upon the contrary it left the Land Commissioner largely untrammelled in the proper effectuation of this duty. The terms provided in the law are simply minimum terms, sale to be made to "the applicant that pays the most." The times provided are simply "not less than once each month when there is land in demand and at 10:00 o'clock a. m. on the date fixed therefor," and the Commissioner was expressly authorized to adopt such rules and regulations "as may be necessary to the proper execution of its purpose,"—that is to say, the purpose of getting the most substantial value for the University out of its lands. As said in Theisen vs. Robison, 8 S. W. (2d) 652, with respect to this same act:

> "It was plainly competent for the act to empower the Commissioner to make regulations as the act authorized in its mere administration in order that the legislative will might be accomplished."

Under the decision in the Theisen case, the Land Commissioner is mandatorily required to sell oil or gas in any University land upon receipt of request to place same on sale; yet he is by the law given a discretion within the range of a month to fix upon the particular day for sale. Having the power to fix a day, he certainly would have the power to alter a day fixed before its arrival, especially when a postponement would seem to be necessary to the proper execution of the law. Any expression of the power of alteration in the terms of the law is utterly unnecessary

to its existence, since such power is implied from the purpose of the law, which is always paramount to its detailed expression.

In our opinion you can withdraw your offer to sell on January 2nd, through advertisement of like kind originally made by you, provided, however, you at the same time fix another and a later date during the month of January when the oil and gas leases on the 103,000 acres of University land in question shall stand for sale. "Any other view would defeat the cardinal purpose of the framers of the Constitution (as well as the Legislature) to realize as great a fund as possible from these lands including their minerals, for the University." Theisen vs. Robison, supra.

We take it that you are satisfied that there is sufficient and ample "demand," in the sense that said word is used in the act, to require you to advertise said lands.

Yours very truly,

C. W. TRUEHEART,
Assistant Attorney General.

Op. No. 2783, Bk. 63, P. 237.

LANDS, PUBLIC—SCHOOL LANDS—PUBLIC DOMAIN—RAILROAD RIGHTS OF WAY.

1. Certain land included in and constituting the right of way of the Texas & Pacific Railway Company in Ward County, being public domain at the time it was designated and taken as a right of way, is not subject to the provisions of our statutes providing for the sale of and the issuance of oil and gas permits on State public free school lands.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 21, 1929.

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

DEAR SIR: The Attorney General has your letter of July 8th, 1929, which reads as follows:

"In the early eighties and after the adoption of the Revised Statutes of 1897, a certain railroad built its track and put in operation its trains prior to the surveying of any land for any purpose in a certain locality. Thereafter surveys under various railroad certificates and for the educational institutions of the State were made in this locality. In each instance, now under consideration, the surveys aforesaid made on the north and south sides of the railroad called for the railroad right of way, leaving a space 36 varas or 100 feet wide on each side from the center of the railroad track. The railroad is still in operation. The 200 feet right of way has never been surveyed nor sold.

"The questions as to whether or not the fee in said right of way is public school land, and therefore subject to sale as such, or if the oil and gas rights therein are subject to be permitted (sold) under Article 5338, Revised Statutes of 1925, or any other law."

The land to which you refer is a strip of ground 200 feet wide lying between what is now the southeast or east corner of Section One, designated as S. 43,461, Gunter and Munson, Maddox Brothers and Anderson Block 9, and the west corner of survey 34, S. F. 7679, State Public Free School Land, in Ward County,

a distance of about 23 miles, through the center of which is located the track of the Texas & Pacific Raliway Company.

In 1881, presumably in compliance with Article 4248 of our Revised Civil Statutes of 1879, the Texas & Pacific Railway Company prepared and filed in the General Land Office a map or plat duly certified as "a correct map of the section of the Rio Grande Division of the Texas & Pacific Railway Company line, between Fort Worth, Texas, and El Paso, Texas (as), it purports to be, showing the topography, curvature, and as far as possible the land taken or obtained for the use of the railway company for right of way, being 100 feet on either side of the center of the track." This includes the foregoing mentioned strip of land. About that time this railway company completed the construction of this track along this line and commenced, and since that time has continued, the operation of its trains along and over this line of its road and is so operating and using this part of its track at this time. In fact, the Texas & Pacific Railway Company so constructing and so using this short stretch of track is one of our great trans-continental railway systems.

At the time this stretch of track was located and constructed, this strip of land, and the lands for a considerable distance to the north and to the south of same, was virgin public domain, no part of it being within any previously located, surveyed or granted area. Thereafter, the lands lying to the north of this strip and the lands lying to the south of it were surveyed and granted, and in each instance, except University Block 16, as hereinafter indicated, the field notes of these grants call for and to lie along this strip a distance of 36 varas (100) feet from the center line of the track of this railroad. The west end of this segment of track passes between what is now University Block 16 on the south and University Block 17 on the north. The field notes of this Block 16 call to begin at the west or northwest corner of Section Six (S. 43,566), Gunter and Munson, Maddox Brothers and Anderson Block O, in the center of the Texas & Pacific Railway Company's track, and to run thence westward with the center line of said track. This corner of this Section 6, however, calls to begin at a point 36 varas (100 feet) from the center of this track. In the location and survey of these several grants, therefore, this strip of ground 200 feet wide through its entire length was left, no part of it being included in any of these grants, unless University Block 16 includes the south one-half of the west 10 miles of same by reason of the calls for its beginning point and north line hereinbefore mentioned.

About the year 1900 this railroad company erected fences on either side of and parallel with and approximately fifty feet from the center line of its track along this entire distance, except where on account of railroad stations fencing was either omitted or set further back. These fences extend eastward and westward beyond this strip of ground and were erected and have been maintained in reference to liability for the injury of

livestock as provided by Article 4245 of our Revised Civil Statutes of 1879 also carried in our Revised Civil Statutes of 1895, 1911 and 1925.

It should also be noted that by condemnation proceedings this railroad company, in 1881, acquired a right of way 200 feet wide through privately owned lands of a similar character and through a section of country where the same general conditions existed as the area here involved, the right of way so acquired lying a comparatively short distance west of this area.

Your specific question is whether or not this strip of land, or any part of it, is subject to the provisions of our statutes providing for either the sale of or the issuance of oil and gas permits on State Public Free School Lands.

Prior to the adoption of our present Constitution, effective on and since April 18, 1876, our Legislature had created by special law certain railroad corporations having for their primary purpose the construction and operation of a railroad from Red River through Texas to the Rio Grande River. Among these were the Texas & Western Railroad Company (Chap. 192, p. 183, Special Laws, 4th Leg., App. Feb. 16, 1852, Laws of Texas, Vol. 3, p. 123), the Vicksburg & El Paso Railroad Company (Chap. 195, p. 197, Special Laws, 4th Leg., App. Feb. 16, 1852, Laws of Texas, Vol. 3, p. 1245), the Memphis, El Paso & Pacific Railroad Company (Chap. 35, p. 79, Special Laws, 4th Leg., App. Feb. 7, 1853, Laws of Texas, Vol. 3, p. 1433; Chap. 49, p. 73, Special Laws, 5th Leg., App. Feb. 6, 1856, Laws of Texas, Vol. 4, p. 73; Chap. 71, p. 80, Special Laws, 6th Leg., App. Feb. 14, 1856, Laws of Texas, Vol. 4, p. 378), the Southern Pacific Railroad Company (Chap. 148, p. 76, Special Laws, 6th Leg., App. Aug. 16, 1856, Laws of Texas, Vol. 4, p. 622), and the Southern Trans-Continental Railroad Company (Chap. 26, p. 40, Special Laws, 12th Leg., App. July 27, 1870, Laws of Texas, Vol. 6, p. 542).

These acts contain a provision substantially the same as the following taken from Section 6 of the last mentioned act:

"That the right of way through the public lands of this State, along the line of said road, or the branch road aforesaid, be and the same is hereby granted to said company; and the right, power and authority are hereby conferred upon said company to take from the public lands adjacent to the line of said railway, earth, timber, rock and other materials for the construction thereof; the said right of way is granted to said railway company to the extent of two hundred feet in width where it passes over public lands, including all necessary grounds or stations, buildings, workshops, switches, sidetracks, turntables, and water stations, not to exceed forty acres at any one point." (Laws of Texas, Vol. 6, pp. 544-5.)

The Texas Pacific Railroad Company was incorporated under an Act of Congress of the United States, approved March 3, 1871 (16 Stat. at Large, p. 573), with authority "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, from a point at or near Marshall, County of Harrison, State of Texas; thence * * * near the 32nd parallel of north latitude to a point at or

near El Paso," and thence to San Diego, California. Section 6 of this act contained the following provision:

"That the said Texas & Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by Congressional, State, or Territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean."

Although not affecting lands in Texas, but nevertheless in point here, this act also contained this provision:

"That the right of way through the public lands be and the same is hereby granted to the said company for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, sidetracks, turntables, water stations, and such other structures as may be necessary for said railroad not exceeding forty acres of land at any one point."

The name of this corporation was changed to "The Texas & Pacific Railway Company" by the Act of May 6, 1872. (17 Stat. at Large, p. 59.)

On May 24, 1871, our Legislature passed an Act (Chap. 272, p. 485, Special Laws, 12th Leg., Laws of Texas, Vol. 6, p. 1623), with the following preamble:

"Whereas, The State of Texas has heretofore, at different periods, incorporated three different companies with power to construct a railway from the eastern boundary of the State to El Paso, on the Rio Grande, towit: The Southern Pacific Railroad Company, the Memphis, El Paso and Pacific Railroad Company, and the Southern Trans-Continental Railway Company; and

"Whereas, The object of the State in these several acts of incorporation has ever been to secure the construction through the State a railway connecting the railway system of the Atlantic States with the Pacific Ocean; and

"Whereas, There is reason to believe that the said Southern Trans-Continental Railway Company will succeed by contract to the rights, franchises and property of the said Memphis, El Paso and Pacific Railroad Company; and that the time has come when, by concert of action between all of the said companies, and by the aid of the government of the United States, the great object of a railway to the Pacific Ocean through the State of Texas may be attained; and

"Whereas, The speedy construction of said railway through the State of Texas would greatly enhance the value of of the public lands, develop the mineral resources of the State and give protection and security to the frontier by expelling therefrom the bands of hostile Indians by whom the western settlements are now continually scourged; and

"Whereas, These objects warrant and demand the most liberal legislation on the part of the State; therefore:" (Laws of Texas, Vol. 6, pp. 1623-24.)

Then, as declared in the act, "in order to secure and promote the speedy construction of a railway through the State of Texas to the Pacific Ocean," provision is made for the issuance of

bonds of the State of Texas, upon certain conditions, to the Southern Pacific Railroad Company and Southern Trans-Continental Railway Company, and for the grant of lands in lieu of and in payment of such bonds. Section 11 of this act reads:

"All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Company, and to the Southern Trans-Continental Railway Company, shall pass to and vest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, by an Act of Congress, approved March 3rd, A. D. 1871, whenever the said Southern Pacific Railroad Company and the said Southern Trans-Continental Railway Company shall have been consolidated with the said Texas Pacific Railroad Company; and authority is hereby given to the said Southern Pacific Railroad Company, the said Southern Trans-Continental Railway Company, and the said Texas Pacific Railroad Company, to consolidate on such lawful terms and conditions as may be agreed upon between the said companies and be ratified by a majority of the stockholders of each of the corporations so consolidating; provided, however, that the said Texas Pacific Railroad Company shall take no benefit whatever under or by virtue of this act until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Company and the Southern Trans-Continental Railway Company." (Laws of Texas, Vol. 6, pp. 1627-28.)

The Act of May 2, 1873, declared that the consolidation thus provided for had been effected and provided for "a complete and final adjustment of the rights of said Texas and Pacific Railway Company, as the assignee and successor of the said Southern Pacific Railroad Company, and said Southern Trans-Continental Railway Company, under the laws of this State, and a definite understanding as to the obligations of the State, and to the further end that said company be encouraged to the speedy construction of said railroad." Then follow certain provisions effecting such adjustment.

We have not mentioned all our legislative acts on this subject, and the foregoing is not intended in any sense as a history of the advent of the Texas & Pacific Railway Company into our State; but sufficient references are made to show that this company, although a foreign corporation, has acquired and is entitled to have and enjoy right of way grants and rights in respect to our public domain in like manner and to the same extent as domestic railroad corporations.

We have already noted certain right of way provisions in certain special laws under which certain railroad corporations were created, and shown that the Texas & Pacific Railway Company became and is entitled to the benefit of such provisions.

The method of providing for the creation of railroad corporations by special law was changed on April 18, 1876, when our present Constitution became effective. Section 56 of Article 3 of this Constitution provides that:

"The Legislature shall not * * * pass any local or special law * * * for incorporating railroads or other works of internal improvement."

By an Act approved August 15, 1876 (Chap. 97, p. 141, Gen. Laws, Reg. Session 15th Leg. Laws of Texas, Vol. 8, p. 977), pro-

vision was made by general law for the creation of railroad corporations, and this Act constituted in a large measure the basis for Title 84 (Articles 4099-4280) of our Revised Civil Statutes of 1879. We do not find in this Act any specific grant of a railroad right of way upon and over our public domain. Section 1 of Article 10 of our State Constitution, however, provides that:

"Any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other Sates, * * *" (Art. 10, Section 1, Constitution of Texas.)

This provision is carried as Article 4166 of our Revised Civil Statutes of 1879, and is also carried in our Revised Civil Statutes of 1895, 1911 and 1925, as Articles 4462, 6481, and 6316, respectively. There are also Articles 4167 and 4169, of our Revised Civil Statutes of 1879, the latter adapted from the foregoing mentioned Act of August 15, 1876, and the former presumably taken from the foregoing special laws. These read as follows:

"Art. 4167: Every such corporation shall have the right of way for its line of road through and over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land."

"Art. 4169: Such corporation shall have the right to lay out its road not exceeding two hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of its railway, and to cut down any standing trees that may be in danger of falling upon or obstructing the railway, making compensation in the manner provided by law."

Texas Channel & Dock Company vs. State, 104 Texas, 168, 135 S. W. 522, was a suit by the State to cancel a patent to certain land situated on Harbor Island and to recover the land for the State. At that time the Aransas Harbor Terminal Railway had surveyed and located its right of way over the lands in question but had not commenced actual construction thereon of its road. Judgment in the trial court was for the State but "without prejudice to the rights of said railway company to construct its road over the land herein recovered by the State, along the route heretofore surveyed by said road." This part of the judgment was disapproved by the Court of Civil Appeals (133 S. W. 316) partly upon the theory that it constituted an unauthorized judgment against the State and partly upon the theory that, as to the railroad "its survey does not give it a right of way; it may never attempt to build, and if it does, the State may not object." In reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court, and basing its holding on the foregoing constitutional and statutory provision, the court said:

"Clearly the judgment for the title to the land and the decree canceling the patents were not only justified, but required, and the Court of Civil Appeals did not err in so determining. We think, however, that that Court erred in setting aside the decree of the District Court recognizing, confirm-

ing and respecting the rights of way on said island claimed by plaintiffs in error."

"Clearly, it seems to us, that, except for the protection furnished plaintiffs in error in the judgment of the District Court, a judgment for the State, with no reservation, would have concluded plaintiffs in error as to any right in the land whatsoever."

"So we are confronted with the direct proposition: Is land belonging to the State, situated upon an island within the State, subject to appropriation (where there is nothing either excessively irregular and specially hurtful in the manner or extent of such appropriation) by a railway company for its use as a right of way? The affirmative of this proposition was recently held in a well reasoned opinion by Associate Justice Rice of the Court of Civil Appeals in the recent case of Rockport & Port Aransas Railroad Company vs. State of Texas (not yet officially reported), 135 S. W. 263, and such is our own opinion." (Texas Channel & Dock Company vs. State, 135 S. W. 523.)

There is also Article 4206 of our Revised Statutes of 1879, carried in our Revised Civil Statutes of 1895 and 1911, as Articles 4473 and 6532, respectively, which reads as follows:

"Art. 4206: The right of way secured or to be secured to any railroad company in this State, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation."

As brought into our Revised Civil Statutes, 1925, this is Article 6339 and was changed to read as follows:

"Art. 6339: The right of way secured by condemnation to any railway company in this State shall not be construed to include the fee simple estate in lands, either public or private, nor shall the same be lost by forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation."

That the facts show a sufficient designation of this area as a right of way has been held in Fort Worth & Denver City Railway Company vs. Southern Kansas Ry. Company (Ct. Civ. App.), 151 S. W. 850.

From the foregoing, we conclude that the Texas & Pacific Railway Company had a right to and did take and is now rightfully holding and using as a right of way the strip of land here involved, and thereupon became and is vested with whatever estate or right therein was granted or intended to be granted by these special and general statutes and this provision of our Constitution.

As a bearing upon this question it is necessary that we also consider those provisions of our Constitution and statutes pertaining to land appropriated or set apart as State Permanent Free School Fund lands.

Sections 2 and 4 of Article 7 of our State Constitution provide:

"Sec. 2: All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatso-

ever; one-half of the public domain of the State; and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund."

"Sec. 4: The lands herein set apart to the public free school fund, shall be sold under such regulations, at such times, and on such terms as may be prescribed by law; and the Legislature shall not have the power to grant any relief to purchasers thereof * * *."

Prior to the Act of February 23, 1900 (Chap. 11, p. 29, General Laws, First Called Session Twenty-sixth Legislature), there had been no partition or division of the public domain as between the State proper and the State Permanent Public Free School Fund and no specific or definite part of the public domain had been set apart or appropriated to the latter except areas located and surveyed by corporations and individuals in locating and surveying lands under land certificates issued to them, they being required in certain instances to locate and survey as such school land an amount of land equal to the amount they were entitled to for themselves under such certificates. There were also certain statutes providing for an equal division between that fund and the State of money derived from the sale or portions of the public domain by the State. No other provisions were made for passing to this fund its one-half of the public domain or the proceeds derived from the sale of same. Meantime, the State was granting lands to preemptors and otherwise, from the public domain.

The case of Hogue vs. Baker, 92 Texas, 63, 45 S. W. 1004, decided May 23, 1898, involved the right of an individual to a homestead donation from the public domain. In that case it was conceded that the State had theretofore granted otherwise than to the school fund more than one-half of the public domain as it existed at the time of the adoption of our present Constitution, and that there did not remain as such public domain the one-half thereof to which the school fund was entitled, and on this ground the right to the homestead donation was denied.

By the Act of May 2, 1899 (Chap. 16, p. 14, General Laws, Reg. Sess. 26th Leg.), provision was made for an accounting or adjustment of the public domain as between the State and the school fund. Certain previously located and surveyed lands were also passed to the school fund by the Act of April 18, 1899 (Chap. 81, p. 123, Gen. Laws Reg. Sess. 26th Leg.). These were followed by the Act of February 23, 1900, by which a complete and final accounting or adjustment of the public domain was made between this fund and the State. Among other provisions this act provided that:

"* * * there is hereby set apart and granted to said school fund * * * all of the unappropriated public domain remaining the State of Texas of whatever character, and wherever so located, * * * except that included in lakes, bays and islands along the Gulf of Mexico within tide water limits * * *."

As carried into Article 5278 of our Revised Civil Statutes of 1911, the foregoing words "unappropriated public domain," are

made to read, "vacant public land," but Article 5385 of that revision, adapted from both the Act of May 2, 1899, and February 23, 1900, uses the words "unappropriated public domain." The foregoing Article 5278 is not brought forward as such into our Revised Civil Statutes of 1925, but the foregoing Article 5385 is carried literally as Article 5416 of that revision, and thus the verbiage "vacant public land," is dropped from this revision and only the expression "unappropriated public domain" retained.

Our Constitution, as we have noted, uses only the words "public domain." Admitting a possible difference in the meaning of these expressions in some instances, it is our view that no distinction exists here and that as here used both mean the same. Landry vs. Robison, 110 Texas, 295, 219 S. W. 819, and authorities there cited.

Provisions have been made from time to time for the sale of these lands and for prospecting for and mining the minerals in those parts of same in which the minerals were and are reserved to the school fund.

Under these statutes, particularly Articles 5323 and 5338 et seq., and in reference to Article 5337 et seq., of our Revised Civil Statutes, 1925, certain applications have been made to buy, and for permits to prospect for oil and gas upon this right of way area, upon the theory that this area was constituted and is State public free school land by virtue of these statutes and the last mentioned provisions of our State Constitution, and is subject as such to the provisions of these statutes. Against this is the theory that, in view of the constitutional provision, statutes and decisions hereinbefore referred to as pertaining to railroad rights of way, and the facts in respect to this particular area, these provisions of our Constitution and statutes did not constitute this area State public free school land and thereby subject it to these provisions for selling same and prospecting thereon for oil and gas; or at least, that this area is not subject to these sale and permit provisions so long as its use and occupancy as a railroad right of way continues.

Notwithstanding this school land provision of our Constitution, and the apparent holding in Hogue vs. Baker, supra, that by force of that provision one-half of our public domain, as of April 18, 1876, when this provision became effective, passed to the public free school fund, and particularly in view of the Acts of March 2, 1899, and February 23, 1900, and the fact that there had not been a previous segregation from the public domain of the one-half thereof declared by the Constitution to constitute a State permanent public free school fund, we take it that this area as such was not school land, subject only to be disposed of as such, at the time it was so taken as a right of way. Furthermore, prior to that time and thereafter until the Act of February 23, 1900, we had no statute indicating that any lands were State school lands other than those surveyed for that fund under certain land certificates, as we have indicated.

It is our view, therefore, that if this area of land, or any interest or estate in it, is State public free school land, it must have become such solely upon the enactment and by virtue of this Act of February 23, 1900.

As heretofore noted (R. C. S. 1879, Art. 4206), there did not pass to the railroad company "the fee simple estate" in this land by reason of its taking and use as a right of way. From this we conclude that whatever estate in this land is meant by the words "fee simple estate," as here used, considered along with other applicable law, such estate did not pass to the railroad company but remained and was in the State at the time of the passage of this Act of February 23, 1900.

It will be conceded, of course, as a matter of law that whatever rights of estate in this area passed to or vested in the railroad company remained unaffected by these statutes. We will now consider the nature and extent of such rights or estate.

The statutory grant is "the right of way for its line of railroad track over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land."

In Western Union Telegraph Co. vs. The Pennsylvania Railway Company, 195 U. S. 540 (570), 49 L. Ed. 312 (323), involving the right of appellant to occupy and use for certain purposes a portion of the right of way of appellee, the court said:

"A railroad right of way is a very substantial thing. It is more than an easement. It is more than a mere right of passage. * * * A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given."

In New Mexico vs. United States Trust Company, 172 U. S. 171, 43 L. Ed. 407, it is said:

"To support its contention, appellant urges the technical meaning of the phrase 'right of way,' and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context and the intention of the Legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing * * * not as an abstract right. It is to be 200 feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad. The phrase 'right of way,' besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes and another thing in a grant to a railroad for public purposes * * * as different as the purposes and uses and necessities respectively are. * * * But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee and, like it, corporeal, not incorporeal property. * * * The interest granted by the statute to the Atlantic & Pacific Railroad Company, therefore, is real estate of corporeal quality and the principles of such apply."

The case of Texas Central Railway Company vs. Bowman, 97 Texas, 417, 79 S. W. 295, was a suit by the Railroad Company "to enjoin interference by the defendants with its right of way." Neither the nature of the interference nor the width of the right of way is disclosed by the report of the case, but in its opinion the Court of Civil Appeals (75 S. W. 556) states that:

"'By agreement of parties' the case 'was tried as an action of trespass to try title upon the allegation of ownership of the land involved in appellees' answer' and that 'the real controversy is over the title to the right of way claimed by' the railroad company."

The railroad has been constructed across certain sections of previously located and surveyed land and appellant had brought these sections of land from the State after the construction of the railroad. The judgment of the Supreme Court was that the "title purchased from the State by defendant in error is subject to the right of way previously acquired by plaintiff in error, * * * and that defendants in error take nothing by their cross action, and that plaintiff be adjudged to be the owner of the statutory right of way claimed by it."

The law being to this effect in respect to a railroad right of way taken upon an area of previously designated school land would clearly be to no less extent and of no less force as to the area here involved.

In Imperial Irrigation Company vs. Jayne, 104 Texas, 395, 138 S. W. 575, it was held, in reference to certain statutes, particularly Article 3126 of our Revised Civil Statutes of 1911, that the right of the company to a right of way upon previously designated and surveyed school land for its canals and reservoir site was authorized and vested an easement and right of occupancy and use as against a subsequent purchaser of the land from the State, the fee passing to the purchaser, however, but subordinate to the occupancy and use of the land as such right of way.

The case Ayers vs. Gulf, Colorado & Santa Fe Railway Company (Ct. Civ. App.), 88 S. W. 436, was an action in trespass to try title brought by appellee to recover a portion of the railroad right of way claimed by the railroad company under a special law granting its predecessor a right of way "not to exceed 50 yards in width," over the public domain. The area here involved was public domain at the time it was so taken. Under the facts, it was held that the company had actually taken only 120 feet as a right of way and judgment accordingly upon appeal by Ayers, was affirmed. Reference is made to the case for a statement of the facts. The railroad company claimed only this width, and did not complain of the judgment and on this point the appellate court said that, "As to the width of the right of way thus appropriated, we think the proof is undisputed that it amounted to at least as much as was awarded to defendants by the judgment."

In the case of Texarkana & Fort Smith Railway Company vs. Bland (Ct. Civ. App.), 205 S. W. 727, the railroad company sought to enjoin the commissioners court of Orange County from

establishing a public road over a strip of ground lying parallel with and 50 feet from the center of the track of appellant. At the time the railroad was constructed it traversed, and the land in question was, public domain, and the basis for contesting the establishment of a public road thereon was that the land constituted, under general law, a part of the railroad right of way. The contention of the railway company was that by force of these statutes, it was "vested with title for right of way purposes to a strip of land 200 feet in width," and "was entitled to the exclusive possession" of same, and that the establishment of a public road over this part thereof would be "an unauthorized and illegal interference with" its rights. On the basis that the record showed no physical appropriation nor actual use of this area by the railroad company, as by clearing, fencing and the like, and that in acquiring a right of way over private lands by condemnation in that vicinity a width of only 100 feet was taken, and upon the evident theory that our statutes did not, of their own force, or at least did not under such a situation as that disclosed by the record in that case, grant a right of way to the extent of 200 feet in width, the judgment of the trial court dissolving the temporary injunction was sustained. It is rather difficult to reconcile this holding with Texas & Ft. Smith Railroad Company vs. Bland, supra, and Fort Worth & Denver City Railway Company vs. Southern Kansas Railway Company and other cases hereinafter considered. In this connection, however, it may be noted that although the fencing in respect to our area hereunder considered did not inclose the entire width of 200 feet, the area acquired by condemnation in that vicinity was 200 feet in width.

The opinion in Fort Worth & Denver City Railway Company vs. Southern Kansas Railway Company (Ct. Civ. App.), 151 S. W. 850, seems to have been carefully considered, and upon thorough briefing. The facts are interesting. The suit was by appellant to recover of appellee "a strip of land lying immediately south of plaintiff's main track, * * * 50 feet wide and 750 feet long, the northern line thereof being 50 feet south of and parallel with the center of plaintiff's main track and its southern line being 100 feet south of the center of said track." The only claim of plaintiff to this area was that it constituted part of its right of way to which it was entitled under the right of way provisions of our Constitution and statutes hereinbefore noted. It had designated the line of its track as there provided but had not actually used or taken physical possesion of this part of the area by fencing or otherwise. The area was public domain at the time the railroad was constructed. On the other hand appellee had possession of this area and was actually occupying and using the same as a right of way, which had continued for such a length of time that it pleaded the limitation statutes of 3, 4, 5 and 10 years; and also held under a right of way grant of same from one to whom the land lying along the right of way of plaintiff had been, after the location of the right of way, granted by the State. Plaintiff further based its right of recov-

ery upon the ground that the strip of land was so situated in reference to the city of Amarillo that its use by plaintiff for switch tracks and the like had become imperative. It is necessary to read carefully the opinion in this case and the numerous authorities it cites to get its full significance. On the theory that by force of these right of way provisions of our Constitution and statutes, with notice of which it is held all parties were charged, and notwithstanding the facts concerning possession and use, it was held that plaintiff was entitled to recover. We quote the following from the opinion:

"We are cited to numerous authorities in the briefs bearing upon these issues, and after a careful review of them all we have concluded that the grant of the right of way was sufficiently certain in its terms, and that it took effect in praesenti." (p. 852)

"Jones vs. Erie & N. W. Ry. Co., 114 Pa. 629, 23 Otl. 251, is authority for our holding in this case that, in the absence of any designation of the boundaries of the plaintiff's right of way, the presumption is that it extends 100 feet on each side of the center of the main line of appellant's track as it has been constructed since the date of its grant in 1875, and that it is presumed to take the full width granted. To the same effect is Campbell vs. Ind. & V. Ry. Co., 110 Ind. 490, 11 N. E. 48; Gaston vs. Gainesville & D. Elec. Ry. Co., 120 Ga. 516, 48 S. E. 188; Kindred vs. U. P. R. R. Co., 168 Fed. 648, 94 C. C. A. 112; P. & R. Ry. Co. vs. Obert, 109 Pa. 193, 1 Atl. 398; Prather vs. W. U. Telegraph Co., 89 Ind. 501; N. P. Ry. Co. vs. Smith, 171 U. S. 261, 18 Sup. Ct. 794, 43 L. Ed. 157. While the evidence is not perfectly clear upon the point, we think the record shows that plaintiff's line of road had been surveyed and staked across Section 156 prior to the time the section was awarded to Lester, under whom appellees claim. This, however, becomes a matter of secondary importance under the view we take of the case." (p. 853)

Among the many other authorities cited in support of its holding in that case is Northern Pacific Railroad Company vs. Smith, 171 U. S. 260, 43 L. Ed. 157, from which we quote the following:

"By the second section of the Act of July 2, 1864, creating the Northern Pacific Railroad Company, there was granted to that company, its successors and assigns, the right of way through the public lands to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain."

"It is evident that when in 1873 the Northern Pacific Railroad Company took possession of the land in dispute, as and for its right of way, and constructed its road over and upon the same, if the tract so taken was then part of the public lands, only the United States could complain of the act of the company in changing the location of its tracks from that previously selected."

"But suppose it be conceded, for the sake of the argument, that the Lake Superior and Puget Sound Land Company made the first entry, and that the City of Bismarck and Smith as its grantee could avail themselves of such entry, still the proof is that the railroad company completed its road over the land before the townsite has patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the Act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the government obtained a grant of the right of way, which was at least perfectly good as against the government."

"Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the townsite, nor its grantee, Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending 200 feet on each side of its said road. The finding of the trial court,

that only 25 feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within 200 feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants."

In New Mexico vs. United States Trust Co., 172 U. S. 171, 184, 43 L. Ed. 407, 412, the Supreme Court of the United States quoted as follows from a decision of the Supreme Court of California:

"Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for sidetracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so."

The Connecticut Supreme Court of Errors aptly stated the same principle in N. Y. N. H. & H. R. R. Co. vs. Armstrong, 102 Atl. 791, 796, in this language:

"We do not think that the railroad was required to exercise its option on any single occasion or occasions or within any precise period of time. The terms of the charter seem to plainly indicate this, for the railroad is authorized 'to locate, construct and finally complete a single, double and treble railroad.' The grant was intended to provide a railroad between named termini, not only for the then present, but for the long future."

"It is not expected that the new line would in the beginning utilize for operation its entire location. The single track was sufficient for 1851; the double for 1892. Public necessity may later on require an additional track, and the General Assembly contemplated by its grant provision for future growth and needs."

The use that may be made by a railroad company of its right of way also indicates the nature of its dominion over same. In Haugan vs. Milwaukee & St. Paul Ry. Co., 35 Iowa, 558, 14 Am. Rep. 502, it is said:

"But the defendant in this case is not the absolute and unqualified owner, or owner in fee, of the land whereon the well was dug. The defendant, however, is owner, by grant from plaintiff, of 'the right of way over and through the land for all purposes connected with the construction, use and occupation of its railway.' We have not been referred to, nor have we been able to find any case deciding this question. Upon principle it is very close, and yet we find ourselves agreed in holding with the learned judge who decided the cause below, that, under the terms of the conveyance and the facts of the case, the defendant had the legal right to dig the well, and cannot be enjoined from using the water therefrom for railway purposes.

"It must be remembered that if the defendant can be enjoined from digging this well and using water therefrom, it can be enjoined from digging any well on its right of way. For, as we have seen by the rule above stated, if the right to dig the well exists, no damages can be recovered

because of the diversion of the water from another. In other words, the fact of diverting or obstructing percolating water constitutes no basis of right in, or ground for an action by another. The cause of action arises from the wrongful act of digging the well, and not from the consequences which flow from it. For, if the right to dig the well exists, these latter are damnum absque injuria. Now, that the digging of wells to supply water to its engines is one of the 'purposes connected with the use of a railway,' can scarcely admit of a doubt. The right to locate a water tank upon its right of way cannot be more clear than the right to dig a well to supply it; both are equally necessary to operate the road, and are fairly embraced in the phrase, 'all purposes connected with the construction, use and occupation of the railway.'"

To the same effect is Canton vs. Canton Cotton Warehouse Company, 84 Miss. 268, 36 So. 266, 65 L. R. A. 561, from which we quote the following:

"It (a railway company) has the right to do all things with its right of way, within the scope of its charter powers, which may be found essential or incidental to its full and complete use for the purpose for which it was acquired." * * * "They may devote the right of way which they have acquired to any use indispensable to, or which will facilitate the fulfillment of, the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe and successful conducting of their business and regular running of their trains." * * * "It is hardly necessary to state that, as railroad trains are pulled by locomotive engines, and as steam is the propelling power, fuel and water are both absolutely indispensable to their movement. As the power cannot be generated without heat, so water is required in order to bring into existence the required motive energy. If water, then, is necessary, a railroad company certainly has the right to purchase it, or procure it in any lawful method most convenient, whether by wells dug on its right of way, or by purchase from others. Haugan vs. Milwaukee & St. Paul R. Co., 35 Iowa, 558, 14 Am. Rep. 502."

There are also Uvalde Rock Asphalt Company vs. Asphalt Belt Railway Company (Comm. App.), 267 S. W. 688, and Gladys City Oil, Gas & Manufacturing Company vs. Right of Way Oil Company (Ct. Civ. App.), 137 S. W. 171, and many other cases along this line, but as we have not before us the question of the uses, nor any particular use, that may be made of this area by the railroad company, and are referring to these cases only as illustrative of the nature and extent of the rights and estate therein of the railroad company, we refrain from pursuing this line of inquiry further.

We now refer back to the question raised in connection with the provisions of our Constitution and statutes pertaining to the public school lands. The character and extent of the rights of estate granted the railroad company in this area are such that we seriously doubt if the "fee simple estate" therein reserved to the State constitutes "unappropriated public domain," or "public lands," as these expressions are used in these provisions and therefore passed as such to the State permanent school fund. It is certainly apparent at least that such rights therein as would purport to vest under our statutes providing for the sale of school lands and for prospecting for and mining the minerals therein are inconsistent and would conflict with the rights therein granted to the railroad company, and we feel that a construc-

tion together of these school fund and right of way provisions that would unavoidably put the State in such an inconsistent position would not be warranted. If, however, this "fee simple estate" did pass to the school fund there is ample authority to the effect that it passed subject and subordinate to the rights of estate in this area theretofore vested in the railroad company. Assuming the entire absence of these school fund or school land provisions, could the State, in view of its grant of this area as a right of way with the resulting rights therein, nevertheless consistently sell this area or grant the right to prospect for and mine the oil and gas therein, with the rights necessarily incident thereto? We think not, and cannot bring ourselves to the view that this was nevertheless intended by the enactment of our school land statutes.

Notwithstanding the statutory reservation that the grant of this area by the State to the railroad company as a right of way is not to be "so construed as to include the fee simple estate in the land" (R. C. S. 1879, Art. 4206), and without passing upon the extent and effect of that reservation, it is our opinion that this area at this time is not subject to sale as State public free school land nor to the provisions of our statutes providing for prospecting for and mining oil and gas on such lands.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2795, Bk. 63, P. 323.

SCHOOL AND ASYLUM LANDS—SALE CONTRACTS AND OBLIGATIONS—INTEREST ON PAST DUE INTEREST—FORFEITURES—REINSTATEMENTS.

The Commissioner of the General Land Office would not be warranted, under Article 5070 of our Revised Civil Statutes of 1925, to charge the purchasers of public free school and asylum lands, nor the obligations executed in part payment for such lands, with interest on past due interest, nor in forfeiting a sale or declining to reinstate a forfeited sale for failure to pay interest on past due interest.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 13, 1929.

Mr. Moore Lynn, Acting State Auditor, Austin, Texas.

DEAR SIR: The Attorney General has your letter of the 9th instant pertaining to the payment of interest under Article 5070 of our Revised Civil Statutes of 1925 on purchase obligations executed in part payment for State public free school and asylum lands sold by the State. You refer to Article 5312 of our Revised Civil Statutes of 1925 providing that for each tract purchased the purchaser shall "submit his obligation in a sum equal to the amount of the unpaid purchase price offered for the land, binding the purchaser to pay to the State at the General Land Office at Austin on the first day of each November thereafter,

until the whole purchase price is paid, one-fortieth of the aggregate price, with interest on the unpaid purchase price at five per cent per annum."

You also refer to Article 5070 of our Revised Civil Statutes of 1925 providing for the payment of interest at the rate of six per cent per annum from and after maturity of an obligation not paid when due when there is no specified rate of interest, and allude to Ward vs. Scarborough (Comm. of App.), 236 S. W. 434. You quote from Article 5326 of our Revised Civil Statutes of 1925 providing for the reinstatement of forfeited sales upon "the full payment of interest due on such sale up to the date of reinstatement," provided that no rights of third persons may have intervened, providing that in such cases "the original obligation and penalties shall thereby become as binding as if no forfeiture had occurred," and further providing that nothing in this article "shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of interest and such penalties as may be due the State at the time such forfeiture occurred or to protect any other right to such land."

As pertaining to these matters you propound the following questions to the Attorney General and request his opinion on same:

"1. Does the application and obligation to purchase constitute 'a written contract ascertaining the sum payable?'

"2. Is there any statute that specifically provides that the State is not to collect interest on past due interest in respect of sales of school lands?

"3. In cases where the interest on school lands has not been paid when due, but the land has not been forfeited, can the Commissioner recover interest on past due interest at the legal rate of six per cent?

"4. Can the expression, 'the full amount of interest due on such claim' be interpreted to mean an amount less than the past due installments of interest and interest at six per cent per annum on all such past due installments from maturity until paid?

"5. In cases where the land has been forfeited for non-payment of interest, but the purchaser has not died, can the Commissioner recover interest on past due interest at the legal rate of six per cent?

"6. In cases where the purchaser has died and the interest has not been paid when due, can the Commissioner recover interest on past due interest at the legal rate of six per cent for the period beginning at the date of the purchaser's death and ending one year after the first of November next after such death?"

By reference to our statutes on this subject it will be noted that it is not the duty of the Commissioner of the General Land Office to recover or collect any item of principal or interest that may be due on these purchase obligations. The duty is the other way around; that is, it is the duty of the purchasers to make the payments as they become due. No duty rests upon the Commissioner of the General Land Office concerning these items other than to receive and receipt for and properly record and dispose of or account for the items paid when and as received by him. The only authority vested in him concerning these payments is that he is authorized in his discretion to forfeit a sale if any portion of the interest accrued thereon is not paid when due.

In so far, therefore, as any duty or authority on the part of the Commissioner of the General Land Office is concerned, your 3rd, 5th and 6th questions are answered in the negative.

Your 1st, 2nd, and 4th questions, as we understand them, present the matter of charging these purchasers or their purchase obligations with interest on past due interest, and the authority of the Commissioner of the General Land Office to forfeit sales, or to refuse to reinstate forfeited sales, upon the failure or refusal to pay interest on past due interest. This is a matter that has never been directly passed upon by any of our courts nor by any of our Attorneys General.

From the earliest time our statutes pertaining to the sale and other utilization of our State public free school and asylum lands have been regarded as complete within themselves on that subject and have been construed and applied without reference to our general statutes in so far as fixing or determining the rights of the State and the purchasers are concerned. These statutes have always fixed a State rate of interest and have never provided for the payment of interest on past due interest. In the administration of these statutes no Commissioner of the General Land Office has ever provided in the purchase obligations for the payment of interest on past due interest nor taken any other action indicating a construction of these statutes to that effect. From the time our statutes first provided for office forfeitures and for the reinstatement of forfeited sales there have been many such forfeitures and reinstatements and all have been based solely upon the payment or non-payment of the specified rate of interest, and at no time has the payment or non-payment of interest on past due interest been made, demanded or considered in connection therewith. Both the State and the purchasers have at all times acted upon and considered these statutes and purchase contracts as providing for only the specified interest rate and as not requiring the payment of interest on past due interest. Rights resting upon these forfeitures and reinstatements have frequently been before our courts and have been determined on the basis of the payment or non-payment of the specified interest rate without the question of the payment of interest on past due interest being raised.

This construction and application of these statutes have been without exception, have been and are matters of common knowledge, known to the legislative, executive and judicial departments of the government, and have never been called in question by anyone charged with the administration of these statutes nor by anyone who might have profited by a different construction. It is our view that this long continued construction and practice are such as to establish a fixed State policy in accordance therewith, that they constitute a construction of these contracts in this regard by both the State and the purchasers, and that the Commissioner of the General Land Office should follow and adhere to such construction and policy until changed by legislative enactment or judicial determination.

In answer to your first question you are advised that each of these purchase contracts and obligations, considered alone upon its face is "a written contract ascertaining the sum payable" within the meaning of the foregoing mentioned Article 5070, but for the reasons hereinbefore stated it is our opinion that this article has no application to these land sale contracts and purchase obligations and that the Commissioner of the General Land Office would not be warranted in charging these purchasers or purchase obligations with interest on past due interest, nor in forfeiting a sale or declining to reinstate a forfeited sale for failure to pay same.

Your second question is answered in the negative.

We answer your fourth question in the affirmative; that is, it is our opinion, based upon the reasons hereinbefore stated, that the expression "the full amount of interest due on such sale," appearing in the foregoing mentioned Article 5326, as pertaining to the reinstatement of forfeited sales, means the full amount of interest at the rate stated in the purchase obligations, and no more, and does not require the payment of interest on such interest as under said Article 5070 as a prerequisite to a reinstatement.

We are not saying that the State, in a suit brought by the Attorney General affecting one of these sales, purchase contracts or obligations, might not assert a claim on such basis as the Attorney General might deem proper, in excess of the sum of the principal and specified rate of interest. This phase of the matter must of necessity be left to the determination of the Attorney General according to his view of the facts and the law pertaining to such case or cases as may arise.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2798, Bk. 63, P. 342.

UNIVERSITY LANDS—PIPE LINES.

1. As against the State, common carrier pipe line concerns in this State have the right under present statutes pertaining to them, and without purchase from or direct compensation to the State therefor, or contract with or consent of the Board of Regents of the University of Texas or other State agency or authority, to construct, maintain and operate pipe lines and other facilities necessarily incident to their pipe line transportation systems, within, upon and across State University lands, to the extent that such occupancy and use of such lands may be necessary therefor.

2. As against the State, common carrier pipe line concerns in this State have not the right under present statutes pertaining to them, to construct, maintain or operate within, upon or across State University lands, pipe lines or other properties which are limited in their use to wells, stations, plants and refineries and which are not a part of the pipe line transportation system of a common carrier, nor any property of such a common carrier which is not a part of or necessarily incident to its pipe line transportation system, unless so authorized by the Board of Regents of the University of Texas, and said Board of Regents is empowered to so author-

ize under and within the provisions of Article 2596 of our Revised Civil Statutes of 1925.

3. As against the State, pipe line concerns not common carrier in this State have not the right, under our present statutes, to construct, maintain or operate pipe lines or other property within, upon or across State University lands unless so authorized by the Board of Regents of the University of Texas, and said Board of Regents is empowered to so authorize under and within the provisions of Article 2596 of our Revised Civil Statutes of 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 20, 1929.

Mr. R. E. L. Saner, University of Texas Land Department, Dallas, Texas.

DEAR SIR: The Attorney General has your two letters, one dated November 5, 1929, and the other dated November 29, 1929, requesting his opinion on whether or not pipe line concerns have the right to construct, maintain and operate pipe lines and appurtenances within, upon and across Texas University lands without compensation to the State therefor, and without express contract, agreement or consent of the Board of Regents or other State agency or authority so authorizing.

What we shall say in answer to your inquiry is not to be taken as having any application to the relative rights of pipe line concerns and those who have purchased or may purchase the oil and gas in these lands, as to the lands embraced in such purchase, nor to the latter concerning such lands. Stevens County vs. Mid-Kansas Oil and Gas Company, 113 Texas, 160, 254 S. W. 290; Humphreys-Mexia Oil Company vs. Gammon, 113 Texas, 247, 254 S. W. 296; State vs. Hatcher, 115 Texas, 332, 281 S. W. 192; Theisen vs. Robison (Sup. Ct.), 8 S. W. (2nd) 646.

It will also be observed that pipe line concerns may or may not be common carriers, and that certain pipe line facilities and properties of a common carrier pipe line concern may or may not be a part of or necessarily incident to its pipe line transportation system, and that this has an important bearing on this question. In our use of the expression "common carrier" and "common carriers," therefore, our reference will be to those pipe line concerns that are or may be common carriers within the meaning of our statutes on that subject, such as Articles 6018, 1495-1507, or any one or more of the subdivisions of Article 1302, of our Revised Civil Statutes of 1925, excluding from such expressions, however, those pipe lines, facilities and properties of common carrier pipe line concerns as are "limited in their use to the wells, stations, plants and refineries of the owner and which are not a part of the pipe line transportation system of any common carrier," and "any property of such a common carrier which is not a part of or necessarily incident to its pipe line transportation system."

You will also understand, of course, that whether or not a particular pipe line concern is at any time a common carrier, and whether or not at any particular time certain pipe lines and pipe line facilities are necessarily incident to the transportation sys-

tem of a common carrier pipe line concern, within the meaning of our statutes pertaining to such concerns, will depend upon the facts as they are at the time, and that we are not passing on this question as pertaining to any particular concern.

The lands in question are those alluded to in Sections 10, 11, 12 and 15 of Article 7 of our State Constitution. The provision in said Sections 10 and 15 that these lands "shall be sold under such regulations, at such times and on such terms as may be provided by law" is exactly the same, and is of like force and effect concerning University lands, as the provision in Section 4 of the same article of the Constitution pertaining to the sale of State public free school lands. Theisen vs. Robison (Sup. Ct.), 8 S. W. (2nd) 646. The University does not own these lands and of itself has no voice, power or authority concerning them. Their status as to title, and their disposition and use under the Constitution, are the same as our State public free school lands, and of the latter it is said in Greene vs. Robison, 109 Texas, 367, 210 S. W. 398:

"While these lands were by the Constitution dedicated to the school funds, the school fund acquired no title to them as against the State. The State did not thereby become a mere trustee. As the sovereign State it continued to own the lands just as fully as before their dedication. This has been definitely settled. Judge Stayton settled it in Smisson vs. State, 71 Texas, 222, 9 S. W. 112. See, also, Imperial Irrigation Company vs. Jayne, 104 Texas, 395, 138 S. W. 575, Ann. Cas. 1914-V322."

This holding is adverted to and again stated in Theisen vs. Robison (Sup. Ct.), 8 S. W. (2nd) 646. This being the status of these lands, the right of eminent domain does not exist concerning them (Imperial Irrigation Company vs. Jayne, 104 Texas, 395, 138 S. W. 575), and the taking and use of them by common carrier pipe line concerns, as contemplated by your inquiry, would not, as to the University, be in violation of either Section 17 or Section 19 of Article 1 of our State Constitution. Texas Central Railroad Company vs. Bowman, 97 Texas, 417, 79 S. W. 295.

The only statutes we have pertaining directly to such of these lands as have not been sold are Articles 2596-2603 of our Revised Civil Statutes of 1925, and Chapter 282, page 616, General Laws, Regular Session, Forty-first Legislature, effective March 29, 1929. The foregoing mentioned Articles 2599, 2600, 2601 and 2602 pertain solely to railroad rights of way and cities and towns and are inapplicable here. Said Articles 2597, 2598 and 2603 are likewise clearly inapplicable. Said Chapter 282 pertains only to the oil and gas in these lands and has no application here. There remains only Article 2596 of the foregoing mentioned statutes. In a letter addressed by us to the Governor, dated July 12, 1929, pertaining to the patents to two tracts of University land situated in Lamar County, we state that in our opinion this Article 2596 is invalid, as in violation of Section 12 of Article 7 of our State Constitution, in so far as it purports to authorize the sale of University lands, citing Smisson vs. State,

71 Texas, 222, 9 S. W. 112; State vs. Opperman, 74 Texas, 136, 11 S. W. 1076; Chancey vs. State, 84 Texas, 529, 19 S. W. 706, and Theisen vs. Robison (Sup. Ct.), 8 S. W. (2nd) 626. Assuming our views on this article to be correct we find, then, that we have no statute under which any of these lands can be sold, so as to pass the title thereto, for the purposes contemplated by your inquiry. It is our view, however, that this article, in so far as it vests in the Board of Regents of the University of Texas the "management and control" of these lands and the power and authority to "lease and otherwise manage, control and use the same" in any manner "not in conflict with the Constitution," is valid, but in this connection it should be borne in mind that the Constitution carries a mandate to the Legislature to sell these lands, and fixes the status of the proceeds of such lands when sold and that the Board of Regents may not, in the exercise of the power conferred upon it by this article of our statutes, transgress or abridge these constitutional requirements. Chancey vs. State, 84 Texas, 529, 19 S. W. 706; Smisson vs. State, 71 Texas, 222, 9 S. W. 112; Swenson vs. Taylor, 80 Texas, 584, 16 S. W. 336; Brown vs. Shiner, 84 Texas, 505, 19 S. W. 686; Reed vs. Rogan, 94 Texas, 177, 59 S. W. 255; Theisen vs. Robison (Sup. Ct.), 8 S. W. (2nd) 646. Subject only to these limitations, it is our opinion that the Board of Regents is authorized and empowered to contract, in behalf of the State, with pipe line concerns for the construction, maintenance and operation by the latter of pipe lines within, upon and across these lands and, under our present statutes, is the only authority or agency that is authorized to do so.

It is evident, we think, that pipe line concerns that are not common carriers have not the right to occupy or use in any way any of these lands for any purpose except as granted by or obtained from the Board of Regents. This is also true of common carriers pipe line concerns as to "pipe lines which are limited in their use to the wells, stations, plants or refineries of the owner and which are not a part of the pipe line transportation system of any common carrier" and as to "property of such common carrier which is not a part of or necessarily incident to its pipe line transportation system."

This brings us to a consideration of common carrier pipe line concerns, using the expression "common carrier" as hereinbefore indicated.

In Humble Pipe Line Company vs. State (Ct. Civ. App., error denied), 2 S. W. (2nd), 1018, it is held that a common carrier pipe line company has the right to "lay its pipe lines from a point on the main land at Corpus Christi Bay across and upon the bottom of Red Fish Bay, Corpus Christi Bay, the tide lands adjacent thereto * * *, and the Gulf of Mexico opposite Mustang Island, to two deep sea loading points, all within the three-mile territorial jurisdiction of the State," solely by reason of our present statutes pertaining to pipe line concerns, hereinbefore

mentioned, and an established State policy in that regard. The cases of Rockport and Port Aransas Railway Company vs. State (Ct. Civ. App.), 135 S. W. 263, and Texas Channel and Dock Company vs. State, 104 Texas, 168, 135 S. W. 522, the latter expressly approving the holding of the former, hold that a common carrier railroad company in this State has the right to construct and operate its line of railroad upon and over the beds of navigable bays, and upon and over islands therein and in the Gulf of Mexico, and this notwithstanding our express reservation of such islands from settlement, sale or grant under our general statutes providing for the disposition of public lands. It is true that in this case the court considered what are now Articles 6316, 6317 and 6319 of our Revised Civil Statutes of 1925, granting to railroad companies "the right of way for its line of road through and over any lands belonging to this State," whereas, we have no such statute pertaining to pipe line concerns, but a study of the case indicates that the holding, in view of Section 1 of Article 10 of our State Constitution, would have been the same in the absence of such a statute. There was also considered in this case Section 1 of Article 10 of our State Constitution wherein it is provided that railroad companies organized under the law for that purpose "shall have the right to construct and operate a railroad between any points within this State," whereas, we have no similar constitutional provision pertaining to pipe line concerns, but our statutes (R. C. S. 1925, Art. 1495) provide that pipe line corporations shall have the power "to lay down, construct, maintain and operate pipe lines * * * between different points in this State," and it is evident that the latter, at least as far as the question here presented is concerned, is no less broad or effective as to pipe line corporations than the former is held to be as to railroad companies. That the former is a constitutional and the latter a statutory provision is not here material.

It is true that the lands involved in the foregoing mentioned cases where underneath or embraced navigable waters, and lands consisting of islands which were and are reserved from and not subject to our general laws pertaining to the disposition of public lands (Landry vs. Robison, 110 Texas, 295, 219 S. W. 819; Roberts vs. Terrell, 101 Texas, 517, 110 S. W. 733), but in Ayers vs. State (Ct. Civ. App.), 88 S. W. 436, there was the same holding as to the latter class of lands.

In Texas Central Railway Company vs. Bowman, 97 Texas, 417, 79 S. W. 295, it is held that a railroad company has the right to a right of way upon and across unsold State public free school lands without the sale of same by the State for that purpose, and without direct compensation to the State therefor, and that such right is superior to the claim of a subsequent purchaser from the State of the area of school land upon and across which the line of railroad may be located, reference being made to Section 17, of Article 1, Sections 1 and 2 of Article 10, Section

3 of Article 14, Section 56 of Article 3 and Section 12 of Article 7, of our State Constitution, and to what is now Articles 6316 and 6317 of our Revised Civil Statutes of 1925. The specific holding of this case is that notwithstanding the requirement of the Constitution that State public free school lands shall be sold, the Legislature nevertheless has the power, in view of the other mentioned provisions of the Constitution, to grant to railroad companies, without sale by the State for that purpose or direct compensation to the State therefor, rights of way upon and across these lands, and that said Articles 6316 and 6317 constitute and are a proper, sufficient and effective exercise of that power, available to any railroad desirous of such a right of way. In this case it is said:

"It is claimed that the Legislature is without power to grant such rights of way over school lands because of the provisions of the Constitution in the second section of Article 7 that 'all the alternate sections of land,' etc., 'shall constitute a perpetual school fund'; and in the fourth section of the same article that 'the lands herein set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law."

"The power of the Legislature to devote the general property of the State to public purposes without other compensation than such as arises from the advantages resulting from such use of it is therefore not only not taken away, but is expressly recognized, and, unless the power here in question is excluded by the provisions on which defendants in error rely, it must be held to exist. If the contention, based upon the provisions creating and providing for the disposition of the school fund, that they take away all power from the Legislature to grant rights of way over the lands thus appropriated, is sound, it follows that these lands cannot be subjected to any public use whatever, or dealt with otherwise than by outright sale. The objection would apply equally to legislative attempts to authorize the location upon them of public roads, courthouses, and even public schoolhouses; for the contention is, in effect, that, as the lands must be sold, nothing else can be done with them."

"This power is not expressly denied by the Constitution, and as, judged by our own legislative history and the Constitution itself, it is to be regarded, not as an impediment, but as a help, to the prescribed utilization of the school fund, it should not be held to have been denied by implication. In other words, the appropriation of these lands and the command to sell them were made in contemplation of the existence of other legislative powers, which might be employed consistently with and in aid of the objects in view. The right granted to any company is only to the use of a narrow strip of land, of which the fee is not acquired by the railroad company, but remains in the State, subject to its disposal; and the right of the railroad company is held subject to all conditions and limitations which by law attach to such property. No legitimate exercise of the power to grant such rights can materially impede the exercise of the other powers conferred over the school lands."

There is also the case of Imperial Irrigation Company vs. Jayne, 104 Texas, 395, 138 S. W. 575, in which it is held that Article 3126 of our Revised Civil Statutes of 1925, wherein it is provided that certain corporations and associations formed for the purpose of irrigation are "granted the right of way, not to exceed one hundred feet in width, over all public free school, University and asylum lands of the State," is valid. In that case the judgment of the trial court in favor of the purchaser from the State of a tract of public free school land, "subject to per-

petual easement for a reservoir and dam site in connection therewith of 404.43 acres and a perpetual easement for an irrigation canal and right of way on a part of said section of four-tenths of an acre," previously acquired by such corporation, was affirmed.

In the foregoing mentioned two cases it is argued that a more rapid settlement and development of the country, and an enhancement of the value of remaining school lands, would result from the construction and operation of railroads and irrigation projects, and would bring about an increase rather than a diminution of the fund ultimately realized from the sale of these lands, and it might be argued that this would not be true as to common carrier pipe line concerns, but we do not understand that such considerations were at all controlling in these cases. If they were considered as persuasive it might be argued, to the same end, that the transportation of oil and gas by pipe lines, in view of our statutes pertaining to the development and disposition of these minerals from our State public free school University and asylum lands, is necessary and will decidedly tend to enhance rather than to diminish the amount of money that may be ultimately derived from these lands.

The cases we have referred to and the authorities cited by them are available and it would serve no good purpose for us to attempt here a further discussion or analysis of them. A study of these cases, however, is necessary to an understanding of the status of these lands and the power of the Legislature over them as determined by our courts. Whatever may be one's view on first impression, of the question raised by your inquiry, we are convinced that these authorities are conclusive to the effect that the Legislature has the power notwithstanding our constitutional provisions pertaining to these lands, to grant to common carrier pipe line concerns rights of way for their pipe lines and other facilities necessarily incident to their pipe line transportation systems within, upon and across our State University lands, without the sale by the State of such lands for that purpose or direct compensation to the State therefor, and that our present statutes hereinbefore mentioned pertaining to such concerns, particularly said Articles 1496 and 6017, are sufficient for that purpose and constitute such grant. It is our opinion, therefore, and you are advised:

(1) That, as against the State, common carrier pipe line concerns in this State have the right, under our present statutes pertaining to them, and without purchase from or direct compensation to the State therefore, or contract with or consent of the Board of Regents of the University of Texas or other State agency or authority, to construct, maintain and operate their pipe lines and other facilities necessarily incident to their pipe line transportation systems, within, upon and across our State University lands, to the extent that such occupancy and use of such lands may be necessary for that purpose.

(2) That, as against the State, common pipe line carriers in this State have not the right, under our present statutes pertaining to them, to construct, maintain or operate within, upon or across our State University lands, pipe lines or other properties which are limited in their use to wells, stations, plants and refineries and which are not a part of the pipe line transportation system of a common carrier, nor any property of such a common carrier which is not a part of or necessarily incident to its pipe line transportation system, unless so authorized by the Board of Regents of the University of Texas, and that the Board of Regents is empowered to so authorize under and within the provisions of Article 2596 of our Revised Civil Statutes of 1925.

(3) That, as against the State, pipe line concerns not common carriers in this State have not the right, under our present statutes, to construct, maintain or operate within, upon or across our State University lands, pipe lines or other properties unless so authorized by the Board of Regents of the University of Texas, and that the Board of Regents is empowered to so authorize under and within the provisions of Article 2596 of our Revised Civil Statutes of 1925.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2808, Bk. 63, P. 415.

SCHOOL LANDS—UNSURVEYED—WITHDRAWAL FROM SALE.

Where, under an application of inquiry pertaining to the sale by the State of unsurveyed State public free school lands under Article 5323 of our Revised Civil Statutes of 1925, there had not been issued, prior to August 10, 1929, a notice of the classification and valuation of the land by the Commissioner of the General Land Office and a final application filed with that officer to purchase the land, the Commissioner of the General Land Office, in view of Chapter 22, page 526, General Laws, Third Called Session, Forty-first Legislature, effective August 10, 1929, should decline to issue such notice of classification and valuation, or to make the sale.

OFFICES OF THE ATTORNEY GENERAL,
May 3, 1930.

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

DEAR SIR: The Attorney General is in receipt of yours of the 26th of April, from which we quote the following:

"Under date of July 1, 1929, Lay Powell filed in this office an application of inquiry embracing a tract of 111.5 acres in Sterling County. He was advised that the vacancy possibly existed.

"On the 26th of July, 1929, he filed in this office his application to the surveyor, field notes and sketch as prescribed by the statute on the subject. On September 27, 1929, the field notes were found to be correct.

"My inquiry is whether the Act effective August 10, 1929, would prevent the appraisement and sale of this land to Mr. Powell."

Article 5323 of our Revised Civil Statutes of 1925 provides certain methods for determining whether or not a given area of land exists as unsurveyed State public free school land, and that article and other applicable statutes provide for the sale of any area so found to be such land. When in the manner thus provided it is shown to the satisfaction of the Commissioner of the General Land Office that the area in question is unsurveyed State public free school land, the person initiating the proceedings in the manner provided for has the right to have the land classified and valued by the Commissioner of the General Land Office, and to have issued to him by the Commissioner of the General Land Office a notice of such classification and valuation, and has a preference right, as against all others, to buy the land at any time within sixty days from the date of the notice of such classification and valuation. If the land is not so bought it is then regarded as surveyed State public free school land and is to be placed on the market for sale as such. The land here involved is regarded for present purposes as unsurveyed State public free school land, and the applicant, Lay Powell, is proceeding under this statute to acquire same.

From the foregoing, and the facts stated by you, the next step to be taken under this statute would be the classification and valuation of the land and the issuance of notice thereof to the applicant, and it has become your duty to classify and value the land to issue the notice unless this is, at least in effect, precluded by Chapter 22, page 526, General Laws, Third Called Session, Forty-first Legislature, effective August 10, 1929, which is the act referred to by you. This act withdraws from sale or lease the surface and minerals therein of all river beds and channels and of all unsurveyed public free school lands and portions of same until otherwise provided by law, but provides that such withdrawal of unsurveyed public free school land should not apply in cases where applications of inquiry were made and on which suits were pending at the time of the passage of the act.

Our State Constitution (Sec. 4, Art. 7) carries the mandate that our State public free school lands shall be sold, and a situation may not be brought about by the Legislature or otherwise that would preclude this being ultimately done, but it is within the discretion of the Legislature to determine the time, terms and manner of such sale, and in the exercise of this discretion the Legislature may withdraw such lands from sale temporarily, and a statute authorizing the making of a contract between the State and another having this effect has been held to be valid. Smisson vs. State, 71 Texas, 223, 9 S. W. 112; Swenson vs. Taylor, 80 Texas, 584, 16 S. W. 336; Brown vs. Shiner, 84 Texas, 504, 19 S. W. 686; Reed vs. Rogan, 9 Texas, 182, 59 S. W. 255; Savings Bank vs. Dowlearn, 94 Texas, 383, 60 S. W. 754; Ketmer vs. Rogan, 95 Texas, 559, 68 S. W. 774; Fish Cattle Company vs. Terrell, 97 Texas, 492, 80 S. W. 73; Blevins vs. Terrell, 96 Texas, 411, 73 S. W. 515; McDowell vs. Terrell, 99 Texas, 107, 87 S. W. 669; Sherrod vs. Terrell, 97 Texas, 165, —— S. W. ——; Greene

vs. Robison, 117 Texas, 544, 8 S. W. (2) 663. The Legislature had the power, therefore, on the basis of its authority and obligation concerning State public free school land, to withdraw such lands from sale in the manner and to the extent provided in this act.

The applicability of this withdrawal act in the matter of the sale of a particular tract or area of unsurveyed State public free school land concerning which, prior to the passage of the Act, one had taken certain steps to purchase under our statutes providing for the ascertainment of the existence and sale of such land, presents a different question. We would say, however, that the Legislature has the power in such a case to withdraw the land from sale unless prior to the time of withdrawal there existed such a contractual relation between the State and the one seeking to acquire the land that for the State to decline to take or to permit the taking of the additional steps requisite to the passing of the title to the land, or to a proper evidencing of such title, would be, in effect, the impairment of the obligation of a contract within the inhibition of Section 16 of Article 1 of our State Constitution, or Subdivision 1 of Section 10 of Article 1 of the Constitution of the United States, or a deprivation of property without due course of law prohibited by the Fourteenth Amendment to the Constitution of the United States.

It is not clear that prior to August 10, 1929, the date on which this withdrawal act became effective, such rights as may have been acquired by the applicant had reached the status of a vested property right in the land in question, not that a contractual relation then existed between the State and the applicant to the extent that an application of this act to the instant matter would result in an impairment or deprivation such as is inhibited by these constitutional provisions. The affirmative of this might be plausibly argued from Jumbo Cattle Company vs. Bacon, 79 Texas, 514, 14 S. W. 840, and the authorities there cited, but there is Banning Company vs. People of California, 240 U. S. 142, presenting facts and a statute quite similar to those here under consideration, that holds against the existence of a contract in that case such as is contemplated by this provision of the Constitution of the United States. There is also Thompson vs. Baker, 79 Texas, 163, 38 S. W. 21, wherein it is held that after the passage of an act repealing all laws theretofore enacted authorizing the grant of lands and land certificates to railroad companies and certain others, the Commissioner of the General Land Office has not the power to issue land certificates for lands theretofore earned by a railroad company under the repealed statutes; and in that case it is stated that if there was a contract in that respect between the State and the railroad company, and a breach of the contract by the State, the remedy was with the Legislature and not with the courts, citing authorities in support of this statement. We do not understand that Marshall vs. Robison, 109 Texas, 15, 191 S. W. 1136, and

that line of cases, pertaining to the sale of surveyed State public free school land, are here applicable.

There is also the question whether an executive or administrative officer should decline to abide by an act of the Legislature on the ground that in his judgment it is unconstitutional. The sounder rule and better policy is that he do so, leaving those who may feel themselves thereby denied a right recourse to the courts for redress, except, possibly, where there is good authority or sound reason indicating the invalidity of the act.

It is noted that this act does not repeal our statutes pertaining to the ascertainment and sale of unsurveyed State public free school lands, but only withdraws such lands and the minerals therein from sale and lease "until otherwise provided by law." This indicates a purpose on the part of the Legislature to provide at some future time for the sale and lease of these lands, as is its duty to do under the Constitution, and we must assume that this will be done in due time. Of course, it is within the power of the Legislature at any time to authorize or provide for the completion of the purchase of this land from the State by this applicant.

It is noted that the act is broad and sweeping and that it contains only one express exception, which is not here applicable, and it is proper to consider that if we should hold that certain other of these lands not included in the exception nevertheless remain subject to sale, on the theory that because a certain stage in the prescribed proceedings for their sale had been reached they were not included in the act, we would thereby not only write other exceptions into the act but would foreclose a judicial determination of whether such lands were withdrawn from sale, whereas, if we abide by the face of the act as written we will not only not deprive anyone of his right to purchase the land, if he has such right, since he may resort to the courts to establish and enforce the right, but a situation will thereby arise under which the matter may be determined by the courts.

For the reasons here stated, and without passing on the constitutional question mentioned, it is our opinion that you should abide by the face of this act as written and decline to issue the notice of classification and valuation of this land, and should not make the sale of same.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2810, Bk. 63, P. 426.

SCHOOL AND ASYLUM LAND—FORFEITED SALE—REINSTATEMENT—INTERVENING RIGHT—OIL AND GAS PERMIT.

Where State school or asylum land classed as mineral land is sold by the State, and the purchaser executes an obligation in part payment for same, and at the time of sale there is in force an oil and gas permit or lease

on the land theretofore issued by the State, and the land sale is forfeited by the State for non-payment of interest on the purchase obligation, such oil and gas permit or lease, although having continued and being in force at the time of a proposed reinstatement of such forfeited sale, does not constitute such an intervening right as will prevent a reinstatement of such forfeited sale.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 30, 1930.

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

DEAR SIR: The Attorney General has your letter of the 24th instant which we understand requests his opinion on the following:

"Where State school or asylum land classed as mineral land is sold by the State, and the purchaser executes an obligation in part payment for same, and at the time of sale there is in force an oil and gas permit or lease on the land theretofore issued by the State, and the land sale is forfeited by the State for non-payment of interest on the purchase obligation, does such oil and gas permit or lease, same having remained and being in force at the time of a proposed reinstatement of such forfeited sale, constitute such an intervening right as will preclude a reinstatement of such forfeited sale?"

Articles 5309 et seq. of our Revised Civil Statutes of 1925 provide for the sale of State school and asylum lands, and Article 5310 contains this provision:

"The land included in this chapter shall be sold with the reservation of the oil, gas, coal and all other minerals that may be therein to the fund to which the land belongs, and all applications shall so state."

These statutes provide for the sale of certain of these lands on credit, for the execution by the purchaser of his obligation for a part of the purchase price, and for the payment of interest on the deferred payment so evidenced. Article 5326 provides for the forfeiture by the State of a contract of sale for the non-payment of interest on the purchase obligation, and contains the following:

"In any case where lands have been forfeited to the State for the non-payment of interest, the purchasers, or their vendees, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened. In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

Your inquiry is whether or not an oil and gas permit or lease issued by the State is, in such case as that stated in the foregoing question, an intervening right within the meaning of this part of Article 5326 such as would preclude a reinstatement of the forfeited sale.

Articles 5338 et seq. provide for the issuance by the State of oil and gas permits and leases on unsold State school and asylum lands in which the minerals have been reserved or otherwise belong to the State. Article 5402 reads as follows:

"The issuance of an award, permit or lease on unsold land hereunder

shall not prevent the sale of such land without minerals under the laws applicable to such land. In case of such sale after an application has been filed with the Commissioner, the purchaser of such land shall not be entitled to any part of the proceeds of such minerals or mining location nor other compensation, nor shall such purchaser have any action for damages done to such land by or resulting from the proper working of or operation under such award or prospector's location."

There is also Article 5373 which contains this provision:

"If one acquires a valid right by permit or lease to the oil and gas in any unsold public free school or asylum land under any other law, a subsequent purchaser of such land shall not acquire any rights to any of the oil and gas that may be therein, but when the rights under such permit or lease terminate in the manner provided in the law under which they were obtained, then the owner of the soil shall become the owner of that portion of the oil and gas herein relinquished, and shall be thereafter subject to the provisions of this law."

It is obvious that the reinstatement of a purchase contract as contemplated by Article 5326 is not the making of a new contract of sale, and does not contemplate any change in any respect of the forfeited contract, but means a restoration of the forfeited contract in its entirety as to parties, provision and subject matter, so that upon being reinstated it will stand in all respects as though there had been no forfeiture. There are no statutes defining the character of right that is meant by this statute such as would preclude the reinstatement of a forfeited sale. There are certain decisions of our courts on whether or not the particular facts in certain cases evidenced an intervening right within the meaning of this statute, and in Freels vs. Walker, No. 5488, by the Commission of Appeals, approved by the Supreme Court April 9, 1930, in which there is a motion for rehearing pending, it is said that "the character of intervening right contemplated by the Legislature was a vested one, that is, a right enforceable in the courts and not a mere inchoate, imperfect or incomplete right," but neither these cases nor this definition is of any material assistance to us here. Without attempting a definition of a general application, we think the right meant by this statute, as far as the question here is concerned, must be a right acquired from the State upon or subsequent to the forfeiture and must be of such a nature as will be in conflict with the sale contract in the event the sale contract should be reinstated or restored as hereinbefore indicated. With this understanding of what is meant by reinstatement and by an intervening right within the purview of this statute, and in the light of certain of the statutory provisions hereinbefore set out, it seems obvious that your inquiry should be answered in the negative. In such case such rights in the oil and gas in the land as may have vested under the oil and gas permit or lease so vested prior and not subsequent to the sale, and the sale contract was originally subject and subordinate to, or was at least in no sense in conflict with, such rights concerning the oil and gas in the land as vested under the oil and gas permit or lease theretofore issued and in force at the time of the sale, and, this being

true, there would likewise be no conflict in the event the sale should be forfeited and thereafter reinstated.

It is our opinion, therefore, that where State school or asylum land classed as mineral land is sold by the State, and the purchaser executes an obligation in part payment for same, and at the time of sale there is in force an oil and gas permit or lease on the land theretofore issued by the State, and the land sale is forfeited by the State for non-payment of interest on the purchase obligation, such oil and gas permit or lease, although having continued and being in force at the time of a proposed reinstatement of such forfeited sale, does not constitute such an intervening right as will prevent a reinstatement of such forfeited sale, and you are so advised.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2813, Bk. 63, P. 442.

COUNTY SCHOOL LANDS—OIL AND GAS LEASE—PERMANENT SCHOOL FUND—AVAILABLE SCHOOL FUND.

A lease by a county of its county permanent school fund lands for oil and gas development purposes, using the usual and customary form employed in making oil and gas leases, constitutes a sale of such oil and gas as a part of the land, and the proceeds arising and paid to the county under such lease, whether denominated bonus, royalty, rental, or otherwise, are county permanent school funds and are not county available school funds.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 10, 1930.

Honorable Sam D. W. Low, County Judge, Washington County, Brenham, Texas.

DEAR SIR: Attorney General Bobbitt has referred to me for reply your inquiry of the 14th instant, which is as follows:

"Should Washington County lease its land of 17,371 acres in Tom Green County for oil and mineral and receive a cash bonus and rental for $17,371, place that money in the Washington County Available School Fund to be apportioned to the different districts of the county, or will it be used as the royalties of the University of Texas?"

Section 6 of Article 7 of our State Constitution contains these provisions:

"All lands heretofore, or hereafter granted to the several counties of this State for educational purposes, are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties. * * * Each county may sell or dispose of its lands in whole or in part, in manner to be prescribed by the commissioners court of the county. * * * Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust fund for the benefit of public schools therein; said proceeds to be invested in 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; * * * the

interest thereon and other revenue, except the principal, shall be available fund."

Article 2824 of our Revised Civil Statutes of 1925 is substantially the same as the foregoing constitutional provision, and Articles 2825 and 2826 read as follows:

"Art. 2825. Besides other available school funds provided by law, the proceeds of any leasing or renting of lands, heretofore granted by the State of Texas to the several counties thereof for educational purposes, shall be appropriated by the commissioners courts of said counties in the same manner as is provided by law for the appropriation of the interest on bonds purchased with the proceeds of the sale of such lands; and the proceeds arising from the sale of timber on said lands, or any part thereof, shall be invested in like manner as the Constitution and law requires of proceeds of sales of such lands; and it shall be unlawful for the commissioners court of any county to apply said proceeds, or any part thereof, to any other purpose, or to loan the same, except as above required."

"Art. 2826. It shall be the duty of the commissioners court to provide for the protection, preservation and disposition of all lands heretofore granted, or that may hereafter be granted to the county for education or schools."

Your question is whether, in the event your county should lease its permanent school fund lands for oil and gas development purposes, the "bonus and rental" received under such lease would be permanent school fund money or available school fund money within the meaning of these provisions of our Constitution and statutes.

This Article 2825, wherein it alludes to "the proceeds of any leasing or renting of said lands," might be taken as indicating that the proceeds arising from a so-called oil and gas lease of such land should constitute available county school fund money, but in view of the legal status or effect of such oil and gas lease contracts, as held by our courts, we do not understand this to be the law, at least as to the ordinary or usual form of oil and gas lease contracts.

For some time the power of a county to lease its school lands for oil and gas development purposes on the terms and provisions common to such transactions concerning privately owned lands was seriously questioned, but in Ehlinger vs. Clark, 117 Texas, 547, 8 S. W. (2d) 666, such a lease, as set out in the opinion of the court, was held to be authorized and valid. That case and the authorities therein cited also make it plain that oil and gas in place as they exist by the ordinary processes of nature beneath the surface of a given area of land are a part of the land in which they so exist and that they may be by contract, while in such state, constituted into and held as an estate or property separate from and independent of the balance of the land. These cases also establish the law of this State to be that such leases, contracts or whatever they may be called, as were involved in Ehlinger vs. Clark, supra, and certain of the other cases, constitute in law a conveyance of the title to and property in the oil and gas in the lands described in them. We also think that these cases fully establish the proposition that whatever may be re-

ceived under or as in consideration for such lease or contract is so received as in payment for such oil and gas and therefore in payment for that part of the land itself. The instrument before the court in Ehlinger vs. Clark recited that it was executed by the county in consideration, in part, of the execution by the lessee of two notes aggregating the sum of $4,000.00 and in referring to this part of the consideration the court said:

"Under the contract, as we view it, the county parts with its title to all the minerals in place, and obtains a moneyed consideration of $4000, and, in addition, the usual one-eighth royalty from the oil produced. That such a transaction is a sale of the minerals in place is the established law, we think, in this State."

In State vs. Hatcher, 115 Texas, 332, 281 S. W. 192, involving the question of whether oil and gas royalty received from oil and gas produced from University permanent fund lands was permanent or available University fund money, it is said:

"Being thoroughly convinced that the royalties from University lands are a part of the permanent fund of that institution, we think they should be placed there, and thereafter invested according to the express provisions of our State Constitution. We think the Act of April 3, 1925, in so far as it affects the question herein discussed, contravenes the Constitution itself, and is therefore null and void."

It is true that in Greene vs. Robison, 117 Texas, 516, 8 S. W. (2d) 655, it is held that the ten cents an acre and the one-sixteenth royalty payable to the surface owner under an oil and gas lease executed under the so-called "Relinquishment Act" (R. C. S. 1925, Arts. 5367 et seq.) are not "part of the consideration for the sale of the oil and gas" in the land, and are in the nature of compensation to the owner for damages to the surface of his land resulting from oil and gas operations on same, but this necessarily followed from another holding in that case that the surface owner had not by his purchase of the land from the State acquired and did not own the title to nor any interest in the minerals in the land and therefore could not sell nor receive compensation for such minerals. In this connection the court says:

"The Legislature has brought about this desired result in a lawful manner by requiring the purchaser of the oil and gas to compensate the owner of the soil for the use he makes of the surface, independent of the price he pays for minerals. He compensates said owner for the inevitable damages of oil exploration and operation. The landowner acquires no estate in the oil and gas. He simply has a right to receive the compensation from the lessee out of the lessee's production as the statute provides. * * * The provision that the payment of the ten cents per acre per annum and the one-sixteenth of the production shall be 'in lieu of all damages to the soil' shows clearly that same was not regarded as a part of the consideration for the sale of the oil and gas."

While this is the holding in that case as to the compensation accruing to the surface owner under such a lease contract, it is just as plainly held that the payments thereunder to the State are payments for the oil and gas as constituting a part of the land; that is, that such a lease is in legal effect a sale by the State,

acting through the surface owner as its agent, of the oil and gas in the land and that the payments accruing to the State thereunder are in payment for such oil and gas. As bearing on this feature of the case the court says:

"As pointed out, the Act provides that the owner of the land, as agent of the State, is authorized to sell or lease the oil and gas 'upon such terms and conditions as such owner may deem best, subject only to the provisions hereof'; and that 'no oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year plus royalty, and the lessee or purchaser shall in every case pay the State ten cents per acre per year of sales and rentals,' and one-sixteenth of the value of the oil and gas in case of production, and 'like amounts to the owner of the soil.' * * * We interpret the Act to fix a minimum price of ten cents per acre per annum and the value of one-sixteenth of the gross production free of cost to the State, for which the State is willing to sell the oil and gas, and the agent is authorized to secure the highest price obtainable for the benefit of the fund to which the land belongs,—like amounts received by the State to be paid by the purchaser to the owner of the soil. If a bonus is paid, if a larger royalty or other amounts are contracted for, the State and the owner of the soil receive equally in like amounts. * * * There can be no doubt that the State may sell these lands through the form of an ordinary gas and oil lease upon a royalty basis. The terms of the lease as to the minimum royalty, and other provisions of consideration, the time of payment, and the agency or agencies through which the sale is accomplished, are within the legislative discretion. Through the owner of the soil, as its agent, the State continuously offers for sale the oil and gas under the public free school and asylum lands."

As further indicating that the money accruing to the State under such a lease contract constitutes the purchase price payable to the State for the oil and gas as a part of the land the court in that case further says:

"There are certain provisions of the Act which do not affect its validity or practical operation, which are clearly void. In Article 5370, after providing for a forfeiture for failure to drill offset wells, it is provided: 'The oil and gas relinquished herein shall revert to and become the property of the State's general revenue fund.' In Article 5371, after providing that the oil and gas so forfeited shall be sold to the highest bidder, etc., it is provided: 'The sum received in addition to the reserved one-eighth shall be divided equally between the general revenue fund and the owner of the soil.' The oil and gas belong to the State for the benefit of these various funds, and their proceeds must go where the Constitution provides."

The provisions of our Constitution and statutes pertaining to State permanent school fund lands and University permanent fund lands, and the proceeds arising from the sale of such lands, are not identical in verbiage with the constitutional and statutory provisions dealing with county permanent school fund lands, but the language of the latter is such as fairly to indicate the same intent concerning such lands and proceeds, and this is well substantiated by the authorities herein cited. Based upon these, it is our view that a lease by a county of its permanent school fund lands for oil and gas development purposes, using the usual lease form such as is set out and considered in certain of the cases herein cited, constitutes a sale by the county of such oil and gas as a part of the land, and that the money accruing and paid to the county thereunder, whether denominated bonus, roy-

alty, rental or otherwise, belongs to and must be preserved as a part of the permanent school fund of the county, and does not constitute and may not be apportioned or otherwise expended as county available school funds.

Assuming, therefore, that your inquiry relates to the ordinary or usual oil and gas lease form, it is our opinion that the "cash bonus and rental" that may accrue and be paid to the county thereunder will constitute county permanent school fund money and should be preserved and handled as such, and will not constitute and may not be apportioned or otherwise expended as county available school funds, and you are so advised.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

OPINIONS RELATING TO PUBLIC OFFICERS, FEES AND COMPENSATION.

Op. No. 2753, Bk. 63, P. 26.

JUSTICES OF THE PEACE—EX-OFFICIO COMPENSATION—COURTS.

1. A justice of the peace has authority to try any criminal action in which the punishment is by fine only not to exceed two hundred dollars, but is not authorized to charge or collect any fees for his services in trying the case.
2. The effect of the decision of the Court of Criminal Appeals in the case of Ex parte Kelly is that justices of the peace are not authorized to charge any fees for the trial of a criminal case.
3. A justice of the peace is a county officer.
4. The commissioners court is authorized to pay ex-officio compensation to justices of the peace for services for which they are not authorized to charge fees, with limitations set out in Articles 3883, 3883a, and 3895.

Construing: Art. 1066, C. C. P.; Arts. 3883, 3883a, and 3895, R. C. S. Constitution, Art. 5, Sec. 1; Art. 5, Sec. 11, and Art. 5, Sec. 19.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 9, 1928.

Honorable W. J. (Dick) Holt, County Attorney, Waco, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 8th instant in which you ask to be advised as to the proper procedure in the trial of misdemeanor cases in the justice court since the recent opinion of the Court of Criminal Appeals in the case of Ex parte Kelly. We have received numerous inquiries from officers over the State as to the effect of this decision, and the question raised by these inquiries may be stated as follows:

1. Is the justice court now deprived of jurisdiction to try criminal cases where no fees are charged or collected for the justice of the peace?
2. If trials may be had under the above conditions, is there any compensation that might be lawfully paid to the justices for the services they render in the trials of cases?

In the Kelly case, the defendant was convicted in the justice court of a misdemeanor. He refused to pay the fine and costs adjudged against him on the ground that the justice of the peace was personally interested in the case by reason of receiving a fee only in the event of his conviction. On appeal, the Court of Criminal Appeals held that the particular judgment of conviction against the defendant was void, as violative of Article 5, Section 11 of the State Constitution, which provides that no judge shall sit in any case wherein he may be interested, and also violative of the due process clause of the Fourteenth Amendment to the United States Constitution. The court was of the opinion that since Article 1066 of the Code of Criminal Procedure authorized fees for the justice of the peace only in the event of the conviction of the defendant, and since the cost bill showed that the justice of the peace did charge $3.85 as fees, his personal and pecuniary interest was clearly shown. Therefore, since the Court of Criminal Appeals has held that it is unconstitutional for a justice of the peace to sit in a trial of a case wherein his fees were based upon a conviction only, and since the only compensation provided for justices of the peace for the trials of criminal cases is the fees prescribed by Article 1066 of the Code of Criminal Procedure, the effect of the opinion is to hold that we now have no statutory compensation for such service.

We do not believe that it was the intention of this opinion to hold that justice courts no longer have jurisdiction to try criminal cases. Article 5, Section 1 of the Constitution of Texas vests judicial power in the courts of justices of the peace. Section 19 of the same article provides that justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine imposed by law may not be more than two hundred dollars. We see, then, that the jurisdiction of justice courts is fixed by the Constitution, and the Legislature is without authority to alter the same. If the Legislature, by means of a statute fixing the compensation of justices of the peace, has thereby caused each trial to be void, is it not reasonable to say that the statute causing the trial to be void is of no effect, but the constitutional jurisdiction is not changed, and justices of the peace are still required to sit in the trials of criminal cases?

The fact that justices of the peace have been deprived of their right to charge and collect fees does not relieve them of performing the duties required by law. It is a well settled principle that an officer must perform all duties required by law, even though no compensation may be provided for the services rendered. McCalla vs. City of Rockdale, 246 S. W. 654; Knight vs. Harper, 279 S. W. 589; Duclos vs. Harris County, 298 S. W. 417.

You are advised, therefore, in answer to the first question that justices of the peace have jurisdiction and authority to try all criminal cases in which the punishment is by fine only not to exceed two hundred dollars, but they are not authorized to charge or collect any fees for the service rendered therein.

In answering the second question, your attention is called to Article 3895, Revised Civil Statutes, 1925, which reads as follows:

"The commissioners court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the commissioners court shall allow compensation for ex-officio services when, in their judgment, such compensation is necessary, provided, such compensation for ex-officio services allowed shall not increase the compensation of the official beyond the maximum of compensation and excess fees allowed to be retained by him under this chapter."

In Opinion No. 2166 rendered by this department on December 18, 1919, during the administration of Attorney General Cureton, the question arose as to whether the commissioners court had authority under Article 3893, Revised Civil Statutes of 1911, which is now found as Article 3895, to pay ex-officio compensation to constables and justices of the peace. The question naturally arose as to whether a justice of the peace is a county officer within the meaning of the above quoted statute. The opinion cites numerous authorities which hold that a justice of the peace is a county officer, towit: Hendricks vs. State, 49 S. W. 705; Kimbrough vs. Barnett, 55 S. W. 120; Hart vs. State, 15 Ct. App. 202; Ex parte Brown, 43 Tex. Cr. 45; Brown vs. State, 55 Tex. Cr. 572; Article 5, Section 24, Const., and Article 5030, Revised Civil Statutes, 1911, see also 35 C. J. 450; 16 R. C. L. 331; 22 R. C. L. 387. We agree with the holding in this opinion that the justice of the peace is a county officer within the meaning of Article 3895.

The opinion above mentioned, however, held that the statute allowing the payment of ex-officio compensation to justices of the peace permitted the compensation to be paid only to justices of the peace in cities of twenty thousand inhabitants. The reason for this holding, while none is given in the opinion, might have been that the commissioners court was authorized to pay ex-officio compensation only to those officers named in the maximum fee bill, and since only justices of the peace in cities of twenty thousand inhabitants or more were named in the fee bill law at the time of this opinion, only those justices were allowed to receive ex-officio compensation. However, under new Article 3883, which is the present statute providing for maximum fees, justices of the peace in counties under twenty-five thousand population are named in Article 3883a, also names justices of the peace in certain other counties, leaving only those counties in the second section of Article 3883 where justices of the peace are not mentioned. Therefore, under the holding in the above mentioned opinion, as applied to the present statutes, the commissioners court is authorized to pay ex-officio compensation to all justices of the peace mentioned in the first section of Article 3883 and in Article 3883a.

But we do not believe that Article 3895 should be construed to include only those officers mentioned in the maximum fee bill. It is true that officers who receive a salary and who are not on a fee basis cannot be allowed ex-officio compensation under this article, for the reason that such officers receive their salaries for all services performed, and they perform no services for which compensation is not allowed. The second sentence of Article 3895 is authority for the commissioners court to allow compensation to officers for ex-officio services and does not state the officers to which this compensation may be paid, but only limits the amount to be paid for such ex-officio services, so that the amount paid shall not increase the compensation beyond the maximum compensation and excess fee allowed to be retained by the maximum fee bill.

Since we have already held that the effect of the decision in the Kelly case is that the statutes no longer authorize any fees or compensation for a justice of the peace for the trials of criminal cases, then the services rendered by a justice of the peace in the trials of criminal cases are ex-officio services. Therefore, the commissioners court is authorized to pay such justices such compensation as they may deem reasonable and just, provided that the amount of annual ex-officio compensation in counties under twenty-five thousand population must not exceed the difference between two thousand dollars and the total annual fees, both civil and criminal, earned by the justice of the peace, and in those counties mentioned in Article 3883a the amount of annual ex-officio compensation must not exceed the difference between twenty-seven hundred and fifty dollars and the total annual fees, both civil and criminal, earned by the justice of the peace.

In this connection, we call your attention to the fact that if the commissioners court should allow a justice of the peace any ex-officio compensation, the order allowing same should not in any respect be conditioned upon the conviction of defendants in criminal cases, and also suggest that the ex-officio compensation not be based upon the number of cases tried as this might cause the justice to have a personal interest. We also suggest that when a justice of the peace hereafter sits in the trial of a criminal case that he inform defendant that no fees for the justice of the peace will be charged or collected. regardless of the result of the trial.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2763, Bk. 63, P. 89.

FEES OF COUNTY JUDGE—COMMISSION OF EXHIBITS.

1. County judge is not entitled to a one-half of one per cent commission on the actual cash receipts as reported by an inventory and appraisement filed by an independent executor.
2. Unliquidated insurance policies reported by an executor, administrator

of guardian are not such actual cash receipts as to entitle the county judge a commission thereon.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 25, 1929.

Hon. W. F. Parsley, County Judge, Young County, Graham, Texas.

DEAR SIR: We are in receipt of your letter of March 20, asking the opinion of this department on two questions as follows:

"1. Is an executor of a will which provides that 'no other action shall be had in the county court in the administration of my estate than to approve and record this will and to return an inventory and appraisement of my estate, and a list of claims' required to pay the commission of one-half of one per cent to the county judge on an order approving the inventory and appraisement?

"2. Are insurance policies to be counted as *actual cash* received by such an executor?"

We must answer both of your questions in the negative.

Article 3926 of the Revised Statutes of Texas, 1925, is the statute controlling the first question. The portion of said article applicable is as follows:

"A commission of one-half of one per cent upon the actual cash receipts of each executor, administrator or guardian upon the approval of the exhibits and the final settlement of the account of such executor, administrator or guardian, but no more than one such commission shall be charged on any amount received by any such executor, administrator or guardian."

We do not think that the word "exhibits" as used in this statute is inclusive of the inventories and appraisement filed by an independent executor. There are but two decisions of the court, so far as we are able to find, that in any way throw light upon the proposition involved.

The case of Grice vs. Cooley et al., 179 S. W. 1098, construes the word "exhibits" as referring to annual accounts. A discussion of the case of Wilhelm's Estate vs. Matthew, 274 S. W. 251, is more in point. This was a case where an independent executrix managed the estate for eighteen months and then entered into an agreement with the devisees to deliver all properties to a trustee and be relieved of all liability to such devisees. The independent executrix then filed a final account and application for discharge in the probate court. The county judge approved the account and taxed his fee on the cash receipts reported in such account. The San Antonio Court of Appeals held that the filing and approving of the account was unnecessary and unauthorized and that the county judge was not entitled to the fees of one-half of one per cent on the cash receipts. In the course of the opinion, we find this language of the court:

"The case has not been without its difficulties, but we have concluded upon a careful investigation of the authorities, that the fees in question were not properly chargeable to the estate. The statute (Art. 3362) which provides that any person capable of making a will may provide therein that no other action shall be had in the county court in relation to the settle-

ment of the estate than the probating of the will and return of inventory, appraisement, and list of claims, should be so construed as to more nearly accomplish its obvious purpose, which is to avoid the usual costs and bother of regular administration."

The purpose of the one-half of one per cent fee allowed to the county judge by Article 3926 was to compensate him for his supervisory control of an estate in probate. He has duties of investigation the advisability of permitting certain actions, sales of property and numerous other matters regarding the handling of the estate. This is a valuable service to the estate and the county judge is entitled to compensation. Under wills which provide for no action in the county court, the county judge does not have this supervisory control and there is no reason for any extra compensation to him for the probating of the will and for incidental orders made in connection therewith. This reason, in addition to that set forth by the San Antonio Court in the Wilhelm case, *supra*, to the effect that the testator in making an independent will desired to relieve his estate of the burden of the cases of administration, leads us to the conclusion that the first question must be answered "No," and that the county judge is not entitled to a one-half of one per cent commission on the actual cash receipts as reported in an inventory and appraisement filed by an independent executor.

We answer your second question "No" because we do not think that by any reason, an unliquidated insurance policy could be held to be an actual cash receipt.

Yours very truly,
W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2767, Bk. 63, P. 109.

CONSTITUTIONAL LAW—INCREASING SALARIES OF OFFICERS OF HOUSE OF REPRESENTATIVES AT SPECIAL SESSION OF LEGISLATURE.

1. Under Rule 2 of the House of Representatives, the salary of an officer of the House which has been fixed at the Regular Session may not be increased unless and until by a two-thirds vote of a quorum present House Rule 2 has been rescinded, changed or suspended.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 26, 1929.

Honorable W. S. Barron, Speaker, House of Representatives, Capitol.

DEAR MR. BARRON: In your communication of April 25th, you state that the House of Representatives at the beginning of the Regular Session fixed the salaries of the Chief Clerk and other officers at a certain sum per day; and at the beginning of the First Called Session a resolution was passed increasing the salary of some of these officers, and that thereafter another reso-

lution was introduced to raise the salary of certain other officers, to which latter resolution a point of order was made that the proposed increase was in violation of House Rule No. 2; that thereafter, a resolution was introduced that the Speaker of the House be requested to withhold his signature to any vouchers for the increased salaries that had been raised by the resolutions passed, to which latter resolution a point of order was made that it was an effort to rescind a former resolution passed by the House, which point of order was sustained by the Speaker; that thereafter, a further point of order was made as to the resolutions passed increasing salaries that they violated Section 44, Article 3 of the Constitution.

Under this statement of facts you submit several inquiries which, in a way, involve the same questions of law, the gist of which is as to whether or not after the House of Representatives has organized at its Regular Session and fixed the salaries of its officers, those salaries can thereafter at a Special Session be increased in view of the rules of the House of Representatives, and the provisions of Section 44, Article 3 of the Constitution, and the provisions of Article 6824, Revised Civil Statutes, 1925.

Section 44, Article 3 of the Constitution inhibits the Legislature from granting any "extra compensation to any officer, agent, servant, or public contractor, after such public service shall have been performed or contract entered into for the performance of the same." This provision of the Constitution has no relevancy to the inquiries you submit. The purpose of it is to prevent the granting of extra compensation to any officer, agent, servant, or public contractor after the public service has been performed, or after the contract for such public service has been made, and under the opinion of the Supreme Court in the case of Dallas County vs. Lively, 106 Texas, 364, this provision of the Constitution has no application to fixing a salary for services to be performed in the future, nor for increasing a salary for services to be performed in the future above that which already existed. It relates to and inhibits "extra compensation" to officers, agents, servants, and public contractors, and to that only. Therefore, if otherwise valid, an increase in the salary of officers of the House of Representatives in payment for services to be performed after such increase is made would not violate the provisions of the Constitution.

Article 6824 to which you refer provides that the salaries of officers shall not be increased nor diminished during the term of the officers entitled thereto. The title of the act, of which this article is a part, relates to certain specific state, district and county officers, and has no application to the officers of the Legislature.

The application of House Rule No. 2 presents a different question. The Constitution provides that the Legislature shall meet every two years in Regular Session, and at other times when convened by the Governor. It is a continuing body after its members have been elected and qualified, and it has been organ-

ized. Special sessions are merely a continuation in active service of the original organization at the Regular Session. This is evident from the provisions of the Constitution and of Articles 5422 to 5429, inclusive, Revised Civil Statutes, 1925, which fixes the time of the meeting, the manner of organization, the election of the Speaker, and the election of officers. As to the latter, it is provided that after the Speaker shall have been elected, the House shall proceed "to its further organization by electing the necessary officers to whom the Speaker shall administer the official oath." It is not only contemplated under the law, but it has been the unbroken custom that the Speaker elected at the Regular Session and all other officers elected at the Regular Session continue as such during all of the special sessions held thereafter during the term for which the members of said body have been elected.

At the organization of the Regular Session the House adopts its rules of procedure which continue as its rules of government during all of the special sessions unless amended or rescinded by a two-thirds vote. Rule 2 provides that "all officers of the House shall be elected by ballot and shall receive such compensation as the House may determine; and after their salaries have been fixed, no further or extra compensation whatsoever shall be allowed them." The rule goes even further to provide that no officer or other employee shall be permitted to receive directly or indirectly, as a gift or otherwise, any compensation from any person other than the regular salary fixed by the House. The provision of this rule goes further than the constitutional provision in that the latter prohibits only the payment of extra compensation after the service has been performed, or the contract made, whereas the rule of the House prohibits not only extra compensation but further compensation. This must be construed to mean that so long as this rule remains in force, after the salary or compensation of an officer of the House has been fixed, it cannot thereafter be changed so as to provide for any further compensation for the services to be performed. This construction does not make the matter so inelastic that emergencies cannot be met for the reason that Rule 23 authorizes the suspension of any rule or order of the House by an affirmative vote of two-thirds of the members present. So that if in the opinion of two-thirds of a quorum of the House it is deemed necessary or expedient to suspend, rescind, or change Rule 2 so as to authorize an increase in the compensation of any officer of the House, there is nothing in the rules of the House, or in the Constitution, or in the statutes to prevent such action being taken. This, however, is the only way in which it may be done, for so long as House Rule No. 2 remains unchanged, an increase in the salary of an officer of the House cannot be made.

In response to your inquiry with reference to the application of Article 1569 of the Penal Code prohibiting more than a certain number of days' work per week and a certain number of

hours per day, you are advised that this article has no application to the officers and employees of the House of Representatives.

In view of what I have already said, you are advised specifically upon the points of inquiry in your letter, as follows:

1. You are correct in sustaining the point of order to a resolution raising the salary of the enrolling clerk from $7.50 per day to $10.00 per day in that said resolution is in violation of Rule 2 of the House.

2. You were in error in sustaining the point of order to the resolution that you be requested to withhold your signature to any voucher carrying salary raises of the Chief Clerk and Calendar Clerk from $7.50 per day to $10.00 per day because said resolution making such increases was initially void as being in violation of Rule 2 of the House.

3. The point of order that the salary increases violate Section 44, Article 3 of the Constitution, should have been overruled.

4. House Rule No. 2 prohibits an increase in the compensation or salary of the Enrolling Clerk, the Chief Clerk, the Calendar Clerk, and all other officers of the House, and all points of order directed to this violation of the rule should be sustained, and in the absence of a point of order to the resolution increasing the salaries of any of said officers, said salary increases are void as being in contravention of said rule.

5. If two-thirds of a quorum present deem it expedient to increase the compensation or salary of any officer of the House, this may be done by rescinding, changing or suspending Rule No. 2 under Rules 23 and 29 without violating any provision of the Constitution or of the statutes, but it can be done in no other way.

6. It is your duty to refuse to pay any increased salary made in violation of Rule 2 unless such rule had been suspended under Rules 23 and 29 prior to the time such increase was made.

Yours very truly,

CLAUDE POLLARD.
Attorney General.

Op. No. 2773, Bk. 63, P. 145.

OFFICERS—EX-OFFICIO COMPENSATION—FEES OF OFFICERS.

1. The amount of ex-officio compensation that may be granted to officers in counties under 25,000 population cannot exceed an amount which will increase the total compensation, including ex-officio compensation, of the official beyond the amount set out in the first section of Article 3883.

2. In determining the amount of fees earned by an officer, it is not necessary to include those fees exempt by statute from the operation of the maximum fee bill, such as delinquent tax fees.

May 21, 1929.

Honorable R. R. Donaghey, County Attorney, Vernon, Texas.

DEAR SIR: This department acknowledges receipt of your letter in which you ask to be advised the amount of ex-officio

compensation that may be paid to officers in counties under 25,000 population in view of the recent unpublished decision of the Supreme Court of Texas in the case of Stephens County vs. Heffner.

In the case of Veltman vs. Slater, 217 S. W. 378, the Supreme Court of Texas held that the ex-officio compensation authorized to be paid to a sheriff was limited by the statutes now Articles 3934 and 3895 of the 1925 statutes. In opinion No. 2711 (Biennial Report, 1926-1928, page 248), this department held that the ex-officio compensation of a county clerk is limited by both Articles 3932 and 3895. We believe, therefore, that the same reasoning can be applied to the amount of ex-officio compensation that may be paid to a county judge as provided by Article 3926. While this last article does not limit the amount that may be paid to a judge, yet the provisions of Article 3895 will limit the amount that may be paid.

We see, therefore, the statutes limit the amount of ex officio compensation of all officers to the amount prescribed by Article 3895, with the exception of the further limitations on the amounts to be paid sheriffs and county clerks under Articles 3934 and 3932. What, then, is the amount that may be paid to officers under Article 3895?

Article 3895, Revised Civil Statutes of 1925, reads as follows:

"The commissioners court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the commissioners court shall allow compensation for ex-officio services when, in their judgment, such compensation is necessary, provided, such compensation for ex-officio services allowed shall not increase the compensation of the official beyond the maximum of compensation and excess fees allowed to be retained by him under this chapter."

In the case of Anderson County vs. Hopkins, 187 S. W. 1019, the court construed the statutes now composing Article 3895, and held that the commissioners court under the statute could allow an officer ex officio compensation just so the amount allowed plus the compensation earned does not exceed the maximum fees plus excess fees allowed to be retained by an officer. In other words, if an officer is allowed a maximum compensation of $3500.00 and allowed to retain $1500.00 in excess fees, then it is possible to earn a total of $5000.00. If the fees and excess fees earned amount to $4000.00, then the court cannot allow more than $1000.00 ex officio compensation.

The maximum compensation allowed officers is set out in Article 3883; the amount of excess fees allowed is set out in Article 3891.

We see that county judges in the counties of the class mentioned in the third section of Article 3883, are allowed a maximum compensation in fees of $3500.00 per year. Article 3891 allows officers in counties exceeding 38,000 population to retain

one-fourth of the excess fees until the same amounts to the sum of $1500.00. Therefore, county judges in counties containing more than 38,000 population may retain the maximum of $3500.00 and one-fourth of the excess fees not exceeding $1500.00, making it possible to earn $5000.00 per year. Applying the rule above set out, the commissioners court may allow the county judges in counties containing 38,000 population or more any amount of ex officio compensation just so the amount allowed, together with the fees earned by the county judge in such counties, does not exceed $5000.00 per year.

It is noted that the county judges of the counties in the class mentioned in the second section of Article 3883 are allowed a maximum compensation of $2500.00 per year. Article 3891 provides that officers in counties between 25,000 and 38,000 inhabitants may retain one-fourth of the excess fees until such one-fourth amounts to the sum of $1250.00. We see, therefore, that it is possible for county judges of counties between 25,000 and 37,500 inhabitants to earn a total sum of $3750.00 per year, the maximum compensation and excess fees. Therefore, applying the rule above stated, the commissioners courts of counties between 25,000 and 37,500 inhabitants may allow county judges any amount of ex officio compensation just so the amount allowed, together with the fees he has earned during the year, does not exceed $3750.00. This rule does not apply to those counties between 37,500 and 38,000 population for the reason that the maximum compensation classification begins with the first sized counties and the excess fee classification begins with the second sized counties.

We see that the first section of Article 3883 provides that the maximum compensation of a county judge in counties under 25,000 population is $2250.00. Neither Article 3891 nor any other statute makes any provision for excess fees of officers in counties under 25,000 population. Therefore, under the statutes, the maximum compensation and excess fees for a county judge in a county under 25,000 population is $2250.00, being only the maximum compensation, and we know of no provision for excess fees. Again applying the rule above stated, we see that the commissioners courts in counties under 25,000 population may allow the county judge any amount of ex officio compensation just so the amount allowed, together with the fees earned, does not exceed $2250.00.

In the recent case of Stephens County vs. Heffner, the only question involved was whether under the provisions of Article 3900 the officers in counties under 25,000 population were under what we commonly term the maximum fee bill and were required to pay to the county any part of the fees earned in excess of the amount set out in the first section of Article 3883. The court held that under the provisions of Article 3900, it was the intention of the Legislature to allow the officers in such counties to retain all of the fees that might be earned, regardless of the amount, and not require such officers to account for any

excess above the amount set out in the first section of Article 3883. The question of the amount of ex officio compensation allowed such officers is not involved in this case.

If the commissioners court should have the authority to allow ex officio compensation to an officer in a county under 25,000 population so as to increase the amount of his compensation beyond the amount set out in the first section of Article 3883, then there is no limit to the amount that might be allowed such officers. In such cases, the court would be allowed to pay such officers the sum of $10,000.00, or any other amount it may see fit. Can we say that it was the intention of the Legislature to authorize the commissioners court in a small county to pay greater compensation than allowed to be paid to officers in the larger counties? We believe not. We believe that it was the intention of the Legislature, as to compensation, to divide the county officers in this State into three classes, and that the officers in the larger counties should receive greater compensation than those in the smaller counties, subject to the provisions of Article 3900 as construed by the Supreme Court in holding that the officers in the small counties are entitled to all the fees that they might earn. It was the evident intention of the Legislature that since the fees for the officers in the small counties are much less than the fees of the officers in the larger counties, such officers should be allowed to retain all fees earned, for with the exception of a few instances the officers in the small counties cannot earn as great amount of fees as officers in the larger counties. But we cannot believe that it was the intention of the Legislature to throw open wide the county treasury in paying ex officio compensation to county officers in the small counties; we find no statutory authority for allowing the same.

We advise, therefore, that it is our opinion that the amount of ex officio compensation that may be paid an officer in a county under 25,000 population cannot exceed an amount which will increase the total compensation of the official, including ex officio compensation, beyond the amount set out in the first section of Article 3883.

In determining the amount of fees earned by an officer, it is not necessary to include fees exempt by statute from the operation of the maximum fee bill, such as delinquent tax fees.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2787, Bk. 63, P. 273.

CLERKS OF COURTS OF CIVIL APPEALS—COSTS—FEES—COPIES OF RECORDS—STATUTES.

1. The Legislature does not have authority by means of a rider to an appropriation bill to enact a statute affecting the fees or costs of clerks of Courts of Civil Appeals when the same are fixed by general statute.

2. The clerk is not required to make a charge for uncertified copies of opinions or other papers on file in any cause that are furnished to book companies or other parties.
3. The clerk may make a private contract with publishing companies and others to furnish uncertified copies of opinions, and retain as his compensation all moneys received therefor.
4. The clerk is not required to furnish uncertified copies of opinions or other papers on file when requested, but can be required to furnish certified copies of such papers.
5. The clerk is not required under Chapter 98 of the Regular Session of the Forty-first Legislature to furnish more than three free copies of an opinion, one being to the clerk of the court, one to appellant, and one to appellee.

Construing: Judiciary Appropriation, Chapter 18, Acts of Third Called Session of the Forty-first Legislature. Articles 3924 and 1834, R. C. S.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 26, 1929.

Mr. D. W. Stallworth, Clerk of Court of Civil Appeals, Waco, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 13th instant, in which you call attention to the statutes affecting the fees and costs of clerks of Courts of Civil Appeals, and also the provisions of the judiciary appropriation, which is found as Chapter 18 of the Acts of the Third Called Session of the Forty-first Legislature, and contains the following provision:

"Fees shall be fixed, charged and collected from book companies, litigants, and their attorneys, and all others, for all unofficial and certified copies of opinions of the court made or furnished by said court or the clerk, stenographers or other employees thereof, and fees shall be fixed, charged, and collected for all other services rendered by said court, the clerk, stenographers or other employees, to book companies, litigants, and their attorneys and all others not now furnished or required to be furnished free of charge; and all of said fees and charges when collected, shall be paid into the Treasury of the State of Texas."

In connection with these statutes you ask the following questions:

1. Is the clerk of the Court of Civil Appeals required to make a charge for uncertified copies of opinions or other papers on file in any cause that are furnished to book companies or other parties?
2. Can the clerk of the Court of Civil Appeals make a private contract with the publishing companies and others to furnish uncertified copies of opinions either by the clerk, deputy clerk or stenographer, and retain as his compensation all moneys received therefor?
3. Is the clerk of the Court of Civil Appeals required to furnish uncertified copies of opinions or other papers on file in any cause when requested, and if he is so required, is he required to collect a reasonable charge therefor, and must be send the money received for the uncertified copies of such papers to the State Treasurer?
4. Under the provisions of Section 2 of the Act of the Forty-first Legislature, increasing the fees of the clerk, under the provisions of Senate bill No. 26, which require him to send to the clerk of the court from which the case is appealed two copies of the opinion, can the clerk, where there are more than two attorneys, send more than two copies free, or is he required to charge for all over the two copies furnished, provided he does not certify to same?

The writer believes that a brief history of the statutes concerning the compensation of the clerks of Courts of Civil Appeals will be of assistance in answering these questions.

Prior to 1919 the clerks of such courts were compensated solely by fees of office, which are now set out in Article 3924 of the Revised Civil Statutes. Chapter 78, page 129, Acts of the Regular Session of the Thirty-sixth Legislature (1919) provided by Section 1 that the clerks of such courts shall receive an annual salary of three thousand dollars. Another section provided that all costs thereafter collected by the clerk shall be paid into the Treasury of the State. These sections of this act are now contained in Articles 6819 and 1834, respectively. Since the enactment of this act, various appropriation bills, and particularly the one enacted by the Forty-first Legislature, have contained a provision similar to that set out above with reference to charging for unofficial copies of opinions.

Under the provisions of the appropriation act above quoted, it is clear that it is the duty of the clerk to charge for unofficial or uncertified copies of opinions and pay the amount received into the Treasury of the State.

However, the question to determine is whether the Legislature was within its authority in enacting this provision as a rider to the appropriation bill.

It seems to be well settled that in this State the Legislature is without authority to attach to an appropriation bill a rider not pertaining to an appropriation when the subject matter of the same is found in a general law. See State vs. Steele, 57 Texas, 200; Linden vs. Finley, 92 Texas, 451; Opinion No. 1745, written by Attorney General B. F. Looney and printed at page 110 of the reports of the Attorney General, 1916-18, and letter opinion in book 60, page 24 of the Attorney General's Department. It is true that most of these authorities deal with the question of the lack of authority of the Legislature to change the salary fixed by law by making a different appropriation for the same, but the principles enunciated in each are applicable to the question under consideration. You are advised, therefore, that it is our opinion that the rider attached to the judiciary appropriation bill, which is quoted above, is of no effect, and it is necessary to resort to the general statutes in order to answer your question.

Article 3924 prescribes the fees that shall be collected by the clerks of the Courts of Civil Appeals, among which is the following:

"Making copies of any papers or records in their offices, including certificate and seal, for each one hundred words, ten cents."

Article 1834 provides that each clerk of a Court of Civil Appeals shall collect and pay into the State Treasury all costs collected by him.

Since we have already taken the view that the rider on the appropriation bill of the Forty-first Legislature is ineffective, we are left to determine the question whether that part of

Article 3924 above quoted applies to unofficial or uncertified copies of papers or records. We think not.

The fact that the statute uses the phrase "including certificate and seal," leads us to believe that it is intended to include only such copies that are certified; otherwise, it would not be necessary to use this expression.

If Article 3924 is intended to include uncertified copies, then it would not have been necessary for the Legislature to place the above rider on the appropriation bill so as to require that the fees collected for unofficial opinions shall be placed in the State Treasury. Therefore, the Legislature evidently considered that Article 3924 did not include uncertified copies.

In the case of Ex parte Brown, 166 Ind. 593, 78 N. E. 553, the Supreme Court of Indiana had the identical question before it in construing a statute of that State which provided that the clerk of the court shall receive "for every copy of record or other paper, per one hundred words * * * ten cents." The court held that this statute was intended to include only certified copies admissible in evidence under the statutes of that State, and did not include uncertified or carbon copies. The statute of Indiana is somewhat different from the statute of this State in that it mentions only copies of records, whereas, the Texas statute goes further and uses the expression "including certificate and seal."

In this case the question at issue was whether the clerk was authorized to charge a smaller amount for uncertified copies of the opinions of the court which were secured by West Publishing Company for publication in its law books.

It cannot be denied that any person has a right to go to the office of the clerk of a Court of Civil Appeals and make copies of any public records, subject, of course, to reasonable rules and regulations concerning the use of the office for this purpose. If the publishing company should have a private stenographer copy the opinions, it is certain that the clerk could not charge or collect a fee for this work. However, if a certified or official copy is made, then, of course, it is necessary to charge a fee therefor and account for same under Article 1834. What, then, is the difference between allowing the clerk to earn this compensation for services that are official and allowing a private stenographer to earn the same?

In the case of Burlingame vs. Hardin County, 164 N. W. 115, the Supreme Court of Iowa held that an officer is accountable only for fees earned by him in his official capacity, and in discussing this question used this language:

"The right of the county to demand and recover money received by the clerk depends solely upon the question whether such money has been received by him in his official capacity. A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county. 'His duties are fixed by statute, and when these are performed he is not required to do more.' Polk Co. vs. Parker, 160 N. W. 320, L. R. A. 1917B, 1176. If, for example, he receives payment or fees as a witness in a civil action, or for service

as one of a board of arbitrators, or as clerk of an election board, or as laborer in the harvest field, or indulges in literary work for which he receives more or less in royalties, or being a merchant, or banker, or mechanic, wins profits wholly disconnected with the duties placed upon him by statute, no one would soberly contend that the county or any of its officers could rightfully lay claim to any part of the income or earnings so accruing. In each and every case cited and relied upon by the appellee the right of the county to compel an accounting by the clerk has been exercised solely upon the admitted or proved fact that the moneys in question were received by him in his official capacity."

It appears, of course, that the Legislature of Texas desired to require the clerks to account for the compensation received for making uncertified copies of opinions, but they did so in an ineffectual manner as already pointed out. The department cannot make laws, but can only give its construction of the same.

You are advised in answer to your first question that the clerk of the Court of Civil Appeals is not required to make a charge for uncertified copies of opinions or other papers on file that are furnished to book companies or other parties.

In view of our holding that the costs required by Article 1834 to be paid into the State Treasury includes only the fees collected under Article 3924 and our holding that fees for uncertified copies are not within the provisions of the last named article, you are advised in answer to your second question that the clerk may make private contracts with publishing companies to furnish uncertified copies of opinions and retain as his compensation all moneys received therefor.

In the case of Ex parte Brown above cited, the court held that the phrase "copy of records" means a certified copy, and that the clerk could not be required to furnish an uncertified copy. We believe that this decision is applicable to the Texas statute. You are advised, therefore, in answer to your third question that the clerk is not required to furnish uncertified copies of opinions or other papers on file when requested but is authorized to require that only certified copies be furnished.

In answer to your fourth question, you are advised that the statute mentioned by you does not require you to furnish more than three free copies of opinions, one to the clerk of the court, one to the appellant, and one to appellee.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2789, Bk. 63, P. 286.

OFFICERS—HOLDING MORE THAN ONE OFFICE—COURT REPORTERS.

1. An official court reporter appointed under the provisions of Article 2321 is a civil office of emolument.
2. The same person cannot hold the position of court reporter for two district courts at the same time and draw the salary of both offices.

Construing: Art. 16, Sec. 40, Const., and Articles 2321, 2323, and 2326, R. C. S.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 15, 1929.

Honorable John A. Valls, District Attorney, Laredo, Texas.

DEAR SIR: This department acknowledges receipt of your letter of October 6th in which you ask to be advised if a court reporter for the One Hundred and Eleventh Judicial District may also be appointed court reporter for the Forty-ninth Judicial District and hold both positions and draw both salaries at the same time.

Article 16, Section 40 of the Constitution, provides that no person shall hold or exercise, at the same time, more than one civil office of emolument except certain offices named therein, which exceptions do not include a court reporter. The first question to determine is whether the position of court reporter is a civil office of emolument.

Article 2321 provides that a reporter shall hold his "office" during the pleasure of the court. Article 2322 requires the reporter to take the official oath of office. Article 2323 makes provision for the appointment of a deputy official shorthand reporter. Article 2324 prescribes the duties of each official court reporter. Article 2325 prescribes the fees for the court reporter.

We call attention to the above statutes in order to show that a court reporter has the right to exercise public employment and to take the fees or emoluments belonging thereto, and has all of the characteristics of an officer. See 22 R. C. L. 372. We believe, therefore, that a court reporter is an officer within the meaning of the constitutional provision above mentioned, and by said provision is precluded from holding two of such offices at the same time.

In the case of Kruegel vs. Daniels, 50 Tex. Civ. App. 215, cited by you, an attack was made upon the action of the district clerk in issuing an order of sale, the county having two judicial districts. It was insisted that the clerk was holding two civil offices of emolument in derogation of the Constitution, but the court held that one clerk for the district court in each county is provided for in the Constitution, but that this does not restrict the Legislature from imposing upon one district clerk of a county the duties necessarily incident to two district courts in the same county.

There is a distinction between the matter involved in the above case and the question we now have under consideration. In the Kruegel case, the question was whether the district clerk of Dallas County was holding two offices while acting as clerk of the two district courts in said county. In the matter under consideration, the statute provides that an official court reporter shall be appointed by each district judge, and not for each county. See Article 2321. It appears that it was the clear intention of the Legislature to have separate persons as court reporters for

each district court regardless of the provisions of the Constitution.

You are advised, therefore, in answer to the question propounded by you that in our opinion, the same person cannot hold the position of court reporter for two district courts at the same time and draw both salaries attached to each position.

Yours very truly,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2807, Bk. 63, P. 410.

FEES OF OFFICE—COUNTY ATTORNEY.

The county attorney in judicial districts composed of two or more counties is entitled to fees provided in Articles 1020 and 1025, C. C. P., 1925, for performing services in the absence of the district attorney in examining trials, habeas corpus proceedings and felony cases under the facts and circumstances more fully described in this opinion. The fact that a law was enacted placing district attorneys in districts composed of two or more counties on a per diem basis did not have the effect of depriving county attorneys of fees provided for by statute for services performed in the absence of the district attorney.

OFFICES OF THE ATTORNEY GENERAL,
April 26, 1930.

Honorable J. M. Edwards, Acting State Comptroller, Austin, Texas.

DEAR SIR: This department is in receipt of your communication of March 14th, enclosing an account of a county attorney for fees for attending and prosecuting examining trials and habeas corpus proceedings, and also one fee for a conviction in a liquor case. Accompanying the account is an affidavit executed by the district attorney of the district disclosing that the district attorney was attending court outside of the county at the time the proceedings were had for which the county attorney claims these fees. The account also shows certificate of the district judge to the effect that the county attorney represented the State in the district court cases set out on the reverse side of the account.

The county attorney is in a county forming a part of a judicial district composed of two or more counties.

You call attention to the fact that the opinions of the Attorney General are conflicting during the past several years on the question as to whether the county attorney is entitled to fees under these circumstances, and you then propound the following questions:

"(a) Is the county attorney residing in a judicial district composed of two or more counties entitled to a fee for representing the State in cases where examining trials are had and the testimony reduced to writing and thereafter bills of indictment are returned by the grand jury and when district attorney is absent from county?"

"(b) Is a county attorney residing in a judicial district composed of two or more counties entitled to a fee for representing the State in habeas

corpus hearing in the absence of the district attorney of such judicial district when it is shown that such district attorney is engaged in discharging his official duties in the district of another county constituting a part of his judicial district?"

"(c) Is a county attorney residing in a judicial district composed of two or more counties entitled to the fee prescribed by law for representing the State where the defendant is charged and convicted of a felony and where no appeal is taken, if such appeal is taken, the judgment of trial court is thereafter affirmed by the Court of Criminal Appeals and when district attorney is engaged in the trial of criminal cases in another county of such judicial district?"

Article 1020 of the Code of Criminal Procedure of 1925 contains the following language:

"District and county attorneys, for attending and prosecuting any felony case before an examining court, shall be entitled to a fee of five dollars to be paid by the State for each case prosecuted by him before such court. Such fee shall not be paid except in cases where the testimony of the material witnesses to the transaction shall be reduced to writing, subscribed and sworn to by said witness."

Article 1025 of the same Code reads as follows:

"Art. 1025. Fees to District and County Attorneys.—In each county where there have been cast at the preceding presidential election 3000 votes or over, the district or county attorney shall receive the following fees:

"For all convictions of felony when the defendant does not appeal, or dies or escapes after appeal and before final judgment of the appellate court, or when the judgment is affirmed on appeal, twenty-four dollars for each felony other than felonious homicide, and forty dollars for each such homicide.

"For representing the State in each case of habeas corpus where the applicant is charged with felony, sixteen dollars.

"In each county where less than 3000 such votes have been so cast, such attorney shall receive thirty dollars for each such conviction of felony other than homicide, and fifty dollars for each such conviction of felonious homicide, and twenty dollars for each such habeas corpus case."

It will thus be seen that the law expressly provides fees for the county attorney for services such as those inquired about by you. Therefore, unless there is something in the statutes elsewhere which has the effect of modifying the meaning of these statutes, it is clear that the county attorney is entitled to these fees. The only statute that we know of that has been invoked in support of the idea that the county attorney is not entitled to such fees is the statute providing for per diem compensation for district attorneys in districts composed of two or more counties, the same now being Article 1021 of the Code of Criminal Procedure of 1925 as amended. This article provides for district attorneys in such districts to be paid on a per diem basis and also contains the following provision:

"All commissions and fees allowed district attorneys under the provisions hereof, in the districts composed of two or more counties, shall, when collected, be paid to the district clerk of the county of his residence who shall pay the same over to the State Treasurer."

It appears that the first statute that was enacted placing district attorneys on a per diem basis in such districts was an act

of the Thirtieth Legislature and that act has been amended from time to time but in so far as material to your inquiry it is the same now as it was in the beginning. That is, it places district attorneys in such districts on a per diem and provides that the fees collected by them shall be turned over to the district clerk to be placed in the State Treasury.

When this law was first enacted, the situation was that both the county attorney and the district attorney were paid upon a fee basis and the per diem statute changed the method of compensating district attorneys but said nothing about county attorneys. Such is the condition of the statute at this time. The codifiers have brought forward these provisions allowing county attorneys these fees notwithstanding the fact that the per diem statute above mentioned has been enacted. The statutes say nothing about the county attorney not being entitled to fees for services in the absence of the district attorney.

With the greatest respect for those who have held otherwise or may have a different opinion, this department cannot see how it would deprive the county attorney of fees allowed by express provisions of the statutes to amend the law changing the method of paying district attorneys. It is our opinion that the enactment of the district attorneys' per diem statute had the effect of modifying the provisions of Articles 1020 and 1025 in so far as fees of district attorneys are concerned, but no further. The statute fixing per diem compensation for district attorneys leaves in force and effect those provisions allowing fees to county attorneys.

It is true that these services would have been performed by the district attorney primarily, but in the absence of the district attorney they are performed by the county attorney. The county attorney's office is an entirely separate one from that of the district attorney and the law has provided different methods of compensation.

You are therefore advised that in the opinion of this department the county attorney is entitled to the fees provided in Articles 1020 and 1025 for performing the services and under the circumstances mentioned in your questions (a), (b) and (c) hereinbefore quoted.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

OPINIONS RELATING TO RAILROADS AND MOTOR CARRIERS.

Op. No. 2776, Bk. 63, P. 160.

MOTOR CARRIER LAW—MOTOR TRUCKS—CARRIERS—RAILROAD COMMISSION.

Construing: Chapter 314, Acts of Regular Session of the Forty-first Legislature.

1. A person operating a motor carrier between two points, only one of which is incorporated, is not within this act. In order to come within this act, the operation must be carried on between two or more incorporated cities, towns, or villages.

2. A person operating a motor carrier over a fixed route cannot receive a permit as a Class "B" carrier. A Class "B" carrier cannot have either fixed routes, regular schedules, fixed termini, or published rates.

3. A Class "A" carrier must have each and every one of the following four characteristics: (1) fixed routes, (2) regular schedules, (3) fixed termini, and (4) published rates.

4. All Class "A" carriers are required to have fixed terminals or places of doing business in each incorporated city along their routes.

5. A certain fixed time, either daily, weekly, or monthly, will constitute a regular schedule under this act.

6. A wholesale firm delivering goods sold by it under a delivered price is not a motor carrier within this act.

7. The fact that such wholesale firms charge a higher delivered price than the price f. o. b. the wholesale house does not make such firm a carrier within this act.

8. A person under private contract with a newspaper publishing company to deliver papers over a fixed route to different incorporated cities is not a motor carrier under this act. The purpose of this act is to regulate only common carriers.

9. A person operating in the manner set out in the preceding paragraph is not entitled to receive a certificate of convenience and necessity to operate a Class "A" carrier and is not required to make application for a permit to operate a Class "B" carrier.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 26, 1929.

Honorable Mark Marshall, Director, Motor Bus Division, Railroad Commission, Austin, Texas.

DEAR SIR: This department acknowledges receipt of your two letters of the 17th and 18th instant in which you ask the following questions concerning Chapter 314 of the Acts of the Regular Session of the Forty-first Legislature, known as the Motor Carrier Law:

"(1) If a person is operating a motor-propelled vehicle over the highways of this State for compensation or hire between two points, only one of which is incorporated, would that person come within the terms of the law so as to require supervision and regulation of his operation by the Railroad Commission?

"(2) If a person making application for a permit to operate as a Class 'B' carrier has a fixed route but does not have regular schedules or fixed termini or published rates, would that person be entitled to receive a Class

'B' permit, and could he operate over a fixed route as a Class 'B' operator without infringing upon the rights intended to be given by the Legislature to those coming within the definition of Class 'A'?

"(3) The definition of Class 'A' motor carriers provides that they shall operate over fixed routes, under regular schedules and having fixed termini, and receiving compensation or hire for such service in accordance with published rates and tariffs; such operation being carried on between two or more incorporated cities, while the definition of Class 'B' motor carriers provides that such operators shall have no fixed route, regular schedules or fixed termini, or published rates. If we consider fixed routes, regular schedules, fixed termini and published rates as four separate qualifications, would it be proper to conclude that a Class 'B' motor carrier may not have any one of the four qualifications? In other words, would the fact that a motor carrier who possessed only one of those four qualifications be required to operate such motor carrier service after receiving a Class 'B' permit in such maner as to abandon that qualification?

"(4) If a person making application for a certificate of convenience and necessity to operate as a Class 'A' motor carrier has a fixed route and regular schedules and charges the same rate on the same commodity received from all persons, but does not have fixed termini in the sense that he loads and unloads property to be transported at a certain fixed street address in any of the incorporated towns on the fixed route, would that person come within the definition of a Class 'A' motor carrier?

"(5) We have advised those making inquiry that 'the operation of a motor-propelled vehicle over the public highways of this State between two or more incorporated towns, cities, or villages for hire or compensation on a certain fixed day of each week or month would constitute a regular schedule.' Please advise if the above definition is proper.

"(6) If a wholesale grain and feed company, or a wholesale grocery and produce company situated within an incorporated city owns several trucks with which it delivers merchandise to retail customers in various incorporated cities, towns and villages within its trade territory, will such wholesale company be required to make application for a Class 'B' permit?

"(7) In the event that such company quotes the price of the goods delivered in towns or cities in its trade territory which is greater than the price quoted for the same commodity f. o. b. the wholesale company's loading platform, will such sale and delivery amount to the transportation of property for hire or compensation over the public highways of Texas between two or more incorporated towns so as to require such wholesale company to make application to the Railroad Commission of Texas for a Class 'B' permit?

"(8) If a newspaper publishing company should contract with some individual, firm, or corporation, to deliver by motor-propelled vehicle owned by operator a certain number of newspapers to each town along a certain route at certain stated times, and such firm or individual did not accept or transport any other property for hire or compensation over the public highways of Texas between incorporated towns, would such individual, firm, or corporation be required to make application to the Railroad Commission for a certificate of convenience and necessity?

"(9) Would such individual be entitled to receive a certificate of convenience and necessity if he were operating over a regular route, with fixed schedules on February 20, 1929, and continuously ever since?"

We will discuss these questions in the order set out above.

Question 1.

Section 1(a) of the act defines a "motor carrier" as being a motor-propelled vehicle operated along the highways or streets for the purpose of carrying or transporting property for compensation or hire "between two or more incorporated cities, towns, or villages." We believe that this act is clear in requir-

ing that before a motor vehicle constitutes a motor carrier, the operation must be between two or more cities, towns, or villages, which are incorporated, and that the operation between two points, only one of which is incorporated, does not come within the terms of the act so as to require supervision and regulation by the Railroad Commission.

Questions 2 and 3.

Section 1(a) defines a motor carrier as one carrying or transporting property for compensation or hire between two or more incorporated cities, towns, or villages. We see that before any motor vehicle becomes a motor carrier, it (1) must carry or transport property for hire or compensation, and (2) must operate between two municipal corporations; otherwise, it is not a motor carrier under this act if it lacks either of these two characteristics.

Section 1(b) defines the classes of motor carriers and sets out the character of transportation for each class. It is noticed that motor carriers of Class "A" have four distinct characteristics: (1) fixed routes, (2) regular schedules, (3) fixed termini, and (4) published rates and tariffs. Section 3 provides that no certificate of public convenience and necessity shall be issued except to a Class "A" carrier. Section 10 provides that the application for a certificate of convenience and necessity, or for Class "A" carrier, must state the routes, schedules, and rates, and Section 9 provides for the Commission to take into consideration the character and location of the depots or termini. We conclude, therefore, that Class "A" carriers must have each and every one of the four characteristics above named.

Class "B" carriers are defined as those that have no fixed routes, regular schedules, fixed termini, or published rates. This definition excludes from this class all carriers that have any of the four characteristics of Class "A" carriers by specifically naming such characteristics. If a carrier has *fixed routes,* it cannot be a Class "B" carrier, even though it does not have the other three characteristics; if it has *regular schedules,* it cannot be a Class "B" carrier, even though it does not have the other three characteristics; if it has *fixed termini,* it cannot be a Class "B" carrier, even though it does not have the other three characteristics; and if it has *published rates,* it cannot be a Class "B" carrier, even though it does not have the other three characteristics. This view is strengthened by Section 6(2) which requires the application for a permit for Class "B" carriers to show "substantially the territory to be covered by the operation," thus indicating clearly that a carrier of this class should not have fixed routes, or the applicant would be required to state definitely the route as prescribed in Section 10(2) for Class "A" carriers, instead of stating substantially the territory to be covered. We also find that Section 6(3) requires the applicant for a permit to operate as a Class "B" carrier to state that it is not his intention

(1) to operate regularly on schedules, or (2) to engage in the character of transportation defined in the definition of a Class "A" motor carrier, thereby clearly showing that a Class "B" carrier cannot operate on regular schedules, and in addition thereto, is also prohibited from engaging in the character of transportation of Class "A" operators. What character? This can mean nothing else than any or all of the four characteristics already named, which are prescribed for Class "A" carriers. We conclude, therefore, that the meaning of the definition of Class "B" carriers is that if a carrier has any one of the four characteristics named in the definition, it is not a Class "B" carrier.

The statute might seem to require a determination of the character of transportation carried on by the carrier before the passage of this act in order to determine the classification for the purpose of making application for a certificate of convenience and necessity to operate as a Class "A" carrier, or for a permit to operate as a Class "B" carrier. But if the act is so construed, it is probable that very few carriers could qualify under either class. Before the passage of this act, a person might have been engaged in the kind of transportation set out in the definition of a Class "A" carrier, except he might not have had one of the four characteristics, such as operating on schedules. Under these circumstances he would not be entitled to make an application for a permit as a Class "B" carrier for the reason that Section 6(3) specifically requires that his application shall state that it is not his intention to operate regularly on schedules.

We cannot escape the conclusion that it was the intention of the Legislature by the passage of this act to place thereunder all common carriers operating motor vehicles for carrying or transporting property for compensation or hire between two or more incorporated cities, towns, or villages, regardless of the character of operation before the passage of the act. The Legislature further intended to divide all such operators into two classes, and specifically states the character of transportation that must be carried on by each class. We also find that Section 18 requires each motor carrier vehicle shall have displayed thereon a plate showing whether it is Class "A" or Class "B" carrier. We conclude, therefore, that it was the intention of the Legislature that all operators described in Section 1(a), being motor carriers as defined therein, must conform their operation to one of the two classes mentioned in Section 1(b), regardless of the manner of the operation of the carrier before the passage of the act. Therefore, a carrier described in Section 1(a) must operate (1) over fixed routes, under regular schedules, have fixed termini, and have published rates and tariffs, thereby becoming a Class "A" operator, and must make application for a certificate of convenience and necessity under Section 10, or (2) he may operate without having any of the four characteristics just named, and thereby become a Class "B" operator, and must

make application for a permit as such under Section 6; but it is necessary for the operator to decide the manner in which he is going to operate, and must conform his operation to one of these two manners just mentioned.

From the views just expressed, you are advised in answer to your second question that the Commission is without authority to issue a permit as a Class "B" carrier where the applicant has a fixed route, even though he does not have regular schedules, fixed termini, or published rates.

In answer to your third question, you are advised that a Class "B" carrier cannot operate with any of the following four characteristics: fixed routes, regular schedules, fixed termini, or published rates.

Question 4.

In view of the opinion just expressed that Class "A" carriers must have each and every one of the four characteristics above named, we believe that it is necessary for such carriers to maintain depots, terminals, or places of business where the public may transact business with them, such as receiving and delivering freight. As already stated, Section 9 requires the Commission to take into consideration the character and location of the depots or termini proposed to be used. Section 4 authorizes the Commission to regulate Class "A" carriers in all matters affecting the relationship between such carriers and the shipping public. These provisions indicate clearly that it is the purpose of the act to require Class "A" carriers to have terminals in each incorporated city along their routes.

You are advised, therefore, in answer to your fourth question that the fact that a carrier before the enactment of the law had no fixed termini does not relieve it from maintaining the same after it secures a certificate as a Class "A" carrier.

Question 5.

In answer to your fifth question, you are advised that "regular schedules" are those that occur at regular intervals, whether hourly, daily, weekly, or monthly, and the number or time intervening between the same is a matter to be determined or approved by the Commission.

Question 6.

The general definition of a motor carrier in Section 1(a) and the definitions of both Class "A" and Class "B" carriers in Section 1(b) provide that the motor vehicle must be operated for the purpose of carrying or transporting property for *compensation or hire* in order to come within the terms of the act. The question to determine, then, is whether a wholesale house in delivering goods it has sold under a delivered price, delivery to be made by its own trucks, is operating for compensation or hire. We believe that it is not. A familiar rule of construction

is to construe a law in view of the condition which prompted its enactment and in the light of the evil which it was intended to correct. It certainly cannot be said that there existed any evil in wholesale houses delivering goods it has sold to purchasers. What necessity would there be to require a wholesale firm to take out insurance as required by Section 13? If such firms should be required to secure a permit, then by the same reasoning any person living in any incorporated city who sells any commodity and delivers the same to another city would be required to secure a permit.

In construing the Motor Bus Act of Michigan, which covered the transportation of both persons and property, the Supreme Court of that State in People vs. Carr, 203 N. W. 948, used this language:

"The act, being in derogation of common right to use the public highways, must, so far as its criminal provisions are concerned, be strictly construed. No intendments, beyond such as necessarily go along with the purpose expressed, can be indulged, for it must be assumed that all rights theretofore common remain undisturbed except as pointedly taken away or restricted."

More cogent reasons for the views expressed in answer to this question will be found in our discussion of your eighth question.

Question 7.

This question requires the same answer as the sixth question. The fact that the delivered price is greater than the price f. o. b. the wholesale house does not cause the concern to operate its motor vehicles for compensation or hire any more than would be if a person in one city should drive to another city and purchase a commodity and return with it in his automobile, and thereby save freight, express or postage charges on the commodity purchased.

Question 8.

This question brings us to a consideration of the kind of carriers intended to be regulated by the Legislature. As we have already seen, Section 1 defines generally the term "motor carrier," and the two classes of such carriers. No distinction is made between common carriers and private carriers. It is true that most carriers performing the character of transportation required of Class "A" carriers are common carriers, and the Legislature no doubt intended that only common carriers should be included within Class "A" carriers, for Section 4 provides for the Commission to regulate such carriers in all matters affecting the relationship between them and the shipping public, indicating thereby that only common carriers would be in this class.

However, if we consider only the definition of Class "B" carriers, we find that the same is broad enough to include private carriers as well as common carriers, for the reason that the

same includes any operator who carries or transports property for compensation or hire between two or more incorporated cities, towns, or villages. But this class will include those common carriers not operating in the manner of Class "A" carriers.

We believe, however, that since Section 2 provides that all carriers mentioned in Section 1 are declared to be common carriers, it was the legislative intent to regulate only common carriers, and not to regulate private carriers. The Legislature certainly did not intend to require that a private carrier, such as one who simply operates under private contract to deliver newspapers, should take out the insurance required by Section 13. Also, as we have already seen, Class "A" carriers must have each and every one of the four characteristics named, and a Class "B" carrier cannot have any of the characteristics. A contractor with a newspaper publishing company to deliver papers between incorporated cities necessarily has fixed routes, but it would be impracticable to require this contractor to have fixed termini, regular schedules, and to publish the amount of compensation he receives under his private contract, and thereby make him assume the character of a common carrier.

If this act is otherwise construed, we will be placing upon private carriers the same burdens as placed upon common carriers. We cannot believe that the Legislature intended to do this. If so, then there arises the question of its right to do so.

In the case of Michigan Public Utilities Commission vs. Duke, 266 U. S. 570, 45 S. Ct. 191, the Supreme Court of the United States construed a statute of the State of Michigan regulating motor carriers in a particular case involving a private contract to transport automobile bodies from one city to another. Outside of the question of interstate commerce involved in this case, the court held that the State of Michigan was without authority to place on private carriers the burdens of common carriers, for the reason that the same violated the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of California, in the case of Frost vs. Railroad Commission, 240 Pac. 26, held that the State had the right to regulate private carriers on its highways, and that the decision of the Supreme Court above mentioned applied only to contracts in existence at the time of the passage of the act. However, the Supreme Court of the United States reversed this case in a decision in the case of Frost vs. Railroad Commission, 271 U. S. 583, 46 S. Ct. 605, and again held that under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a private carrier cannot be converted against its will into a common carrier by mere legislative command, and held that the power of the State to grant a privilege on such conditions as it sees fit to impose is limited, so that it may not impose conditions requiring relinquishment of constitutional rights. In describing the situation, the court said: "The carrier is given no choice, except a choice between the rock and

the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." This view was reaffirmed in the case of State of Washington Ex rel. Stimson vs. Kuykendall, 275 U. S. 207, 48 S. Ct. 41.

We conclude, therefore, in view of the provisions of Section 2 of the act in question and the decisions of the Supreme Court of the United States, it was not the intention of the Legislature to regulate private carriers. We do not mean to say that the Legislature is without authority to regulate the use of motor vehicles by private carriers on the public highways, but we do say that the same has not been done in this act.

You are advised, therefore, in answer to your eighth question that a person delivering newspapers over a fixed route under a private contract, and not engaged as a common carrier, is not required to make application for a certificate of convenience and necessity.

Question 9.

This question is really answered in the answer to the eighth question, and you are advised that such individual is not entitled to receive a certificate of convenience and necessity as a Class "A" carrier, and is not required to make application for a permit as a Class "B" carrier.

Yours very truly,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2790, Bk. 63, P. 289.

EXPRESS COMPANIES—COMMON CARRIERS—JURISDICTION OF RAILROAD COMMISSION.

1. A corporation which carries different kinds of property, money, papers, and packages for hire upon railroads and otherwise over a regular route upon schedule is an express company under the provisions of Article 386, Revised Statutes of Texas.

OFFICES OF THE ATTORNEY GENERAL,
October 31, 1929.

Railroad Commission of Texas, Austin, Texas.

GENTLEMEN: I have before me a letter of recent date, addressed to the Attorney General by your late and very much esteemed Chairman, Clarence E. Gilmore. This letter reads as follows:

"The Texas and Pacific Motor Transport Company has filed with this Commission an application and brief for the purpose of determining whether or not the Railroad Commission of Texas has any jurisdiction over its operation.

"Briefly stated, the Texas and Pacific Motor Transport Company is a common carrier corporation chartered under the laws of the State of

Delaware with a permit to do business in the State of Texas. They own no motor or other equipment used in the transportation of property, but they purpose to employ other transportation agencies to carry out their contracts which they raise with the public to transport its property.

"Their contention is that the Railroad Commission has no jurisdiction whatever over either the rates they shall charge or service they shall render. The full plan of the proposed operation, together with the argument which they offer to sustain their position that the Commission has no jurisdiction, is embodied in a letter of date July 23, a copy of which is enclosed herewith for your information.

"We shall be pleased to have you advise us whether or not the Commission does have jurisdiction over their proposed operation, as outlined in this letter."

For the purpose of clearly setting out the nature of said transport company, I copy an excerpt from the letter of R. S. Shapard, dated July 23rd, and referred to above:

"The Texas and Pacific Motor Transport Company is a common carrier corporation chartered under the laws of the State of Delaware, with a permit to do business in the State of Texas. The business that the motor transport company may ultimately desire to transact in Texas, broadly stated in its charter and permit, is 'to transport goods, wares and merchandise or any valuable thing, as a common carrier, including the gathering, receiving, transporting, distributing and delivering of persons, baggage, mail, express, goods, wares and merchandise, and property of every kind and description, and the contracting with railroads, steamship lines, bus, State, motor truck and motor bus and other transportation lines and systems, as well as with corporations, partnership, business concerns of every kind, individuals and the public in general, for the gathering, receiving, transporting, and/or forwarding, distributing and delivering of persons, baggage, mail, express, goods, wares and merchandise, and property of every kind and description.'

"The present purpose and intention of the motor transport company is to engage in the transportation of freight between points in Texas by means of motor truck and railroad, using the facilities of existing truck lines and railroad lines. It purposes to co-ordinate these means of transportation by contracting with owners of truck lines for store door pick-up and delivery service and with rail lines for the transportation between the cities and towns to be served, and for the joint use of station and certain other railroad facilities. It will issue its own bills of lading covering the complete transportation from store door to store door, and it desires to establish rates for this complete service. It is expected that the rates to be charged will be the current less-than-carload class rates of the rail carriers, plus a charge which will approximate the cost of the pick-up and delivery service. If it is found that such a scheme of rates does not attract business to the motor transport company the charges will have to be made to more nearly meet the rates being charged by the truck lines with which the motor transport company is in competition.

"The motor transport company proposes to begin its operations by using the facilities of truck and railroad carriers, but may later provide its own truck service. Its present plans contemplate operations on the lines of the Texas & Pacific Railway Company and its subsidiary companies. Its negotiations with these companies indicate that an agreement or agreements may be reached for the station to station transportation and the joint use of the necessary facilities. Specific points will be given the service proposed by the motor transport company, as the volume of business may justify."

I have quoted at length from the above letter because it appeared necessary to do so in order to properly define the unique nature of the business. The writer does not know of any other

corporation or company in Texas that purports to cover exactly the same field of endeavor.

The question to be determined is whether or not the Railroad Commission of Texas has jurisdiction over the operation of said company.

That this company is a common carrier is both evident and admitted. Of course, the Railroad Commission has the power and authority to administer the law with respect to railroad companies, however, it is evident that this concern is not a railroad company. The Railroad Commission has jurisdiction over express companies. Article 3860 of the Revised Statutes of this State reads as follows:

"Each person, firm or corporation which shall do the business of an express company, upon railroads or otherwise, in this State, by the carrying of any kind of property, money, papers, packages, or other things, are hereby declared to be common carriers, and shall receive, safely carry and promptly deliver at the express office nearest destination every such article as may be tendered to them, and in the carriage of which they are engaged. No such company shall be compelled to carry any gunpowder, dynamite, kerosene, naphtha, gasoline, matches, or other dangerous or inflammable oils, acids or materials, except under such regulations as may be prescribed by the Railroad Commission. No person, firm or corporation so engaged shall demand or receive for such services other than reasonable compensation."

Article 3861 of the Revised Statutes reads as follows:

"The Railroad Commission of Texas shall have power, and it shall be its duty, to fix and establish reasonable and just rates of charges for each class or kind of property, money, papers, packages and other things, to be received and charged for by each express company, and, which, by the contract of carriage are to be transported by such express company between points wholly within this State. Such rates shall be made to apply to all such companies, and may be changed or modified by said Commission from time to time in such manner as may become necessary. Said Commission shall have the same power to make and prescribe such rules and regulations for the government and control of such express companies as is, or may be, conferred upon said Commission for the regulation of railroads."

Article 3862 provides a penalty for overcharge by the company of the compensation fixed by the Commission.

Does the company under consideration come within the definition of an express company as set out in Article 3860? It is a corporation; it carries different kinds of property of every "class and description," money, papers, packages, and goods, wares and merchandise. It transports and carries for hire this property both upon *railroads and otherwise.* Then surely this corporation must be a common carrier under the definition of same as set out. It has been urged that it does not *do the business of an express company.* With this conclusion, the writer is unable to agree. The term "express company" was used by the Legislature in Article 3860 in a generic sense. It is the writer's opinion that in the use of this term it was intended to cover a class of organizations not merely those that use passenger trains for the transportation of property, nor was the intention limited to transportation over railroads. If this were

true the words "or otherwise" would have no meaning. The Legislature by the use of plain and unambiguous language left little for construction. The clause "shall do the business of an express company" is defined by the words which follow "by the carrying of any kind of property, money, papers, packages or other things."

The company under consideration purposes to accept for transportation all classes of property, to issue its own bills of lading, therefor to charge a definite rate for the service, to transport the property over a regular route within a definite time. It is immaterial that this is to be done in the present instance by use, partially of truck and partially of freight train. The company is a common carrier and an express company under the above quoted Texas statute.

Inasmuch as Article 3861 gives the Railroad Commission the power and charges it with the duty of fixing rates and prescribing rules and regulations for the government and control of express companies, you are advised that it is the opinion of this department that the Railroad Commission of Texas has jurisdiction over the operation of the above company.

Very truly yours,

JACK BLALOCK,
Assistant Attorney General.

Op. No. 2793, Bk. 63, P. 309.

RAILROAD MOTOR CARS—FULL CREW LAW.

1. A motor car which runs on a railroad track on regular schedule and transports United States mail, baggage, and express and passengers, is a train.
2. The Full Crew Law applies to all passenger trains, regardless of the form of energy employed to propel them.

Construing and applying Article 6380, Revised Statutes of Texas.

OFFICES OF THE ATTORNEY GENERAL,
November 26, 1929.

Railroad Commission of Texas, Austin, Texas.

GENTLEMEN: The writer has before him, dated July 22nd, a letter from the late and esteemed Chairman of the Railroad Commission, Clarence E. Gilmore. Said letter reads as follows:

"On May 4, 1929, your department rendered an opinion to the Railroad Commission with respect to the classification of motor-drawn railroad trains. In that opinion you hold that the particular situation inquired about was a train within the meaning of the law.

"We desire now to have your advice with respect to the application of what is known as the Full Crew Law to motor-drawn trains, such as the one referred to in your opinion of May 4, and likewise to all motor cars operated on railroads.

"While we are not in possession of all the details, we do not know that there are a number of single motor cars operated by different railroads in the State, consisting of one car, in some instances, which car carries

passengers and express. In other instances, there are two or more cars in the same train.

"We will thank you to advise us if the Full Crew Law of the State of Texas applies to these motor-operated trains, first, where there is only one car used and, second, where there is more than one car in the train."

On May 4, 1929, the writer, in a letter approved by Claude Pollard, then Attorney General, advised the Commission as follows:

"Your letters of April 17th and April 19th, addressed to the Attorney General, have been assigned to the writer for answer. Attached to the letter of April 17th is a letter addressed to Mr. Clarence Gilmore, Chairman of Railroad Commission of Texas, dated April 8th, from Mr. L. A. Weiss, Chairman of B. of R. T.; also a photograph of a 'motor-driven car with a passenger coach attached.' Considering the three letters and the photograph together, we understand your inquiry to be as follows:

"The Southern Pacific Lines now have in operation between the stations of Austin, Texas, and Llano, Texas, passenger service consisting of two cars. One of these cars is provided with a motor in the front compartment and driven by an engine which derived its power from gasoline or distillate. This car is 71.9 feet in length and also has compartments for the transportation of and actually transports United States mail, baggage and express, no place being provided on this car for the accommodation of passengers. Attached to and drawn by this car is a standard railway coach, which is provided for transportation and the accommodation of passengers. This coach is without power in any form of energy, and is coupled by means of a standard railway coupling to the baggage, mail and express car ahead.

"This equipment operates on a 'main track' over which twelve 'first class passenger trains' operate daily. The same time table designation is given this equipment as is given each of the twelve passenger trains. These twelve passenger trains and this equipment are all classed as 'first class passenger trains' and are all operated under the same rules, and the same rules are applicable alike to each of these twelve passenger trains and to the equipment in question.

"This equipment operates on a schedule provided in the time table as follows: Westward movement from Austin to Llano, the equipment is classed as a 'first class train.' The number of the equipment is 'No. 47' and the character of the equipment is shown as 'passenger.' The eastward movement is made from Llano to Austin and the equipment is classed as a 'first class train.' The number of the equipment is 'No. 48' and the character of the equipment is shown as 'passenger.' The average speed of No. 47 from Austin to Llano is twenty-six miles per hour. The average speed of No. 48 from Llano to Austin is twenty-seven and two-tenths miles per hour. The time table carries a special instruction making No. 47 a train of 'superior right' over No. 48.

"This equipment substitutes and operates in the place of a regular passenger train consisting of one steam locomotive and tender, one baggage, mail and express car, and one or more coaches, and discharges all the duties formerly performed by said regular passenger train, and operates under the same time-table schedule, train number and rules under which said passenger train formerly operated. When convenience of the service requires, this equipment is replaced with a regular passenger train, which operates under the same time-table schedule, train number, and rules under which this equipment regularly operates.

"The passenger, mail, baggage and express traffic handled on and by this equipment is the only regular passenger, mail, baggage and express service operated by these lines from Austin to Llano and return.

"YOU DESIRE TO KNOW WHETHER OR NOT THE ABOVE DESCRIBED EQUIPMENT IS A PASSENGER TRAIN.

"In answer to the above question, we advise you that we have examined what purports to be a copy of the rules and regulations of the transportation department of the Southern Pacific Lines in Texas, said rules being

dated January 1, 1923. On page 5 of said rules, we find the following definitions:

"ENGINE.—A locomotive propelled by any form of energy.

"MOTOR.—A car propelled by any form of energy.

"TRAIN.—An engine or motor, or more than one engine or motor, coupled with or without cars displaying markers.

"REGULAR TRAIN.—A train authorized by a time-table schedule.

"TIME-TABLE.—The authority for the movement of regular trains subject to the rules.

"Section 5 of Article 6541, Revised Civil Statutes of this State, in enumerating certain rights of railroad companies, provides that said corporations shall have the following right:

"To receive and convey persons and property on its railway by the power and force of steam *or by any mechanical power.*

"In the case of Chicago, R. I. & P. Ry. Co. vs. Brant, 162 S. W. 51, we find the following declaration by the court in which is found a practical definition of 'Locomotive.'

"Headlight Law (Acts 1907) requiring every locomotive operated in road service in the night time to be equipped with a headlight of power and brilliancy of fifteen hundred candlepower applies to a gasoline motor car used by a railroad for the transportation of passengers; the word 'locomotive' being a comprehensive one applying to all self-propelling engines or machines used on railroads for the ordinary purpose of transporting freight or passengers.

"In the case of Spokane & I. E. Railroad Co. vs. Campbell, 217 Fed. 518, the court, in defining 'locomotive,' 'engine,' and 'engines," has the following to say:

"Section 1 of the Safety Appliance Act of Congress, March 2, 1893, requires common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes and appliances for operating the train-brake system, and to equip a sufficient number of cars in the train with power or train brakes so that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose. 27 Stat. 531. By an amendment of this statute (Act March 2, 1903, 32 Stat. 943, the provisions and requirements thereof relating to train brakes, automatic couplers, etc., are made to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars and similar vehicles.

"There can be no doubt that when the primary act was passed, electrically-propelled trains were not within the legislative mind, and where 'locomotive engine' occurs reference was had to a steam-propelled engine. And likewise when 'engineer' is spoken of, it had relation to a person in charge of a steam-propelled locomotive. But this does not signify that other locomotive or motor engines, and that persons driving other motor cars, may not come within the scope and intendment of the act. The purpose of the Legislature was to provide, among other things, for a more efficient and effective way of handling trains in interstate commerce, so that the speed and movement of the train might be regulated and controlled, and, when desired and in cases of emergency, readily brought to a stop, all from the engine and by the one person in charge of it, thereby to lessen the danger to employee and the public incident to the operation of the railroads.

"The electric railroad has since come into very general use, with its driving engines called motors, and its employes in charge of the engines are called motormen or enginemen. These railroads, notwithstanding, are common carriers of property and persons, same as railroads, and have employes and come into relation with the public in the same way, the only essential difference being that electricity has taken the place of steam as a propelling agency to the used desired, so that the broad purpose of the Legislature applies as completely to the one kind of railroad as to the other.

"The Supreme Court of Arkansas, in the case of Central Ry. Co. of Arkansas vs. Lindley, 151 S. W. 246, held as follows:

"The railway company operated a motor car from Plainview to Ola for

the purpose of carrying passengers. It was built with a deck with springs, and its capacity is six or eight passengers. The engine is a small type motor, slow speed, and is on the deck of the car. One man runs the car. Counsel for defendant contends that a motor car is not a train * * *. The motor car in question was run by the defendant company for the purpose of carrying passengers over its line of railroad, and we think was a 'train' within the meaning of the statute.

"Reasoning from the above facts and authorities, the writer sees no escape from the conclusion that the above described equipment is a train. You are, therefore, advised that it is the opinion of this department that the above described equipment is a 'passenger train.'"

It is necessary to quote the above letter in full for the reason that the writer's opinion expressed in said letter is necessary to a proper understanding of the opinion, which is to follow.

From the letter first above quoted, the *question now presented for determination is whether or not the full crew law applies to motor-drawn trains.*

Article 6380, Revised States of 1925, reads as follows:

"No railroad company or receiver of any railroad company doing business in this State shall run over its road, or part of its road, outside of the yard limits:

"1. Any passenger train with less than a full passenger crew consisting of four persons: one engineer, one fireman, one conductor and one brakeman.

"2. Any freight train, gravel train or construction train with less than a full crew consisting of five persons: one engineer, one fireman, one conductor and two brakemen.

"3. Any light engine without a full train crew consisting of three persons: one engineer, one fireman and one conductor.

"4. The provisions of this article shall not apply to nor include any railroad company or receiver thereof, of any line of railroad in this State, less than twenty miles in length; and nothing in subdivisions of one and two hereof shall apply in case of disability of one or more of any train crew while out on the road between division terminals, or to switching crews in charge of yard engines, or which may be required to push trains out of the yard limits.

"Any such company or receiver which shall violate any provision of this article shall be liable to this State for a penalty of not less than one hundred nor more than one thousand dollars for each offense. Suit for such penalty shall be brought in Travis County or in any county in or through which such line of railroad may run, by the Attorney General, or under his direction, or by the county or district attorney in any county in or through which such railroad may be operated. Such suits shall be subject to the provisions of Article 6477."

It is at once apparent that this article was adopted by the Legislature as a safety measure. It has been urged that since this statute was adopted prior to the use of motors for the transportation of passengers in this State, its language is applicable only to steam-propelled trains. To this conclusion the writer cannot subscribe. As tending to answer such a contention, I call attention to Article 6341, Revised Statutes, 1925, above copied, defining the rights of railroad corporations. It will be noted that Subdivision 3 of this article provides that railroad corporations shall have the right "to receive and convey persons and property on its railway by the power and force of steam, *or by any mechanical power.*" This indicated that the Legislature, when it enacted these statutes relating to railroads, had in

mind not only steam-propelled vehicles but also those propelled by *any mechanical power*. When the Legislature gave railroads the right to convey persons and property by steam or other mechanical power and then went ahead and enacted regulations applying to "passenger trains" and "freight trains" without making any exception in favor of motor-propelled trains, the inference is strong that it intended to include the latter in its regulatory measures.

It is my opinion that the Legislature intended to protect the traveling public and the train crew by placing every safeguard around them that a full crew could afford. That a fireman does not have the same duties to perform on a motor-driven locomotive that would be necessary on a steam-propelled engine, is entirely probable and true. The same method of fueling the locomotive is not employed. The necessity, however, for performance of the same duties with reference to the safety of the traveling public exists. It is the duty of the fireman on all trains to keep a lookout for danger on the track, to keep and compare the correct time with the engineer, to familiarize himself with the orders governing the movement of trains, and keep check on the engineer as to the proper observance of said orders, to take charge of the engine in event of death or disability of the engineer, to blow the whistle, ring the bell and notify the engineer upon appearance of danger, to notify the conductor when the engineer fails or refuses to observe orders, and numerous other duties, all designed, in part at least, to protect the traveling public. The writer utterly fails to understand why the passengers on a motor-drawn train are not entitled to this protection to the same extent as the passengers on a steam-propelled train.

It has been likewise urged that a brakeman's duties are not so numerous or arduous on a motor car or motor-drawn train as is the case in trains steam propelled; nevertheless, it is the duty of a brakeman to protect the rear of his train from collision in event of a stop or reduced speed. This duty must be performed either by going back a sufficient distance in the event of a stop or by the use of burning fuses when the speed is sufficiently reduced. He must protect the train by flags and lights when it is in a station; his place is in the rear car and he must be constantly ready to protect his train and its passengers. These duties, and numerous others, are imposed upon the brakeman, in part, at least, for the protection of his fellow workmen and the traveling public. Surely the passengers on motor-drawn trains are entitled to this protection to the same extent as passengers on trains drawn by steam-propelled engines.

The Full Crew Law is a regulatory measure having for its main purpose the safety of the public and the crew. The statute makes it applicable to "passenger trains" and "freight trains." Unless these motor-propelled vehicles come within the meaning of these words, then we would be without regulation as to them in so far as the crew is concerned. It cannot be assumed that

such was the legislative intent where the statute does not clearly compel that view. If it should be held that this statute does not apply to trains operated by means of motors, there would be several other important regulations in the statutes that would not apply to them for the same reason. This is true because the statutes use the words "trains," "passenger trains," etc., and there would be as much reason for holding that these various regulations do not apply to motor-driven trains as there would be to hold that the Full Crew Law does not apply to them.

Modern rail transportation is rapidly expanding and constantly employing new facilities. Today many trains are propelled by electricity and many others drawn by gasoline motors. These changes are being made in the interest of efficiency and economy; great changes and progress have been made in railroading in the past few years. Is it to be said that these changes are to render obsolete the safety measures adopted for the benefit of the traveling public by our Legislature? I cannot subscribe to this theory. On the contrary, it is the writer's opinion that the Legislature intended by the adoption of the full crew law to protect the traveling public in the use of a passenger train, regardless of whether or not that train was propelled by steam or drawn by electricity or gasoline motor. The necessity for protection of life has not changed with the changes in the form of energy employed to propel a locomotive.

It has been urged that the application of the Full Crew Law to "motor trains" is ridiculous and absurd. Such argument must fall of its own weight when we examine the true facts. Some of the most powerful engines traveling the rails today are powered by electricity and gasoline and some of the most luxurious trains in America are now being drawn by them. The history of Texas' past and the promise of its future assures that such equipment will soon become common in this State. To hold that a *safety measure* is ridiculous and absurd which requires a full crew to man such an agency of transportation is to thwart the manifest intent of the Legislature. *The intention of the lawmaker is the law.* The Legislature has, in the exercise of its proper prerogatives, declared that the provisions of Article 6380 shall apply to all passenger trains. The Legislature which enacted this statute designed the regulation of trains without reference to the power employed to propel them. This department has no wish, and certainly no desire, to "legislate by opinion." To hold that motor-drawn trains are exempt from the provisions of the above law would be an attempt to do this exact thing. If, as has been urged, the application of this law to motor-drawn trains is ridiculous and absurd, which I do not concede, I can only suggest that the aggrieved parties address their petition to the Legislature for redress of their alleged wrongs. For the desirability this law per se, this department is not responsible. I approve the intention of the Legislature to protect the traveling public and the train crew and sustain its application.

Having previously held in the letter quoted in this opinion that the motor-drawn equipment there described is a train, you are advised that it is the opinion of this department that railroad companies operating motor-drawn trains are subject to the provisions of Article 6380 of the Revised Statutes, known as the "Full Crew Law," in the operation of such equipment. You are further advised that the provisions of said law apply with equal force to such trains of one car or more than one car.

Any previous opinions rendered by this department holding to the contrary are equally overruled.

Very truly yours,

JACK BLALOCK,
Assistant Attorney General.

OPINIONS RELATING TO SCHOOLS AND SCHOOL DISTRICTS.

Op. No. 2778, Bk. 63, P. 186.

COLLEGES AND UNIVERSITIES, AUTHORITY OF SUCH STATE INSTITUTIONS TO ISSUE BONDS—INDEBTEDNESS, AUTHORITY OF STATE TO INCUR—BONDS.

1. Senate Bill 173, authorizing A. and M. College to build stadium and dormitories, and other acts of the Forty-first Legislature authorizing State colleges to build such structures, and to issue bonds or debentures to pay for same, pledging the revenue therefrom for the retirement of such obligations, are not obnoxious to provisions of the Texas Constitution.

2. The pledging of such funds does not create a debt against the State in violation of Section 49 of Article 3, and is not a withdrawal of money from the Treasury without a specific appropriation, nor the making of an appropriation for a longer term than two years, as prohibited by Section 6 of Article 8.

3. The board of directors of State colleges are State officers, and are not authorized by implication to incur ten per cent attorneys' fees and other penalties against the State.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 5, 1929.

Board of Directors, Agricultural and Mechanical College of Texas, College Station, Texas.

GENTLEMEN: We have before us resolution by your board accepting proposal of, and ratifying contract with, R. J. Windrow for the construction of permanent improvements to the stadium of the college, which provides for the issuance of two hundred sixty-five thousand dollars ($265,000.00) of revenue bonds in payment therefor.

We also have the trust indenture appointing the Mercantile Bank & Trust Company of Dallas, Trustee, for the purposes of administering the trust and redeeming said bonds, as provided for by the resolution and trust indenture.

You have also furnished us with the contract with the engineer and his bond.

From examining the record and information furnished us it appears that these improvements are to be made upon the stadium, part of which has already been constructed, and which is on lands belonging to the college.

The bonds being issued by you are payable out of the revenues accruing to the department of physical education and the athletic council of the college, which result from the athletic activities of the college. The bonds contain the usual provisions, being payable to bearer, bearing interest from date of issuance at six per cent, evidenced by interest coupons attached thereto, providing for accelerated maturity in case of default, and for attorneys' fees. The bonds to be payable serially in their numerical order as set forth in the resolution. The bonds are expressly made payable out of the fund created by the trust indenture and not otherwise. A sinking fund is provided for in the retirement of said bonds, and is redeemable at 103 per cent of the face value, plus accrued interest. The bonds must be registered in the office of the Comptroller of the State of Texas.

Reference in the instrument is made of the authority under which it was issued and the purpose for which the funds will be used.

The resolution authorizes the trustee to make delivery of bonds from time to time to the contractor in settlement of the estimates made on the work as it progresses. "All of the funds which shall hereafter accrue to said department of physical education and to the said athletic council, or to either of them, donations and amounts received from the sale of coupon books, and all gate receipts where the said revenues are derived from games, contests, or exhibitions held at the college stadium, or elsewhere, shall be by said instrument assigned to the trustee to secure the payment of said bonds."

It is stipulated that the college shall collect and receive all of said revenues, and on or before certain dates there shall be deposited with the trustee as a sinking fund not less than thirty-five per cent of the gross receipts, and in no event less than the sum of eight thousand two hundred and fifty dollars ($8250.00). As long as there is no default in the payments, the return of sixty-five per cent of the gross receipts shall be for operating expenses and other legitimate charges authorized by the department of physical education, and if the sum above mentioned is not deposited the college shall be considered as in default.

The contract provides that the same shall be performable in Dallas County, and the District Court of that County, as well as any other court of competent jurisdiction, shall be authorized, on the application of the trustee, in the event of default, to appoint a receiver for the funds and revenue aforesaid. It is stipulated that in the event the trustee assumes and obtains possession of the funds and revenues, aforesaid, it shall, after deducting reasonable charges, including reasonable compensation

to itself, apply the money collected so as to retire the principal and interest. The indenture obligates the college, during the life of the bonds, to maintain the organization pertaining to the college athletics in substantially the manner now existing; that it will maintain regular athletic competition with Southwest Conference teams, and will, so far as possible, arrange each year for the college football team to play the University of Texas, and at least one intersectional football game. It further provides that no additional obligations in the nature of liens on the funds and revenues aforesaid shall be permitted without the written consent of the trustee; it shall provide for repairs, lightning, tornado and fidelity insurance policies for the benefit of the trustee; it shall provide for the maintaining of such rates, fees, and charges, and shall be sufficient to carry into effect the provisions thereof; it shall provide for an annual audit by a certified accountant, and the trustee shall have the right to have said departments audited by an independent accountant at its expense.

It will be noticed that the trust indenture pledges all of said fund, or so much thereof as may be necessary for the retirement of said bonds, and expressly assigns sufficient of the revenues accruing to retire the installments of principal and interest.

The trust indenture provides that it shall be lawful but not obligatory to demand and receive all of the funds held by the department, and to assume control and collection of all revenues accruing to the college on account of athletic activities, and thereafter no expenditures shall be made or incurred in the operation of said departments except with the consent of the trustee, and that the instrument shall also be sufficient to authorize and obligate the officials of the college to permit the trustee to collect the share, or all gate receipts belonging to the college at all games, and to continue as long as such default continues. Section 7 makes provision for institution of suit towards the enforcement of the indenture.

The indenture obligates the college to carry public liability insurance when required by the trustee, and that it will place all officials and employees handling money for these departments under fidelity bonds in an amount satisfactory to the trustee.

It is provided that the trustee shall be entitled to be reimbursed for all proper outlays and setting up a schedule of fees on page 15, and providing that all said outlays, fees, and commissions shall be payable out of the funds hereinbefore described.

We have letter from Mr. James Sullivan, business manager of athletics at the college, giving us the history of the handling of the funds that are pledged by the trust indenture, and how these funds have been accumulated, handled, and disbursed in the past, which letter is as follows:

"All funds received by the department of physical education from athletic contests are and have been deposited with the fiscal department of the A. and M. College and disbursements are made on vouchers approved by the business manager of athletics and chairman of the athletic council. These vouchers are presented to the fiscal office and they in turn reimburse

the department of physical education for these approved vouchers. This method has been in vogue for the past ten years.

"The comptroller of accounts of the A. and M. College is responsible to the president and board of directors for the proper checking of all funds received by the department of physical education. The books of the department are audited yearly by the college auditors. At no time during the history of the athletic department has the Texas Legislature in any way endeavored to direct the expenditure of athletic funds. Indeed, the Legislature has never taken cognizance of the manner in which these funds are received and disbursed. All funds received from profits on athletic games have been used for the operation, maintenance, support and improvement of the athletic department, which includes permanent improvements such as buildings."

We have been advised that advertisements for bids were not made, but that the contract was let without notice by the board of directors to the person named above.

You call our attention to Senate Bill No. 173, passed at the Second Called Session of the Forty-first Legislature, which authorizes the board of directors of A. and M. College to purchase, acquire, and construct permanent improvements, including dormitories, stadiums, and athletic fields, and for the improvement of such structures heretofore erected; providing for the equipping, and furnishing of the same, for the issuance and registration of revenue bonds and revenue notes, and for the disposition and pledging of the revenues derived from the operation and control of such dormitories, athletic fields, stadiums, and other improvements; authorizing the purchase and sale of certain lands, imposing the power to contract, and vesting general authority in the board of directors for the purposes of carrying out the provisions thereof, and declaring an emergency.

The bill provides expressly that no indebtedness shall be incurred by or on behalf of the State of Texas, but only the revenues indicated in said act shall be pledged or disposed of.

Nowhere in the act is to be found any provision as to how contracts shall be let, but it does provide that upon the acquisition of said dormitories the board of directors is authorized and empowered to make requisition for all furnishings, equipment, and appointments to the Board of Control. The Board is expressly authorized to do any and all things necessary and convenient to carry out the purpose and intent of the law.

In advising you as to whether or not you have the authority to execute this contract and issue these bonds in the form submitted in the resolution, the following questions arise:

1st. Is the issuance of said bonds the creating of an indebtedness as prohibited in Section 49 of Article 3, which provides that "no debt shall be created by or on behalf of the State except to supply casual deficiencies of revenues, repel invasions, suppress insurrection, defend the State in war, or pay an existing debt, and the debt created to supply deficiencies in the revenue shall never exceed in the aggregate at any one time two hundred thousand dollars ($200,000.00) ?"

2nd. Does the issuance of these bonds infringe Sections 6 and 7 of Article 8 of the Constitution, providing, respectively,

that "no money shall be drawn from the Treasury but in pursuance to specific appropriations made by law, nor shall any appropriation of money be made for a longer term than two years," and "the Legislature shall not have power to borrow or in any manner divert from its purpose any special fund that may or ought to come into the Treasury, and shall make it penal for any person or persons to borrow, withhold, or in any manner divert from its purpose any special fund, or any part thereof?"

3rd. Has the board of directors the right to provide in said bonds, and consummate the provisions thereof if default occurs, the payment of ten per cent attorneys' fees, authorizing a receiver to be placed in charge of said funds, and providing that suits may be instituted, and the control of said fund placed in charge of a receiver who may administer the same?

4th. Has the board of directors the authority to execute said contract without complying with other provisions of the law requiring advertisements of solicitations for bids for the building of public buildings?

The general diffusion of knowledge, and the surging desire to provide ample and adequate means for the education of the masses has always permeated the pages of our Constitution and laws enacted thereunder.

The framers of our Constitution, in making provision for the education of the people, aptly observed that a general diffusion of knowledge being essential to the preservation of the liberty and rights of the people, it should be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Since the day that President Lamar gave eloquent expression to the conviction that "cultivated mind is the guardian genius of democracy—it is the only dictator that freemen acknowledge, and the only security that freemen desire," this belief has dominated the minds and souls of the people and their steadfast adherence to it is demonstrated and manifested by their earnest but feeble attempt to provide for and encourage the education of its people.

The Legislature, in creating the University of Texas in 1858, very appropriately recited its aim in these words:

"From the earliest times, it has been the cherished design of the people of the Republic and of the State of Texas, that there shall be established, within her limits, an institution of learning, for the instruction of the youths of the land in the higher branches of learning, and in the liberal arts and sciences, and to be so endowed, supported and maintained, as to place within the reach of our people, whether rich or poor, the opportunity of conferring, upon the sons of the State, a thorough education, and as a means whereby the attachment of the young men of the State to the interest, the institution, the rights of the State, and the liberties of the people, might be encouraged and increased, and, to this end, hitherto liberal appropriations of the public domain have been made."

That the Legislature has biennially done everything within its power to provide State institutions with adequate dormitory facilities and athletic improvements can not be questioned. The

Legislature has only been reconvened by the Governor because the appropriations, which do not include buildings that are direly needed by some of these institutions, exceed the estimated revenue.

There not being sufficient funds to be appropriated out of the general revenue for this purpose, the Legislature has now provided means for the building of these improvements.

It is a familiar rule of construction of constitutional provisions or legislative acts that when a provision is fairly open to two constructions, one of which will carry out, and the other defeat some great public purpose for which it was designed, the former construction should be applied.

The Agricultural and Mechanical College of Texas was established by an Act of the Legislature of April 17, 1871. The control, management, and supervision of said institution, and the care and preservation of its property since that time have been imposed in a board of directors or managers. See Laws of 1858, 8 Gammel's Laws, 444; 9 Gammel's Laws, 167; 16 Gammel's Laws, 191; Constitution, Article 7, Section 13, Chapter 2, Title 49, R. C. S. 1925.

Full authority is now imposed in a board of directors of nine to manage and control said institution.

We do not find any provision in the statutes constituting the institution a body corporate. However, it is indeed a principle of law which has been often acted on that where rights, privileges, and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed or such powers exercised without acting in a corporate capacity, and such associations form a function of the government, they are by implication public corporations so far as to enable them to exercise the rights and powers granted. Angell and Aims on Corporations, Section 78; State vs. Kansas U., 29 L. R. A. 78; Thompson on Corporations, Section 26; Regents vs. Hamilton, 28 Kansas, 376.

Whether or not the institution is a body corporate it is a State institution. Its management and control has never been surrendered by the State. It is an instrumentality or agency of the State government designed to perform the functions relegated to it by the Legislature.

The board of directors is a mere agency or instrumentality of the State to carry out the public purpose for which it was created. It with its property, management, and control is entirely under the power of the Legislature, and the Legislature having legislated for the welfare of such an institution, such legislation is not subject to any control by the courts so long as the measures enacted are not obnoxious to provisions of the Constitution.

The cardinal question is whether or not the issuance of these bonds, and the pledging of the funds, as provided for by the indenture, is the creation of an indebtedness against the State, as is prohibited by Section 49 of Article 3, supra.

It must be admitted that said institution being an agency of the State, the creating of an indebtedness by it would be that of the State. Therefore, if the pledging of this revenue, or the revenues to be derived from the dormitories which have been authorized to be built by this college, the University of Texas, College of Industrial Arts, and the various normal colleges, constitutes the creating of an indebtedness within the meaning of the Constitution, any bonds or debentures issued by the directors of these institutions are null and void.

The purpose of such a constitutional provision is principally to limit the expenditures by the State to the amount of the revenue forthcoming. The intent of the Constitution is to protect the citizenship of the State from exorbitant taxes.

Said constitutional provisions were intended as restraints on the power of the Legislature to provide for the contracting of that class of pecuniary liabilities not to be satisfied out of the current revenues or other funds within their control lawfully applicable thereto, and which would, therefore, at the date of the contract be an unprovided for liability, and properly included within the meaning of the word "debt." They have no application, however, to that class of pecuniary obligations in good faith intended to be and lawfully payable out of either the current revenues for the year, or any other special fund which is not created by a tax, or the other usual means of raising revenue by the State. See State vs. Whatcom County, 85 Pac. 256; McNeil vs. City of Waco, 33 S. W. 322; Laredo vs. Frishmuth, 196 S. W. 193.

Does the trust indenture create an indebtedness against the State?

Given its plainest and most liberal signification, the word "indebtedness" includes every obligation by which one person is bound to pay money, goods, or service to another. See Webster's Dictionary, "Debt."

Such is undoubtedly the meaning of the word in the common usage of English speaking people, and there are not wanting authorities which extend it to mere moral obligations arising from contracts unenforceable at law.

As applied to a State or municipality, if given its broadest signification, would include not only obligations for extraordinary expenditures, but every outstanding warrant upon the Treasury. It can be readily seen that such rigid literal interpretation of the word in construing the constitutional provision would completely paralyze the power of the States and their political subdivisions.

While the courts have propounded the general proposition that the language of the Constitution in this respect is exceedingly broad and must be given its fair and legitimate meaning, a general acceptation and careful examination of the decisions discloses that in substantially every jurisdiction the word "debt" or "indebtedness" as used in constitutions is given a meaning much less broad and comprehensive than it bears in general

usage. This tendency has been more marked in some States than in others.

It has been held that city warrants issued in anticipation of its revenues are to be treated as assignments to the holder, and not as an indebtedness, and that the holder of such warrants assumes the risk of the taxes proving sufficient for their payment. Even though the money may be payable out of the Treasury, and bonds may have been issued, yet, if the contract be such that its non-payment will not justify a judgment against the city or the issuer of the same, or the enforcement of a charge against its assets, or a resort to general taxation, it does not create an indebtedness of the city or other issuer.

There are authorities which appear to be to the contrary, but these authorities, we think, can be reconciled, because such holdings are largely based upon the fact that notwithstanding the same may be drawn on a special fund, the contracts in almost every case, it will be seen, are so framed as to provide also a general liability upon the part of the issuer.

It has been held by some courts that it is not essential to the existence of debt that the creditor shall have any remedy at law or in equity for its enforcement.

Treasury notes have been held not to be an indebtedness within the meaning of this provision of the Constitution. State Ex rel. Black vs. Eagleson, 181 Pac. 934.

We believe, therefore, that since no deficiency is created there is no debt. The payment of the debentures is limited to a special fund and a special means provided for the raising of such fund, and general liability is expressly waived.

The Act of the Legislature of Texas requires sufficient charges to be made and set aside to satisfy the principal and interest of the bonds. The only obligation on the part of the board of directors is to prescribe and collect the charges, and after having done so, to dedicate them for the purposes of retiring the bonds. If such sum is insufficient, neither the bondholders nor the trustee have any claim against the board of directors for the deficiency. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the board or the State, and it is difficult to conceive how there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there can not be such an indebtedness. In a constitutional sense the prohibited indebtedness must be a burden and payable from the funds which could not be constitutionally appropriated for that purpose. If the bonds were not satisfied the Legislature could not be required, nor would it be obligated to make an appropriation to make up the deficiency. On the other hand, the act so provides, and the trust indenture so discloses the express agreement that the funds out of which said bonds are to be satisfied are to be raised in a certain manner and through that source alone, and that the holder of the bonds will look to that source and that source alone for the payment

of the principal and interest of such instrument, and that he will not expect or demand payment otherwise.

Therefore, by the use of "debt" in this connection, we think the Constitution means an agreement of some kind by the State, or one of its political subdivisions, to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement, and that such debt must be satisfied by the withdrawing of funds from the Treasury of the State, which funds are there for the purposes of maintaining and supporting the government, or that the payment of such bonds must be made from the revenue derived by way of taxation or the other usual methods. See Swanson vs. City of Ottumwa, 91 N. W. 1052, and cases there cited.

The Attorney General has heretofore advised that Article 2592, Revised Civil Statutes of 1925, which authorizes the Board of Regents of the University of Texas to pledge the interest and income of the Permanent University Fund for a term of years in order to obtain money to construct buildings, is not in violation of any provision of the Texas Constitution, and that such pledge does not create a debt against the State under the provisions of Section 49, Article 3 of the Constitution. See Opinion of Attorney General Claude Pollard, rendered to Doctor H. Y. Benedict, President, July 9, 1928.

This department has also advised you and the Comptroller of Public Accounts that the interest from bonds representing money arising from the sale of one hundred and eighty thousand acres of land donated to the State by the United States for the purposes of maintaining certain departments in said college, and which has been appropriated by Articles 2614 and 2615, although being in the Treasury did not have to be appropriated every two years, but that Article 2615 appropriating said money to said college was valid and constituted an appropriation of said fund until otherwise ordered by the Legislature, and was not in violation of Section 6 of Article 8 of the Constitution, which provides that no appropriation of money shall be made for a longer term than two years, the theory being that said fund was not paid into the Treasury as taxes or as a part of the general revenue of the State, and, therefore, said constitutional provision was not applicable. State Ex rel. Spencer vs. Searle, 109 N. W. 770.

The nature and history of this fund is such that we think it is not debatable that such fund was not contemplated by the framers of the Constitution as falling within the provisions of Sections 6 and 7 of Article 8 of the Constitution.

The funds such as those which we have referred to above I do not believe were ever intended by the framers of the Constitution to be guarded and controlled by the constitutional provisions referred to. The purpose of such provisions was to protect the funds realized from taxation and the usual means of revenue of the State, and to limit the Legislature's expenditure

of the same to the amount realized, and thus protect and relieve the people from burdensome taxation.

The fund which is pledged by this trust indenture was never treated as a part of the general revenue of the State. It never has been deposited in the Treasury, as the general revenue is required to be deposited.

The funds of the State in its broadest sense would probably include all funds realized by the college. A reading of the constitutional provisions, however, in connection with the means of raising revenue authorized by the Constitution and provided for by law, makes it apparent that the Legislature did not intend by this general language to reach out and include the funds now being pledged by the college. There are other funds which have been realized by this college and others for years, which have never been paid into the State Treasury, but which funds have been disbursed by the proper officer or employee of the school.

The fact that the Legislature of Texas has never attempted to usurp control or authorized disposition of this fund, together with the history of the general legislation relating to the funds from which dormitories and stadiums are authorized to be constructed by the various acts recently passed, forces the conclusion that it was the legislative intent and construction of the Constitution that such funds should never be considered a part of the general revenue, and that complete authority in the board of directors of such institutions should necessarily be imposed to effect the efficient administration of the affairs of such institutions. If given any other construction these institutions would be so burdened as to deprive them of all of the means of efficient performance and administration of the duties imposed on them. See State vs. Clausen (Wash.), 99 Pac. 743.

We are familiar with the cases enumerated below, which, at first glance, might appear to be contrary to our opinion, but upon careful reading it will be found that each of these cases is based on statement of facts dissimilar in many respects from those under consideration, and incur an indebtedness either directly or indirectly in addition to pledging future revenue or special funds. Phillips vs. Rector, 47 L. R. A. 284; Moscow vs. The University, 113 Pac. 731; State vs. Condland, 24 L. R. A. (N. S.) 261.

It has been held by the Supreme Court of Idaho that the proceeds of Federal land grants, direct Federal appropriations, and private donations to the University are trust funds, and are not subject to the constitutional requirements discussed above, and that the moneys in such funds may be expended by the Board of Regents, subject only to the conditions and limitations provided in the Acts of Congress making such grants or the conditions imposed by the donors. State vs. Board of Education, 196 Pac. 201; Melgard vs. Eagleson, 172 Pac. 655; Evans vs. Van Deusen, 174 Pac. 122.

Although a State, or political subdivision thereof, can not

create an obligation to be satisfied from taxation or the general revenue in view of such constitutional prohibitions, yet the courts have long recognized the right to make a contract whereby a fund on hand is appropriated for its payment, or where a fund has been provided for such payment, although not collected, or an appropriation has been made of an anticipated revenue, and the contract is made payable out of such fund or revenue, it does not create an indebtedness within the meaning of the Constitution. In such case there is no general liability, but the holder of the warrant or debenture agrees to look to the special fund for payment. Sweetland vs. Grants, 79 Pac. 337.

The courts have long recognized the right of a municipality to purchase or contract for the purchase of waterworks and other public utilities, when authorized by law, and obligate itself in excess of the constitutional limitation relating to the creation of indebtedness where the obligation contracted by such municipality is to be satisfied from the revenue produced by such waterworks or other public utility. However, such obligations must be satisfied solely from the revenue thus produced, and if there is an obligation so far-reaching that it would authorize a judgment against the municipality, or otherwise create such a liability that might require the imposing of a tax to satisfy it, then the courts have held that such contracts are in violation of such constitutional provisions. In holding such contracts valid the courts have observed that it is immaterial if the contracts provide that only a certain percentage of the receipts shall be devoted to the retirement of said obligation, and such percentage is estimated to be insufficient.

The only obligation assumed on the part of the municipality is to assess and collect the charges required by the contract, and place the same in a special fund and pay the same out under the terms and provisions of the trust agreement. It is, therefore, not an indebtedness within the meaning of the constitutional provision, because it imposes only that obligation and not the obligation to pay from the general revenue of the city. It may be said to be in some cases, according to the wording of the contract, an assignment of those funds, with the agreement on the part of the city to collect and act as trustee in raising and paying over said fund. Sweetland vs. Grants, supra; Winston vs. City of Spokane, 41 Pac. 889; Faulkner vs. Seattle, 53 Pac. 365; Waterworks vs. Creston, 70 N. W. 739; Springfield vs. Edwards, 84 Ill. 633.

The Legislature and courts of Texas have long recognized the principles announced and discussed above. Several years ago the Legislature authorized cities and towns to acquire waterworks and other public utilities, and to appropriate and apply the net revenues of such utilities to the payment of a sinking fund an interest on the bonded indebtedness. Chapter 10, Title 28.

Authority to encumber the system and the income therefrom

is given, and it is specifically provided *that no such obligation shall ever be a debt of such city, but solely a charge upon the properties so encumbered, and shall never be reckoned in determining the power of such city to issue any bonds for any purpose authorized by law.* Article 1111.

Article 1113 contains the further proviso that no part of the income of any such system shall ever be used to pay any other debt, expense or obligation of such city or town until the indebtedness so secured shall have been finally paid.

The act further requires every debenture to show that the holder shall have no right to exact or demand payment out of any fund raised or to be raised by taxation. See Article 1114.

The authority for such legislation has never been seriously questioned. In construing this act, Chief Justice Fly, of the Court of Civil Appeals for the Fourth Supreme Judicial District, said:

"A mortgage was authorized, not only on the plant itself, but also on the income arising from the operation of the plant, after paying all salaries, amounts for labor, material, interest, repairs, and extensions, 'to secure the payment of funds to purchase same.' The object was not to create a debt, within the purview of the Constitution, which would be a burden on the taxpayers, but one that was secured by the property purchased by the city. As said in City of Tyler vs. Jester, 97 Texas, 344, 78 S. W. 1058: 'These constitutional provisions were intended as restraints upon the power of municipal corporations to contract that class of pecuniary liabilities not to be satisfied out of current revenues or other funds within their control lawfully applicable thereto, and which would, therefore, at the date of the contract be an unprovided for liability, and properly included within the general meaning of the word debt. They have no application, however, to that class of pecuniary obligations in good faith intended to be and lawfully made payable out of either the current revenues for the year of the contract or any other fund within the immediate control of the corporation.'

"Under the provisions of Articles 772-A and 772-B no burden of taxation is placed upon the citizens of the city, but the vendor of the electric light or water plant is relegated to the property sold and its net income and he is fully notified that he can in no way collect his money except from the property itself, and that outside of and beyond that the city is in no wise liable." Andrus vs. Crystal City, 253 S. W. 558; Waterworks vs. City of Creston, 70 N. W. 739; Brackenbrough vs. Water Commissioners, 46 S. E. 32; Franklin vs. The City (U. S. C. C. A.), 3rd Fed. (2d) 114; Monk vs. City (Ga.), 90 S. E. 71; Dallas vs. Atkins, 223 S. W. 170; Laredo vs. Freshmath, 196 S. W. 190.

The cases of Citizens Bank vs. Terrell, 14 S. W. 1003, and Ottumwa vs. City, 59 L. R. A. 604, are readily distinguishable because the contracts construed in these cases required the indebtedness to be satisfied from current revenues.

The revenues derived from the operation of the dormitories, athletic fields, stadiums, and student activities under the direct supervision and control of the managing officers, have never been considered a part of the general revenue of the State. The Legislature has never required these funds, so far as we have learned, to be deposited into the Treasury, as the general revenue is required to be deposited. These funds are derived from the efficient management and operation of the instrumentalities of

the college, and of right should be withheld by such authorities to defray partly the expenses in operating such instrumentalities. If A. and M. College, by the efficient management of its board of directors, or some other college, by the efficient management of its board of directors, operates dormitories and carries on athletic intercourse with other colleges with a material profit, it is but proper that such income should be devoted to the purposes for which it may be needed by such college. The history of these funds shows that it has been so used.

The pledging of such funds by virtue of legislative authority, we do not believe to be in contravention of the constitutional provisions pointed out above. The Supreme Court of Oregon very recently has so held.

Suit was instituted to enjoin the issuance and sale of bonds in the amount of four hundred thousand dollars, the proceeds to be used in the construction of a dormitory on the campus of the University of Oregon. The regents propose to sell such bonds under the authority of an act of the Legislature very similar to the acts in question. The bonds provided that the payment thereof should be limited "to the special fund to be derived from the net income from said building, and from that fund only." The board agreed to impose sufficient charges and fees as best they could to provide a sinking fund and pay the interest on the indebtedness.

Plaintiff contended that such act was in violation of the Constitution of Oregon, which provided that the Assembly should not "loan the credit of the State nor in any manner create any debt or liabilities."

The defendants answered that the regents of the University was a corporation constituting a distinct and independent legal entity, and that by reason thereof the State in no way had undertaken to lend its credit or create any liability in violation of the constitutional limitation of indebtedness. Furthermore, the defendants answered that if it were held that the constitutional provision applied to the University, since the cost of the building was to be paid from the net rentals to accrue in the future, no indebtedness, within the meaning of such provision was created.

The lower court upheld the validity of the bonds.

The appellate court observed that the provision of the Constitution above quoted from was adopted by the people as a protection against burdensome and excessive taxation, and that the State government must respect such wholesome constitutional provision, as must such subordinate agencies. The court in construing this constitutional provision said:

"We think the act is reasonably susceptible of the construction which the regents have given it, as disclosed by their resolution. It does not purport to authorize the Board of Regents to contract any indebtedness other than to pledge on behalf of the University the net income from the rentals of the buildings. The regents are not taking from any existing fund the revenue of the University, but propose that the dormitory to be erected will earn enough to pay the principal and interest of the bonds. Indeed,

the building is the exclusive source from which the payment of the bonds can be made. The resolution recites, and it should be so stipulated in the bonds, that 'said bonds be limited in payment to the special fund to be derived from said building, and from that fund only.' In the event the net income from rentals is not sufficient to pay principal and interest on the bonds, there is no resulting liability against the University of the State. The act does not contemplate nor provide for the levy of an additional tax. However, the Board of Regents, as expressed in its resolution, must 'use its best efforts to the end that said fund will be sufficient to pay said bonds and the interest thereon when due.'

"The only liability is against a special fund which is to be made up exclusively of net rentals. No violation of the constitutional provision against indebtedness is involved. This principle is recognized in Brockway vs. Roseburg, 46 Or. 77, 79 P. 335, wherein the court said:

"'* * * There are decisions holding that where, at the time a contract is made by a municipality, a fund on hand is appropriated for its payment, or where a fund has been provided for such payment, although not collected, or an appropriation has been made of an anticipated revenue, and the contract is made payable out of such fund or revenue, it does not create an indebtedness, within the meaning of the Constitution or charter. In such case there is no general liability against the municipality, but the holder of the warrant or other contracting party agrees to look to the special fund for payment.'

"In the instant case, we are deciding only the precise question before the court and are not undertaking to say to what extent the 'special fund doctrine' should be applied." McClain vs. Regents of the University et al., cited March 20, 1928, reported in 265 Pac. 412.

We think it well settled, therefore, that the provisions prohibiting the creating of indebtedness and limiting indebtedness are a limitation upon the power of the State, or political subdivision, to become indebted are for the benefit and protection of the taxpayer, designed to require the proper authorities to conduct their affairs substantially within the current revenues, but do not apply to the obligation of the special funds enumerated hereinbefore, because such obligations are not required to be satisfied out of taxes or the other general revenue. If the special fund legally provided in this case is not sufficient, then it may be well said that the deficiency is not payable by the college. No burden is created thereby, and there cannot be such an indebtedness. In a constitutional sense, the prohibited indebtedness must be a burden and payable from funds which could not be constitutionally appropriated for that purpose, and you are accordingly advised that A. and M. College has the authority to issue the bonds provided for in the resolution and trust indenture, subject to the conditions and objections set out, infra.

We now come to the third question, having answered the first and second together.

The act authorizes no attorneys' fees to be provided for in the note. The law does not favor penalties. Although we do not advise you that the board is not given implied power to do all things necessary in the execution of such contracts authorized, yet we do advise you that no officer is impliedly authorized to impose a penalty against the State. This provision is not necessary for the issuance of such bonds, and we think totally unau-

thorized, not only for the reasons stated above, but also for other reasons, which we do not think necessary to discuss. See Opinions of Attorney General C. M. Cureton to Frank Williford, February 9, 1914, No. 1131.

We are of the further opinion that the conferring of venue against State officers, the authorizing and delegating of the control and expenditure of such funds to a trustee, which is the effect of the provision authorizing the trustee to appoint an auditor, unauthorized.

Likewise, the appointment of the receiver, and all provisions relating to suit. The board has no such authority. If the right to appointment of a receiver exists, a receiver may be appointed by law, and certainly not with consent of the board.

The resolution, indenture, and bonds should provide in no uncertain terms that the obligation is a charge against the fund created, and no other, that the same shall only be satisfied from said fund and no other, and that the bearer looks to that fund alone for payment.

The obligation should provide for payment from the revenue which is authorized by law to be pledged, and no other. We think the board should obligate itself to maintain competition with certain teams, only so far as is reasonably possible, and not outright.

The provision relative to obtaining the consent of the trustee before pledging any more of the fund, we think should be changed. The trustee has no interest in any part of the fund except that to be paid, and to that and that alone is it entitled. It has the proper remedy to enforce the delivery of the fund if it exists. The resolution should not assign or pledge all of the fund, but only so much thereof as will retire the indebtedness in the manner provided. All provisions of the resolution, indenture, and bonds, we think, should be accordingly made conformable to this opinion.

There are other covenants which we hesitate to approve without further examination of authorities, but there being a doubt, we resolve it in favor of the authority, as the validity of the bonds would not be affected, and the courts could pass on the questions in a proper case, without affecting materially the rights of the parties or the security.

This department has already written an opinion on the last question, and we advise on authority of this opinion written by Allen Clark to board of directors of A. and M. College, April 28, 1927, Letter Opinions of the Attorney General, Vol. 28, page 55, that such contracts may be entered into without advertising for bids.

That the letting of such contracts as those under question were not intended by the Legislature to be on advertisement for bids is further manifested by the proviso that equipment shall be ordered through the Board of Control, but the building of the buildings is imposed in the Board in general terms.

Subject, therefore, to the objections and suggestions above set out, the bonds are valid.

Very truly yours,

RICE M. TILLEY,
Assistant Attorney General.

OPINIONS RELATING TO TAXATION.

Op. No. 2749, Bk. 63, P. 1.

TAXATION—BULK ASSESSMENTS—DELINQUENT TAX RECORDS.

1. A tax assessor in assesing unrendered city lots for taxation is not authorized to assess more than one lot with one valuation, but is required to give a separate value to each lot.
2. Where city lots are rendered for taxation by the owner, contiguous lots in the same block may be assessed as one tract with one valuation, but only by consent of the owner.
3. Article 7321 which requires the collector, in bulk assessments, to apportion to each tract or lot of land separately its pro rata share of the entire tax, penalty, and costs is construed to mean that the taxes for each tract with a separate valuation is to be so apportioned, and if more than one lot has been assessed with one valuation, the taxes on the aggregate number of lots must not be divided but must be shown as a charge against all lots together.

Construing Articles 7321 and 7351.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, September 25, 1928.

Honorable S. H. Terrell, State Comptroller, Capitol.

DEAR SIR: This department acknowledges receipt of your letter in which you ask to be advised whether tax collectors in compiling the delinquent tax record, as provided by Article 7321, Revised Civil Statutes, should separate on said record the various city lots which have been assessed in bulk *with one valuation* for all lots and apportion to each lot a portion of the entire tax for the one valuation.

In discussing this question, it is necessary, first, to determine the proper manner of rendering and assessing such property for taxes. There is no authority for the assessor to assess the property in what we commonly call "bulk assessment," that is, assessing more than one lot with a single valuation. Article 7174, Revised Civil Statutes, provides that each separate parcel of real property shall be valued at its true and full value, and all decisions of our courts construe this provision as prohibiting bulk valuation. It has been held in numerous decisions that where separate and distinct lots or tracts have been assessed together as one tract that the assessment is void. Clegg vs. State, 42 Texas, 607; State vs. Baker, 49 Texas, 763; Edmonson vs. City of Galveston, 53 Texas, 157; Schleicher vs. Gatlin, 85 Texas, 273, 20 S. W. 120; McCombs vs. City of Rockport, 37 S.

W. 988; Lufkin Land and Lumber Co. vs. Noble, 127 S. W. 1093; Cooley on Taxation (4th Ed.), Sec. 1068; 26 R. C. L. 360.

However, the courts have limited this rule to cases in which the land has not been rendered by the owner, but has been assessed by the tax assessor, and it now seems well settled that if the owner of the property renders the same with a bulk valuation, the assessment is valid. State vs. Baker, 49 Texas, 763; Dallas Title & Trust Co. vs. City of Oak Cliff, 27 S. W. 1036; City of San Antonio vs. Raley, 32 S. W. 189; Harris vs. City of of Houston, 52 S. W. 653; Turner vs. City of Houston, 51 S. W. 642; City of Houston vs. Stewart, 90 S. W. 49; Guergin vs. City of San Antonio, 50 S. W. 140; McCombs vs. City of Rockport, 37 S. W. 988.

After the above decisions were rendered, the Legislature, by Section 7, Chapter 130, page 318, Acts of the Regular Sesion, Twenty-ninth Legislature, 1905, which is now Article 7351, Revised Civil Statutes, validated what is commonly called "bulk assessments." However, this statute seems to have reference only to unrendered property, and in view of the fact that the courts had held that only such assessments of unrendered property were invalid, it is probable that this statute was not intended to include rendered property. But regardless of this question, it is clearly seen that this statute applies only to suits that are brought for the collection of delinquent taxes, and even if it does give the right to prorate the taxes in all cases where there have been bulk assessments, the same applies only in case of a suit, thereby making provision for a judicial determination of the value of each lot or tract that might have been assessed with others with one valuation. This act, it seems to us, shows that it was the intention of the Legislature that where several lots are assessed with one valuation, the taxes are not to be apportioned to each lot unless a suit has been filed and not then, as provided by said article, unless the same "can be fairly prorated to each lot." But this statute has no application whatever to the manner of compiling the delinquent tax record in cases of bulk assessments, and, therefore, it next becomes necessary to construe Article 7321.

This article makes provision for the tax collector to prepare the delinquent tax record, and contains this provision:

> "And it shall be required, in bulk assessments, to apportion to each tract or lot of land separately its pro rata share of the entire tax, penalty, and costs."

Prior to the adoption of this act in 1897, the statutes provided that the Comptroller should compile the delinquent tax record for each county and contained the same provision as above quoted for prorating taxes in cases of bulk assessments. See Article 5232c, Revised Civil Statutes for 1895. Since Article 7321 places the duty of compiling a delinquent tax record upon the tax collector instead of the Comptroller, and uses the same language as the old act which made this the duty of the Comp-

troller, we conclude that this provision should be construed in the same light as the same would be construed at the time the Comptroller was required to prepare this record. We are left, therefore, to decide whether the term "bulk assessment," as used in Article 7321, applies to several lots assessed with one valuation, or whether it was intended to include cases where more than one lot has been assessed for taxation with a separate valuation for each lot. If the tax rolls should show an assessment to become delinquent, which has two or more lots with one valuation, how could the Comptroller or tax collector determine the amount of taxes to be apportioned to each lot? Surely it cannot be said that it would have been the duty of the Comptroller to place an equal value on every lot included in the bulk assessment, for one of the lots might contain valuable improvements and be worth more than all other lots combined. It also cannot be said that it was the intention of the Legislature that the Comptroller should make a visit to every county in the State, or otherwise make an investigation, and determine what he considers a just valuation for each lot assessed in bulk. If the Comptroller or tax collector should merely estimate that each lot is of equal value, and the collector should accept payment of taxes for one lot, a subsequent purchaser might rightfully make an objection to the payment of an equal proportion of the taxes for the reason that his property is not of the same value as the other lots. In short, the fact that the Legislature gave no basis for apportioning the taxes leads us to believe that the term "bulk assessments" as used in Article 7321, meant assessments of more than one lot with a valuation for each lot, and it was further intended that where several lots were assessed together with one valuation, the same should be considered as one tract. In such cases it would be an easy matter for either the Comptroller or the collector to follow the provisions of this article and apportion to each lot its pro rata share of the entire tax. For example, let us say that the State tax rate is 67 cents and the county rate 43 cents, making a total of $1. A property owner may render Lots 1 and 2, Block 1, with a valuation of $1200; Lot 1, Block 2, with a valuation of $800; Lot 1, Block 3, with a valuation of $1,000. The tax roll will show a total valuation of $3,000, with a total State and county tax of $30.00. As you well know, the tax rolls do not contain the amount of taxes essessed against each tract, even though separately valued, but show an extension of the taxes and only the total tax due on all property. If the property in the above example becomes delinquent for taxes, the Comptroller prior to 1897, now the collector, is required to prorate the taxes to each lot. The rolls show clearly that Lots 1 and 2 in Block 1 are valued at $1200, and that the pro rata part of the entire tax belonging to both of these lots is 12/30 of same, and the other two lots 8/30 and 10/30, respectively. The collector has no information or basis to prorate the $12.00 in taxes against the two lots with one valuation.

We have already seen that the Legislature never took cognizance of "bulk assessments" until the passage of Article 7351 in 1905 except the phrase contained in Article 7321. But we believe that in the passage of this last named article, it was contemplated by the Legislature that there should never be bulk assessments in any case; that when the Legislature used the term "bulk assessment," it contemplated that each lot would have a separate value, and that it would be an easy matter for the Comptroller or collector to ascertain from the face of the tax rolls sufficient information to apportion the tax to each lot. For these reasons, we believe that the above quoted expression in Article 7321 is not to be construed as authorizing or directing the tax collector to separate the taxes in cases where two or more lots have been rendered with one valuation, but is intended to provide for a separation or apportionment only in cases of renditions of more than one lot with a separate valuation for each lot.

It now seems to be a well settled principle that an owner of city lots has the choice of rendering each lot with a separate valuation, or in the event several lots are in the same block, *and are contiguous,* he may render the lots with one valuation. Having elected the manner of rendering such property, he or his vendee is required to pay the taxes on all property which has a separate valuation, and cannot complain that he is required to pay taxes on several lots in order to pay taxes on one lot when the assessment was made to suit his convenience. He is authorized to make partial payments of taxes only on property which has a separate valuation, and if he has rendered more than one lot with one valuation, he is required to pay the taxes on all lots listed thereunder. Richey vs. Moor, 249 S. W. 172; Hoffman vs. Wood, 258 S. W. 835; Dallas Title Co. vs. Oak Cliff, 27 S. W. 1036; 37 Cyc. 1164.

In view of the fact that it seems to be the well settled policy that taxes must be paid upon fixed valuations, as shown by the rendition and tax roll, and since no basis is given for apportioning taxes in bulk assessments, we conclude that Article 7321 is not to be construed as authorizing the collector to apportion or prorate taxes on several lots that have been assessed with one valuation and that this cannot be done except in case of a suit as provided by Article 7351.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2769, Bk. 63, P. 121.

CONSTITUTIONAL LAW—SECTION 33, ARTICLE 3; SECTION 35, ARTICLE 3.

1. A bill originating in the House of Representatives providing for raising revenue by levying a license fee upon automobiles can be amended

by adding a provision levying an occupation tax on the sale of gasoline without violating the provision of the Constitution that no bill shall contain more than one subject.

2. A bill levying an occupation tax on the sale of gasoline passed by the House of Representatives may be amended in the Senate by adding a provision levying an occupation tax on the sale of cigarettes, or any other occupation without violating provisions of the Constitution, and all bills for raising revenue shall originate in the House of Representatives.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 29, 1929.

Honorable Thos. B. Love, House of Representatives, Capitol.

DEAR SENATOR: In your communication of March 25th, you refer to Section 33, Article 3, of the Constitution, and to Section 35, Article 3, and submit two inquiries:

First: Whether in view of these provisions of the Constitution if a bill is passed by the House of Representatives providing for raising revenue by levying an automobile license fee on automobiles, it can be amended by adding a provision also levying an occupation tax on the sale of gasoline.

Second: If a bill levying an occupation tax on the sale of gasoline should be passed by the House of Representatives, whether such a bill can be amended in the Senate by adding provisions also levying an occupation tax on the sale of cigarettes.

I have given a most thorough study to the inquiries you submit and have discussed the same quite thoroughly in a conference with my assistants, and have reached the conclusion as to your first inquiry, that if a bill introduced in the House of Representatives contains in its caption a proper subject of the legislation, that there may be included in the bill both a provision levying an automobile license fee on automobiles and a provision levying an occupation tax upon the sale of gasoline. The Constitution provides that "no bill * * * shall contain more than one subject, which shall be expressed in its title." Many States have similar constitutional provisions. The Constitutions prior to the one now in force had the same provision except that the word "object" was used instead of the word "subject." This provision of the Constitution has been before the courts of the country many times, and the general rule from all of the decisions, as I construe it, is that it was the intention of the provision to prevent embracing in one act having one ostensible object provisions having no relevancy to that object, but designed really to effectuate other wholly different objects, and thus conceal and disguise the real purpose of the act by a deceptive title. In the case of Fahey vs. State, 11 S. W. 109, this language is used:

"It must not be overlooked that the Constitution demands that the title of an act shall express the subject, not the object, of the act. It is the matter to which the statute relates, and with which it deals, and not what it proposes to do which is to be found in the title."

Again it is said:

"None of the provisions of a statute should be regarded as unconstitutional where they relate directly or indirectly to the same subject having a mutual connection and are not foreign to the subject expressed in the title.

"So long as the provisions are of the same nature and come legitimately under one general denomination or object we cannot say that the act is unconstitutional." (45 Texas, 267; 44 Texas, 306.)

And again in the case of Dodge vs. Youngblood, 202 S. W. 116:

"The end desired is obtained when a law has but one general object which is fairly indicated by the title. The generality of a title is, therefore, no objection to it so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment must be considered as having a necessary or proper connection."

And again in the case of Giddings vs. San Antonio, 47 Texas, 556:

"While this has been regarded as the settled rule of construction here in its application, the most liberal construction has been given by the Supreme Court of this State in accordance with the general current of authority to make the whole law constitutional where the part objected to as infringing this part of the Constitution could be considered as appropriately connected with or subsidiary to the main object of the act, as expressed in the title."

And the following from Cooley on Taxation, 4th Edition, Vol. 2, Section 499, page 1100, which in my opinion is a very concise, accurate statement of authority as gathered from all of the courts of the land:

"* * * The construction of such constitutional provisions as applied to statutes in general is no different from the construction of such provisions as applied to tax statutes. * * * Yet in a great majority of the cases the statute is held not to violate the constitutional provision since it is only in a plain case that the courts will invalidate all statutes or any part thereof on such a ground. This provision is to be liberally construed and all doubts resolved in favor of the law, and it is not essential that the basis or even accurate words are employed in the title. As has been well said 'all objects should be grave and the conflict between the statute and the Constitution palpable before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object that it was not sufficiently expressed by the title." It is not essential that every end and means necessary or convenient for the accomplishment of the general object be either referred to or necessarily indicated in the title, but it is sufficient that the title shall not be made to cover legislation which by no fair intendment can be considered as having a necessary or proper connection * * *. Thus an act entitled a supplement to 'an act concerning taxes' is not open to the objection that it embraces more than one subject expressed in its title because it deals with several details of the matter of taxes.

"This constitutional provision is not intended, nor is it to be so construed to prevent the Legislature from embracing in one act all matters properly connected with one general subject."

In view of this line of authority, and of the tendency of the court of recent years to give a very broad and liberal construction to this provision of the Constitution, I am of the opinion that if a bill contains as a general subject of legislation such a title as substantially this:

"An Act to provide for raising revenue for the purpose of constructing, maintaining, etc., the highways of the State of Texas by the levying of certain license fees and occupation taxes (naming them), and the appropriation of said revenue for such purposes."

would be constitutional although in this act there might be levied both an automobile license fee and an occupation tax upon the sale of gasoline.

As to your second question, I am of the opinion that a bill introduced in the House of Representatives, levying an occupation tax on the sale of gasoline could be constitutionally amended in the Senate by levying an occupation tax upon the sale of cigarettes or any other occupation.

The Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives but the Senate may amend or reject them as other bills."

The Constitution of the United States contains the provision that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

The provision of the Constitution of the United States has been before the Supreme Court of the United States on several occasions. In the case of Flint vs. Stone-Tracy Company, 220 U. S. 143, the court used this language:

"This statement shows that the tariff bill of which the section under consideration is a part, originated in the House of Representatives and was there a general bill for the collection of revenue. As originally introduced it contained a plan of inheritance taxation. In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject matter of the bill and not beyond the power of the Senate to propose."

And in the case of Rainey vs. U. S., 232 U. S. 317, Chief Justice White, speaking for the court, said:

"I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient."

Under the uniform custom of legislative bodies, both State and National, as to amendments of bills, they most frequently include, especially as to occupation tax bills, the adding of additional occupations to those contained in the original bill, and no question has ever been raised, so far as I have been able to ascertain, as to this being a legal amendment of a bill. Certainly while a bill is pending in the House of Representatives, having for its purpose the levy of an occupation tax upon the sale of gasoline, an amendment may be constitutionally made in the House levying an occupation tax upon the sale of cigarettes or any other occupation. The bill having for its purpose the raising of revenue must originate in the House of Representatives, but the constitutional provision is that, having so originated, the Senate may amend it "as other bills." This provision is certainly broad enough to authorize the Senate to

amend the bill as fully and to the same extent as it might have been amended in the House of Representatives.

You are, therefore, advised that such an amendment of a revenue measure, originating in the House of Representatives, by the Senate would not be in violation of the provisions of our Constitution. This construction is accentuated by the fact that under the rules of procedure and the provisions of the Constitution, if and when an amendment of the Senate is made to a House bill, it must be returned to the House for further consideration and final passage by it before it becomes a law.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2774, Bk. 63, P. 152.

TAXATION—TAXABILITY OF MINERALS IN PLACE—DUTY OF COMMISSIONERS COURT.

1. Minerals in place are realty subject to ownership, severance, sale and taxation.
2. Under the Constitution and laws of the State of Texas all property of every kind is subject to taxation and when such property consists of minerals in place, or fractions of said minerals, the taxes should be assessed and collected thereupon as on any other species of real estate.
3. A severance of minerals in place may be accomplished by means of a conveyance of the minerals or by means of an exception or reservation in a conveyance.
4. It is the official duty of the commissioners courts of the several counties of this State, to supervise the assessment of their respective counties and if satisfied that the valuation of any property is in accordance with the laws of the State, to increase or diminish the same and affix a proper valuation thereto.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 22, 1929.

Honorable John Norris, County Judge, Wharton County, Wharton, Texas.

DEAR SIR: You have requested me to furnish you with an opinion as to the taxability of sulphur deposits in Wharton County, and as to the duties of the commissioners court of said county with regard to affixing a proper taxable valuation to said deposits.

From the information before us, we understand that certain real property, including valuable deposits of sulphur and other minerals underlying the surface of the land, and certain real property consisting of sulphur and other minerals, have in the past been rendered and assessed at a valuation below its true taxable value.

Under the Constitution and laws of this State, it cannot be doubted that minerals in place are realty, and as such are subject to ownership, severance, sale and taxation. See Thuss on Texas Oil and Gas, Chapter 21, Section 331, and authorities there cited. The leading cases upon this point are: Texas

Company vs. Daugherty, 107 Texas, 234, and Stephens County vs. Mid-Kansas Oil & Gas Company, 113 Texas, 160.

The decision of Chief Justice Cureton, in the case of Humphreys-Mexia Company vs. Gammon, 113 Texas, 256, conclusively establishes as the law of Texas that a severance of minerals in place may be accomplished by means of a conveyance of the minerals, or by means of an exception or reservation in a conveyance. And the same decision, considered in connection with the cases of State vs. Downman, 134 S. W. 795, and Downman vs. Texas, 231 U. S. 356, also establishes the proposition that where there has been severance by conveyance, exception or reservation so that one portion of the realty belongs to one person and other portions to others, each owner should pay taxes under proper assessments against him of the portion owned by him, and the fact that a portion may consist of minerals, or a fractional interest therein, makes no difference.

The foregoing questions and decisions are considered and discussed by Judge Greenwood in the case of Hager vs. Stakes, 116 Texas, 453, which case undoubtedly controls and settles the question by you to this Department; see also Humble Oil & Refining Company vs. State, 3 S. W. (2nd) 559, in which case writ of error was denied.

Section 5 of Article 7206, R. C. S., provides that when the commissioners court shall convene and sit as a board of equalization, as required by law, said board shall, whenever it finds that it is its duty to raise the assessment of any person's property, order the county clerk to give the person who rendered the same written notice that they desire to raise the value of same, and shall cause the county clerk to give ten days' written notice before their meeting, by publication or posting.

Article 7212, R. C. S., provides that boards of equalization shall have power, and it is made their official duty when satisfied that the valuation of any property is not in accordance with the laws of the State, to increase or diminish the said value, and to affix a proper valuation thereto.

It becomes evident that the commissioners court of Wharton County, acting as a board of equalization, not only has the power to raise the valuation of minerals in place where said minerals have not been rendered at their true taxable value, but that to do so is made the official duty of said commissioners court.

Judge Chapman, in discussing taxation in the case of State vs. Chicago, R. I. & G. R. R. Co., 263 S. W. 249, states that a tax is for the benefit of the State or some division thereof, and that the acts necessary to be performed to determine the amount of tax to be paid by each citizen are performed by officers of the State or county. This is true of the tax here in question. So firmly am I convinced of the taxability of the sulphur and mineral deposits to which you have referred, and of the duty of the commissioners court of Wharton County in the premises, and of the importance to the people of Wharton County and the people of the State as a whole, do I deem this matter, that I

have detailed two of my assistants to advise and assist the commissioners court in carrying out the duties imposed upon it.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2775, Bk. 3, P. 156.

TAXATION—DETERMINATION OF RATE.

The commissioners court may take into consideration, and make allowance for, the possibility of certain tax payments being delayed pending the outcome of possible litigation involving the assessment upon which such payments are based.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 11, 1929.

Honorable H. A. Cline, County Attorney, Wharton County, Wharton, Texas.

DEAR SIR: This will acknowledge receipt of your telegram and letter of June 7th. By these communications, you ask the opinion of this Department whether the commissioners court, in fixing the rate of taxation for levy in its county, could take into consideration, and make allowance for, the possibility of tax payments being delayed upon which said tax payments were based. You further explain this question by the following statement:

"In other words, if the assessments of Wharton County should show some $17,000,000 valuation, exclusive of minerals, and say $120,000,000 of mineral values, would the commissioners court have the right to fix such a rate as when applied to the $17,000,000 of assessments, would produce sufficient funds to meet the county's annual expenses, in order that the county might not be deprived of necessary funds for operating expenses in the event the payment of taxes on the mineral assessments be delayed pending the outcome of a possible legal contest involving such mineral assessments."

Replying to this question, I beg to advise that it is the opinion of this Department that the commissioners court could take into consideration, and make allowance for, the possibility of certain tax payments being delayed pending the outcome of litigation seeking to avoid such payments. In this connection, it will be noted that the statutes providing the authority for the levy of taxes by the commissioners court imposes no limitation upon the manner and amount of such levy other than to provide a fixed maximum for several funds for which taxes may be levied. Art. 7048, R. C. S., 1925; Art. 2354, R. C. S., 1925; Art. 2352, R. C. S., 1925. We quote from Cooley on Taxation, 4th Ed., Vol. 3, p. 2088:

"In fixing the amount or rate the levying body has considerable discretion. The rate necessary to produce the amount required is largely within the discretion of the levying officers, since it is uncertain what the deficiencies in collection will amount to. * * * A levy for future needs is invalid as excessive only when so executive as to show a fraudulent purpose in making the levy."

We find the following in the course of the opinion in the case

of People, ex relator Rea, County Collector, vs. Wabash Railway Company, opinion of the Supreme Court of Illinois, reported in Volume 129, N. E., page 826:

"This court has frequently held that the question of what is a proper rate of tax to produce the amount required is a matter which must rest largely within the discretion of the official estimating the tax, as it is by no means certain what the deficiencies in collection will amount to."

This statement is then followed by a list of authorities supporting this proposition.

Quoting from another opinion of the Supreme Court of Illinois, found in the report of the case of People, ex relator Stevenson, County Collector, vs. Atchison, T. & S. F. Railway Company, 103 N. E. 514:

"It is the duty of the county board to use sound business judgment so that the county's credit will not be impaired."

In support of this proposition, cases are cited from the Indiana, Wisconsin and Michigan courts.

The commissioners court has the duty imposed upon it by law to sit as a board of equalization. Its duties as such equalization board compel it to see that the values of all taxable properties within its county should be assessed at its true taxable valuation. It is a matter of common knowledge that in discharging this duty there are always instances arising of taxpayers being dissatisfied with the values as equalized by said board. This has resulted in the past in much litigation, and it can easily be assumed will arise in the future. To hold that the commissioners court in levying the taxes could not take into consideration the possibility that dissatisfied taxpayers might enjoin the collection of taxes so levied against them, and the consequences thereof, such as the delay of collection thereof pending the determination of such litigation, and also the possibility of a judgment adverse to the collection of the payment, would place the county, and necessarily the State, at the mercy of the dissatisfied taxpayers. This situation would arise particularly where the amounts involved reach to the extent of that contemplated by the statement of facts as detailed in your letter. In other words, if the commissioners court had to base its levy on the $137,000,000, as stated in your letter, and levy a tax on this amount, which would supply the contemplated needs of the county for the ensuing year, and litigation then developed which enjoined the collection of the levy of $12,000,000 of this valuation for several years, or finally permanently enjoining the collection of the levy on such amount, the collections on the remaining $17,000,000 of valuation would be utterly insufficient to meet the requirements and expenses of the county. We do not think the law would countenance the possibility of such a situation, and feel that the statement of facts here involved are properly within the discretion of the commissioners court in the exercise of their sound business judgment to meet the possibilities of the situation, and levy such a tax as would provide the county with revenues sufficient to meet its obligations, indebted-

ness, and expenses. The taxpayers could not be harmed by this discretion of the commissioners court, in that the Constitution and laws provide that the revenues so derived shall go to the certain specified funds. The law further provides that these revenues may not be diverted from one constitutional fund to another.

In the event that the collection is finally made on the entire $137,000,000 valuation, and thereby an excess is created in each of these funds, over and above the needs of the county, we are of the opinion that this excess must then be taken into consideration by the commissioners court upon the occasion of its next subsequent tax levy, and the levy correspondingly reduced. In this wise the taxpayer would secure the benefit of a greatly reduced levy, thus offsetting the amount that he might formerly have been required to pay.

I trust that I have given you the information as called for by your recent communication.

Yours truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2780, Bk. 63, P. 221.

TAXATION—RELEASE OF TAXES—TAX CERTIFICATES.

1. The Legislature is without authority to release taxes due the State and county.
2. Despite the provisions of Senate Bill 152, enacted by the Second Called Session of the Forty-first Legislature, taxes actually delinquent are not released even though a certificate has been issued by the tax collector showing the same to have been paid.

Construing Senate Bill 152, Second Called Session, Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 12, 1929.

Mr. John H. Cullom, Tax Collector, Dallas, Texas.

DEAR SIR: Receipt is acknowledged of your letter of July 27th, in which you ask for additional information to that contained in my letter of July 25th.

You again call attention to Senate Bill 152, enacted by the Second Called Session of the Forty-first Legislature, which provides that in counties having a population of two hundred ten thousand or more the issuance by the tax collector of a tax certificate showing all taxes paid on the property described shall be conclusive evidence of the full payment of all the taxes on said property. You ask to be advised what becomes of delinquent taxes that may appear delinquent after your office has issued a statement or certificate showing all taxes paid.

The act provides that in case the tax collector is guilty of fraud or negligence in issuing a certificate when the taxes have not in fact been paid, recovery may be had by the State or other taxing unit for the loss sustained thereby. However, the act requires proof of negligence or fraud on the part of the col-

lector to authorize recovery, and in the absence of proof of fraud or negligence, the taxes are lost. In view of the fact that the act provides that the issuance of a certificate showing the taxes paid is conclusive evidence of the payment of the same, it appears therefrom that no suit can be maintained for taxes that are delinquent if the collector has certified that the same have been paid.

If this act is to be construed as having the effect of releasing or extinguishing the indebtedness due for taxes, then we believe that the following language in Opinion No. 2534, printed at page 479 of the Biennial Report of this Department for 1922-1924, construing the Act of 1923 (now Article 7326), providing for suits for all taxes since 1908, is applicable:

"If such is the effect of this part of the act then it is obviously clear that it is in conflict with Section 55, Article 3; Section 10, Article 8; Section 1, Article 8; Section 2, Article 8 of the Constitution. State and county taxes levied but uncollected are a liability on the part of the delinquent taxpayer, and the payment thereof could not be released or extinguished and the Legislature is without authority to provide or to enact any provision, the effect of which would be to release or extinguish, in whole or in part, such liability of the delinquent taxpayer, or to enact any statute the meaning of which would be one of limitation.

"Section 1, Article 8, of the Constitution of this State, provides that:

"'Taxation shall be equal and uniform.'

"Section 2, Article 8, of the Constitution of this State, exempts the property therein named from taxation and further provides that:

"'All laws exempting property from taxation other than the property above mentioned shall be null and void.'

"Section 10, Article 8, provides that:

"'The Legislature shall have no power to release the inhabitants of, or property in, any county, city or town, from the payment of taxes levied for State and county purposes.'

"Section 55, Article 3, of the Constitution, provides that:

"'The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or municipal incorporation therein.'

"As was said in the case of Olivier vs. City of Houston, 93 Texas, 206, 54 S. W. 943, it is to be observed that the Constitution itself furnished many evidences of the earnest purpose of the framers to render impossible every form of government favoritism. The granting of special privileges, the bestowal of favors, the lightening of the public burdens as to one citizen at the expense of others, are contrary both to its spirit and its letter. So it is declared by such instrument that taxation shall be equal and uniform, but the force of this provision would be defeated if the power remained to relinquish at will the liability justly and fairly fixed against all delinquent taxpayers. For the prevention of these evils, this constitutional provision was inserted. Its terms are broad enough to cover every conceivable obligation or liability due by any incorporation or individual, to the State, or to any county therein, the remission of such obligations or liabilities would diminish the public revenue, and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption. The difficulty of formulating tax laws which may surely accomplish the equal distribution of the burdens of government seems to have been fully realized by the framers of the Constitution embodying our organic laws, and, therefore, the citizen is hedged about with provisions safeguarding him against the abuse of the taxing power.

"One of the principles upon which this government was founded is that of equality of right, and this principle is emphasized in that clause of the Fourteenth Amendment of the Federal Constitution which prohibits any State to deny to any individual the equal protection of the laws. It has

been repeatedly said that the guaranty of the equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in their lives, their liberty and their property, and in pursuit of happiness. On other occasions it has been said that the equal protection of the laws is a pledge of the protection of equal laws, and that it means equality of opportunity to all in like circumstances. This constitutional guaranty requires that all persons shall be treated alike, both in the privileges conferred and in the liabilities imposed and also in exemption from liabilities.

"Could it be said that this act, if given the effect of exempting and releasing all the individuals and corporations of this State or any of its subdivisions, is consistent with such constitutional provisions, or does it meet the requirement of the constitutional guaranty requiring all persons to be treated alike both in privileges conferred and the liabilities imposed and also as to exemption from liability? Under this presumption, to our minds it is wholly inconsistent with such principles and bestows favors upon those whose taxes have been exempted and released and places a hardship and burden on those who have met and discharged their obligations to their government. It does not have the effect of making the taxes equal and uniform.

"If the Legislature has the right and authority to enact a statute, the effect of which is to preclude county and district attorneys from instituting suits for the collection of delinquent taxes against land and the foreclosure of the constitutional lien thereon, prior to the 31st day of December, 1908, it must be agreed that it also has the power to preclude the county and district attorneys from instituting suits for the collection of delinquent taxes against land and the foreclosure of the constitutional lien for taxes accruing thereon prior to January 31, 1923, thus the result would be to take away from the State its remedy in the courts for the collection of all delinquent taxes, interest, and penalties, thereby depriving the State not only of the remedy, but of taxes legally levied and assessed, and revenue justly due the State, for which the statutes and Constitution of this State impose a lien to secure the payment thereof."

You are advised, therefore, that in the event your office has issued a certificate showing that all taxes assessed against a particular piece of property have been paid, when, as a matter of fact, the rolls show that the taxes have not been paid, the taxes have not been released, and it is the duty of the attorney representing the State to file suit for the same.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2781, Bk. 63, P. 227.

TAXATION—EXCISE TAX.

1. The Legislature has the authority under our Constitution to impose an excise tax on the use of motor vehicles.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 12, 1929.

Honorable John F. Wallace, House of Representatives, Austin, Texas.

DEAR MR. WALLACE: I acknowledge receipt of your communication, to which is attached a copy of House Bill 543 by Long. You ask me to consider the provisions of this bill and give you an opinion as to its constitutionality as a whole.

Two questions arise: First, as to whether the Legislature may under our Constitution impose an excise tax on the use of motor fuel, and, second, as to whether the bill as drawn imposes, or undertakes to impose, such tax upon interstate commerce.

As to the first question, the powers of the Legislature with reference to all matters of taxation is plenary unless it is limited by some provision of the Constitution. There is no implication of absence of power to do anything which is not expressly prohibited. It is an incident of sovereignty and is possessed by the Legislature without being conferred by the Constitution. It is legislative and everything to which the legislative power extends may be the subject of taxation, because nothing but express constitutional limitation upon its authority extends from the grasp of its taxing power. This is inherent and the Constitution is operative as a prohibition of the power, and not a grant of it. The principle is accurately and forcibly expressed by Cooley in his work on Constitutional Limitations, at pages 936, 988, in the following language:

"The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of government affect more constantly and intimately all the relations of life than through the exactions made under it.

"The power to tax rests upon necessity, and is inherent in every sovereignty. The Legislature of every free State will possess it under the general grant of leigslative power, whether particularly specified in the Constitution among the powers to be exercised by it or not. No constitutional government can exist without it."

It is thus expressed by Chief Justice Marshall of the Supreme Court of the United States:

"The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard against its abuse.

"It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with the constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

In the case of Mercantile Co. vs. Junkin (Neb.), 123 N. W. 1055, the court had under consideration the constitutional provision which authorized the Legislature to tax peddlers, auctioneers, brokers, etc., naming several occupations upon which the Legislature was authorized to levy taxes, sixteen in all. It was argued in the case that the enumeration of sixteen occupations upon which the Legislature was authorized to impose an occupation tax by the universal rule of interpretation excluded by necessary implication all occupations not enumerated. The court held that the taxing power vested in the Legislature was without limit except such as was prescribed by the Constitution itself, and that the expression "one excluded the other" did not apply to the construction of a constitutional provision regulating the power of taxation.

There are many cases holding that an occupation may be taxed even though it has been omitted from the enumeration of taxable occupations in the Constitution.

Considering the provisions of our Constitution which relate to the subject, we find that there is a provision that taxation shall be equal and uniform, and that all property shall be taxed in proportion to its value; that the Legislature may impose a poll tax; that it may impose occupation taxes; that it may impose income taxes. These provisions are all contained in Article 8, Section 1, but in order that no doubht might exist as to the purpose of the framers of the Constitution, there was inserted Article 17 of Section 8, as follows:

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

The Supreme Court of this State, in construing this provision of the Constitution in relation to the power of the Legislature to tax the intangible assets of railway companies, said:

"It is probable that this special matter (intangible assets) was not in the minds of the makers of our Constitution when they framed Article 12. If so, they would probably have made some specific provisions with reference to it as was made in the case of rolling stock. But that they apprehended that some question of a like character might arise under the restrictions upon taxation embodied in Article 12 of the Constitution is shown as we think in a subsequent section of that article which is as follows. The court here quotes Section 17, and then said:

"The section just quoted affords ample authority to the Legislature to tax such intangible assets as a subject or object of taxation omitted from those specified in the previous sections of the article."

I think it is clear that under the provisions of our Constitution the Legislature may impose an excise tax upon the use of motor fuels as is attempted to be done in the act, a copy of which you enclosed in your communication.

As to the second question, you are advised that the act does not transgress the provisions of the Constitution of the United States by imposing a burden upon interstate commerce. This is made entirely clear by the provisions of the act as contained

in Section 2 defining the terms of the law. The language which defines those coming within its provisions is definite in stating that it includes all persons "who receive any motor fuel in such form as will preclude the collection of the tax from persons previously named under the laws of the United States and who shall thereafter sell, distribute, or use the same in this State in such manner and under such circumstances as may subject such selling, distribution, or use to the taxing power of this State." This is followed by the express provision that it is not intended by the act to tax any motor fuel oils sold, distributed, or used as a part of interstate commerce and exempt under the Constitution and laws of the United States. These provisions of the act bring it clearly within the rule announced by the Supreme Court of the United States in the case of Bowman vs. Continental Oil Company, 256 U. S. (65 L. Ed. at page 1140). There was involved in that case a statute of New Mexico levying both an occupation tax of a fixed amount, and, in addition, an excise tax of two cents per gallon upon the distributors of and dealers in gasoline and other petroleum products. The court held that inasmuch as the fixed tax to be paid annually could not be distributed as between State and interstate commerce, and inasmuch as there was nothing in the law to indicate that there was no intention to levy the excise tax upon interstate commerce that the law was not a severable statute and the entire act was unconstitutional. The question was raised in the case that the act was unconstitutional because it violated the provisions of the State Constitution that taxes should be equal and uniform. The court, in passing upon this contention, said:

"The tax imposed by the act under consideration upon the 'sale or use of all gasoline sold or used in this State' is not property taxation but in effect as in name, an excise tax. We see no reason to doubt the power of the State to select this commodity as distinguished from others in order to impose an excise tax upon its sale and use; and since the tax operates impartially on all and with territorial uniformity throughout the State, we deem it 'equal and uniform upon subjects of taxation of the same class,' within the meaning of Section 1 of Article 8."

The court further held that there was no substance in the objection that the excise tax as applied to domestic sales and domestic uses of gasoline infringed upon plaintiff's rights under the due process and equal protection clauses of the Fourteenth Amendment. As to the question we are now discussing, the court said:

"With the excise tax as imposed upon the use of gasoline by plaintiff, at its distributing stations in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly gasoline thus used has passed beyond interstate commerce and the tax can be imposed upon its use as well as upon the sale of the same commodity in domestic trade without infringing plaintiff's commercial rights under the Federal Constitution."

The law before us first imposes the excise tax upon domestic sales and domestic use of gasoline, and then includes as a part of the definition of the distribution and use sought to be taxed the language I have quoted above, the intent and purpose of

which is to not undertake to tax the distribution and use of motor fuel while they are a part of interstate commerce, but after they cease to be a part of interstate commerce and become mixed and mingled with the property of the State after the package is broken, so to speak, and make them taxable, a worthy purpose of the law to compel the payment of taxes upon a large percentage of motor fuels which have heretofore under previous laws been escaping.

I have given careful consideration to the act, and you are advised that it is my opinion that it is constitutional in every respect.

Yours very truly,
CLAUDE POLLARD,
Attorney General.

Op. No. 2794, Bk. 63, P. 320.

TAXATION—RAILROADS—INTANGIBLE PROPERTY—ROLLING STOCK.

1. The intangible property and rolling stock of railroads are not subject to taxation by school districts and road districts.
2. The intangible property and rolling stock of railroads are not subject to taxation by a school district even though the district comprises an entire county.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 7, 1929.

Honorable S. H. Terrell, State Comptroller, Austin, Texas.

DEAR SIR: This Department acknowledges receipt of your letter of the 6th instant, in which you ask to be advised if the intangible property and rolling stock of railroads are subject to special taxes in independent school districts and road districts where such districts cover the whole county.

It is well settled that the intangible property and rolling stock of railroads are liable only for State and county taxes. On January 20, 1914, this Department held that such property is not liable for road district taxes. See Attorney General's Report for 1912-14, page 632. On April 1, 1914, this Department held that such property is not liable for school district taxes. See same report, page 617. This view of the Department was upheld in the case of State vs. H. & T. C. Ry. Co., 209 S. W. 820. It appears, therefore, that the only question to determine is whether a tax for a school or road district covering the entire county is a county tax.

The case of State vs. H. & T. C. Ry. Co., supra, was a suit to collect taxes for the use and benefit of the Harris County Ship Channel Navigation Company, which district has the same boundaries as the boundaries of Harris County. The court held that the Legislature might have authorized this district to levy a tax on the intangible property and rolling stock of the railroad, yet it has not done so. It was held that the district was a body corporate separate and distinct from the county.

In the case of Bell County vs. Hines, 219 S. W. 556, in which a writ of error was refused by the Supreme Court, the question arose as to the liability of a railroad for taxes on its intangible property and rolling stock for a county-wide road bond issue, which was authorized by the provisions of Article 3, Section 52, of the Constitution. In this case the railroad took the view that the tax was not a county tax but was a district tax, even though voted by the county as a whole. However, the court held that the above provision of the Constitution authorized a county, as well as portions of a county, to levy this tax, and that, when the same was voted by the county as a whole, it became a county tax instead of a district tax. In short, it was held that the amendment to Article 3, Section 52, of the Constitution, was an extension of the power of a county to levy taxes in addition to the power given by Article 8, Section 9, of the Constitution.

We see, therefore, from the above authority that there can be no road district comprising the county as a whole, but such tax becomes a county tax. However, this does not apply to school districts. A school district is a school district regardless of its size and a tax levied for a school district can in no sense be termed a county tax.

You are advised, therefore, that it is our opinion that the intangible property and rolling stock of railroads are not liable for school district taxes, even though the district may cover the entire county.

Yours very truly,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2799, Bk. 63, P. 355.

OCCUPATION TAXES—MUNICIPAL CORPORATIONS—EXEMPTIONS.

A municipal corporation importing gasoline into Texas from another State is not liable as a distributor for the occupation tax imposed on the use of same under Article 7065, where such gasoline is used exclusively by said corporation for public purposes.

Construing Article 7065, R. C. S., 1925, as amended by the Acts of the Forty-first Legislature, Second Called Session, Chapter 88.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 11, 1930.

Honorable S. H. Terrell, Comptroller, Austin, Texas.

MY DEAR MR. TERRELL: We have before us your letter of December 17th, attaching thereto copy of letter from Honorable George C. Kemble, representing the city of Fort Worth, Texas. You ask for an opinion as to whether the city of Fort Worth is subject to the payment of an occupation tax where said city purchases gasoline in Oklahoma, imports the same into Texas, and then uses the same for combustion in fire trucks, police cars, and other necessary city functions.

Your letter calls for a construction of what is commonly known as House Bill No. 6, Chapter 88, Acts of the Second Called Session of the Forty-first Legislature, amending Article 7065 of the Revised Civil Statutes of Texas, and pertinent provisions of the Constitution of Texas.

Before the above act was passed, Texas had imposed a tax on the sale only of gasoline since 1923. Under the provisions of said act before amended anyone could import gasoline into Texas and use the same without becoming liable for the tax. Now such a person is a "distributor" or "wholesale dealer" under such circumstances, and may be prosecuted for not having filed a bond with your office and having a permit. For using such gasoline without having a permit, the agent or representative of the city of Fort Worth responsible therefor may be prosecuted and, upon being found guilty, may be fined in a sum not less than one hundred dollars and not more than five thousand dollars, or be confined in the county jail not more than six months, or both, if said city is a "distributor" under the act. Heavy civil penalties are also provided.

The State of Texas is limited in its power to impose a tax on gasoline. The Legislature appreciated these limitations, and made express provisions for them. Interstate sales are expressly exempted, and this body showed an intimate familiarity with recent decisions, and complied with the recent ultimatum of the Supreme Court of the United States, and exempted from the tax that gasoline sold by "distributors" to the United States.

After having treated these exemptions in detail, a provision was then made that "no tax shall be imposed on any gasoline, the imposing of which would constitute an unlawful burden on interstate commerce, *nor which is not subject to tax under the Constitution of the State of Texas,* and of the United States, nor gasoline sold to the Federal government or any branch or agency thereof, the imposing of which would be obnoxious to the Federal Constitution."

We think the italicized clause very significant.

No doubt the State can impose a tax against itself and its agencies, instrumentalities, and political subdivisions. Having shown its familiarity with court decisions, we must charge it with its presumed familiarity with pertinent constitutional provisions. We know of no class of persons that could be exempt under the State Constitution except municipal corporations. We must concede then that, by this provision in the act, the Legislature had in mind that exemption.

The following provisions are found in Article VIII of the Constitution of Texas:

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

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

"It may also tax incomes of both natural persons and corporations other than municipal * * *."

This provision is found in Article XI:

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

The Constitution treats the principal objects and subjects of taxation that were resorted to in those days for raising revenue. The words "excise tax" are nowhere to be found in our Constitution. Nevertheless, if we should concede that the framers did not use "occupation taxes" instead, thinking them to be the same, the Legislature is not inhibited from imposing such a tax, our Constitution being one of limitation and not of grant, Section 17 of said article expressly authorizing other objects and subjects than those named. But this section limits the taxing of these subjects so that the same shall be "consistent with the principles of taxation fixed in this Constitution."

Taxes fall into two classes, i. e., property and excise. Occupation taxes are a form of excise taxes. Article 7065, before amended, was no doubt an occupation tax. See Birmingham vs. Goldstein, 44 So. 113, and Knisely vs. Cotterel (Pa.), 50 L. R. A. 86. But, strictly speaking, House Bill No. 6 is an excise tax, because the use of gasoline may not necessarily be an occupation, as is the sale of the same. Such tax laws as that now in effect in Texas have been referred to as "occupation or excise taxes." Only recently the Supreme Court of Illinois has made such reference. See Chicago Motor Club vs. Kenney, 160 N. E. 163.

Since in authorizing the various classes of taxes to be imposed, the framers expressly exempted municipal corporations, we must presume then that they meant to use "occupation taxes" in such a broad sense as to include excise taxes. The Legislature has certainly called "excise taxes" "occupation taxes." All of the excise taxes that have been imposed have been referred to as "occupation taxes." House Bill No. 6, itself, in the caption and in the body of the act, so designates it.

Regardless of whether this is an "excise" or an "occupation tax," the Legislature called it an occupation tax, and knowing that municipal corporations are not subject to it, certainly it cannot be presumed they intended to tax them. To so construe the law would tend to destroy its constitutionality instead of uphold it.

The letter and the spirit of our Constitution reflect a clear intention, we think, to absolve municipal corporations from paying to the State taxes on property devoted exclusively to public use. The property, of course, must be devoted exclusively to public use. See Texas Employers' Association vs. Dallas, 5 S. W. (2nd) 614; Corporation of St. Felipe vs. State, 229 S. W. 845.

The reasons which prompted the exemption of such corporations are quite apparent. The levying of a tax against a city would render necessary new taxes by the city to meet the demands of the public. Thus, the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy.

Municipal corporations are the children of the Legislature. We should not assume that this judicious body would give life in one breath and take it away in the next. Municipal corporations are instrumentalities of the government, used for public purposes. Shylock wisely said:

> "You take my house when you do take the prop
> That doth sustain my house; you take my life
> When you take the means whereof I live."

We think the pages of our Constitution permeated with the spirit, thought, and inhibition against taxing municipal corporations, except where the property or privilege taxed is not used or enjoyed exclusively for public purposes.

If we be mistaken, however, in our reasoning, we think there are several other reasons justifying, possibly, our conclusion.

There can be found, of course, no express provision in the act imposing the tax against municipal corporations. No mention is made of such corporations, or even of the State and its political subdivisions. No words are to be found which would imply that the Legislature intended to make them taxpayers.

The rule of construction is now accepted by all authorities that exemptions from taxation are strictly construed, and that the same are never favored, and will not be permitted except where words used will permit no other construction. However, the rule is just as well settled, that such rigid and strict construction is not applicable to the property of municipal corporations. See Cooley on Taxation, Sec. 673.

Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them, and such is the case with property belonging to the State and its municipalities, and which is held by them for public purposes.

Such exemptions have been implied by most of the States. The reasoning is sound, and the result is wholesome.

The gasoline tax measure was made a part of the registration fee measure, which latter treated cities and towns in its provisions.

In the latter part of Article 7065, proper, the word "person" is defined. Every possible kind of person is contained within the definition, but cities and towns or municipal corporations are not included. However, in the license fee part of the act cities and towns are treated. We believe leaving out municipal corporations or cities and towns in said definition is significant.

An act licensing automobiles is not a tax measure. Therefore, the cities and towns could have been regulated under the

act, but they were treated separately. The act relating to gasoline was a tax measure, imposing what the Legislature thought to be an occupation tax, and knowing that the Constitution would not permit them to be subjected to a tax, no express mention was made of them. Atkins vs. Highway Department, 201 S. W. 226.

The act relating to the imposing of the tax refers to corporations, but nowhere does it refer to municipal corporations as being required to pay the tax, make the report, and keep the records.

It is true that an incorporated city is a corporation, but it is a public corporation. We believe it to be a fairly well settled rule that where the word "corporation" is used in a statute it should be confined in its meaning to *private corporations* unless there is language in the statute which clearly evidences the intention that the word "corporation" shall embrace municipal corporations as well as private corporations.

We quote the following language from an opinion of C. M. Cureton, now Chief Justice, to be found in 1912-14 Reports and Opinions, pages 437, 439:

> "The popular meaning of the word 'corporation' is private corporation, and unless there should be language used which clearly evidences the intention that the word 'corporation' shall embrace municipal corporations as well as private corporations, then the word 'corporation' should be confined in its meaning to private corporations."

The statute construed by Judge Cureton in the opinion just referred to was what is commonly known as the Employers' Liability Act. That act is applicable to "corporations" who are employers of labor under certain circumstances. It was conceded that a municipal corporation might be an employer of labor, but it was held in Judge Cureton's opinion that the act did not apply to municipal corporations. He cited authorities supporting the proposition above quoted in reference to a statute using the word "corporation" being presumed to intend private corporations unless otherwise indicated.

We think the doctrine announced is peculiarly applicable to a revenue measure of this kind. We believe that in a revenue measure of this nature that it will be presumed that the word "corporation" means a private corporation, there being no language showing a contrary contention.

There is one other rule of construction which we think must not be ignored. The act imposes heavy criminal and civil penalties. Our courts are well agreed on the proposition that statutes imposing heavy civil or criminal penalties are to be strictly construed. Statutes which will deprive citizens of their liberty or property should not be given that construction which would result in depriving one of his liberty or property unless it is clearly susceptible of and entitled to such construction. We do not think the citation of authorities necessary.

We only wish to be understood as advising you that the city of Fort Worth is not liable for the tax as a distributor when it is importing and using the gasoline, and not that such city is

not subject to the tax when it *buys* the gasoline from one who is acting as a distributor in this State. The tax is against the wholesaler. He need not even add it in the price of the gasoline if he sells the gasoline to others. It is a personal tax, computed on the sales or usage made against the seller and not the buyer.

That such construction, if placed on the statute by the Attorney General would result in inequalities and discriminations because cities located near border lines could buy their gasoline cheaper than inland cities is not a matter for this Department, but for the Legislature. This Department and the courts must respect and consider whether the act in this particular is obnoxious to the Constitutions of Texas and of the United States, and that the law results in inequalities is not enough to make it subject to judicial criticism, but that is purely a matter for the Legislature, to be controlled by its pleasure and discretion.

We are familiar with the case of Panhandle Oil Company vs. Mississippi, 48 Sup. Ct. Rep., 451, on authority of which Grayburg Oil Company vs. Texas was reversed, holding that the State of Texas could not impose an occupation tax against a wholesaler on gasoline sold to branches of the Federal government, on the reasoning that although it was not a direct tax against the Federal government, the amount of the tax necessarily was added in the price exacted of the government, and was, therefore, in effect a tax against it. The courts have very jealously guarded the right of the respective governments' immunity from taxation. We are not ready to say that the same reasoning would result in exempting cities and towns from paying the tax through wholesalers to the State. The State can tax a municipal corporation under certain circumstances, but not the Federal governments. They are separate and distinct, whereas, municipal corporations are creatures of the State government.

You are accordingly advised that the city of Fort Worth is not liable for the tax as a distributor in using gasoline imported by it and directly used by it exclusively for public purposes.

Very truly yours,

RICE M. TILLEY,
Assistant Attorney General.

Op. No. 2800, Bk. 63, P. 367.

TAXATION—EXEMPTION—PUBLIC PROPERTY.

1. The lien against any property for taxes is extinguished when the property is acquired by the State or any of its subdivisions to be used for public purposes.
2. Property acquired by an independent school district to be used for school purposes is freed of any lien that might exist against said property for taxes accruing prior to the acquisition by the school district.
3. This opinion applies only to public property used for public purposes.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 25, 1930.

Honorable Joseph S. Myers, Assistant District Attorney, Houston, Texas.

DEAR SIR: This Department acknowledges receipt of your letter of the 14th instant, which is also signed by H. L. Washburn, County Auditor, and H. L. Mills, Business Manager of the Houston Independent School District. You state that the Houston Independent School District purchased some real estate on February 1st of a given year. You ask to be advised if this real estate is exempt from taxation for the year in which it was purchased and if the lien of the State and county may be enforced for such delinquent taxes. You also ask several other questions, but in view of our answer to the above question, it will not be necessary to answer the remaining questions.

Article 8, Section 2, of the Constitution, authorizes the Legislature to exempt from taxation public property used for public purposes. Article 7150, Revised Civil Statutes of Texas, exempts from taxation public schoolhouses and the grounds attached to same for the purpose of occupancy, use, and enjoyment of same. The same statute also exempts from taxation all property belonging exclusively to the State or any political subdivision thereof. We believe without further discussion that this is sufficient authority to show that the real estate of an independent school district is exempt from taxation when used for public school purposes.

It is well settled in Texas that the owner of property on January 1st is responsible for the taxes for the ensuing year. Humble Oil & Refining Co. vs. State, 3 S. W. (2nd) 561.

We have been unable to find any Texas authorities on the question submitted by you. Therefore, it becomes necessary to resort to the decisions of other jurisdictions.

The general rule with reference to the taxation of property which has become exempt is that if it is not exempt on the tax day (in Texas which is January 1st), it is liable to taxation for the fiscal year although it afterwards becomes exempt; that where land has become liable for taxation it remains so for that year although subsequently acquired for purposes rendering it exempt. Cooley on Taxation (4th Ed.), Sec. 712, page 1499.

However, as to property which has been acquired for public purposes, a different rule seems to apply. In 26 R. C. L., 299, we find the following:

"When the property is acquired by a private corporation which is entitled to an exemption from taxation only by the express provisions of statute, it is well settled that the lien will not be released. When, however, real property acquired by the State or by a municipal corporation for exclusively public purposes is, when so acquired, subject to a lien for unpaid taxes, all proceedings taken to enforce such lien after the property is so acquired for public purposes are void and in any event if the transfer takes place after the inception of the assessment proceedings but before the lien has attached the land will not be subject to the lien."

In an early case by the Supreme Court of Minnesota, San-

born vs. City of Minneapolis, 29 N. W. 126, it was held that the public easement in a street or alley cannot be affected by a tax judgment against the land. In the case of Foster vs. City of Duluth, 140 N. W. 129, by the same court, the same view is taken. Under the laws of Minnesota a lien for taxes attached to some property on May 1st. The city of Duluth purchased this property on July 17th of the same year. Plaintiff claimed that since the lien attached before the purchase by the city, it became a perpetual lien. The court stated that the property of the State and its political subdivisions, when used exclusively for public purposes, is not subject to taxation, and that any proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. It was held that this situation arose not only because the property was exempt from taxation but because it was public property, and that a sale of such property to enforce collection of taxes against it would destroy its character as public property, to the public injury. It was held, therefore, that all proceedings in attempting to enforce and collect the tax were void. The court specifically held, however, that this rule did not apply to private property which has become exempt by virtue of a statute, and that the general rule applies with reference to taxing the same if liable on the tax date, which is January 1st in Texas.

In the note to the above case printed at page 707, 48 L. R. A. (N. S.), many authorities are cited to sustain the view taken by the Supreme Court of Minnesota in the above cause.

In the case of State of New Mexico vs. Locke, 219 Pac. 790, it was held that property which is acquired by the State in its sovereign capacity is thereby absolved and freed of a further liability for the taxes previously assessed against it, and a subsequent sale thereof is void.

In the annotation under this case at page 413, 30 A. L. R., it is said:

> "With the exception of the Supreme Court of Michigan the cases are agreed that where property, subject to the lien of a tax, is acquired by the State or any of its agencies for a public purpose, it thereby becomes freed from such lien, and further steps to enforce it are without effect."

We believe, therefore, that under the great weight of authority in this country, your question should be answered by saying that when the Houston Independent School District acquired real estate to be used for public school purposes, the same thereby became free of any tax lien that might have previously existed against the same, and it is no longer subject to taxation.

It is distinctly understood, however, that this opinion applies only to property that has been acquired for the use of the public and does not apply to any property other than property owned by the public and used for public purposes.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2805, Bk. 63, P. 398.

TAXATION—WAR RISK INSURANCE, ETC.—EXEMPTION.

Moneys in the hands of guardians of insane persons and minors, received as benefits under the World War Veterans Act, are exempt from taxation in the State of Texas. Such benefits are so exempt whether invested in other property or not, so long as the money or property is in the hands of a guardian.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 29, 1930.

Honorable Eric Eades, Regional Attorney, United States Veterans Bureau, Dallas, Texas.

DEAR SIR: The Attorney General of Texas is in receipt of your request for an opinion as to whether moneys representing war risk insurance, disability compensation, death compensation or adjusted compensation benefits paid by the United States government to guardians of beneficiaries of the Veterans Bureau, that is, insane veterans, insane dependents of veterans, and minor children of veterans which are paid under the World War Veterans Act of Congress of June 7, 1924, as amended July 1, 1929, are subject to taxation by the State of Texas. You desired to be advised whether the same are subject to taxation in Texas when the money is deposited in a bank in a checking account of the guardian, when such money is loaned to a bank on a certificate of deposit, when the money is invested in bonds or other property, etc.

The World War Veterans Act under which such moneys are paid contains, among other things, a provision to the effect that the compensation, insurance and maintenance and support allowance payable under Titles II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III or IV; and shall be exempt from all taxation: Provided, that such compensation, insurance and maintenance and support allowance shall be subject to any claims which the United States may have under Titles II, III, IV and V, against the person on whose account the compensation, insurance or maintenance and support allowance is payable, etc.

Article 7150, Section 12 of the Revised Civil Statutes of Texas, 1925, provides that all annual pensions granted by the State or the United States shall be exempt from taxation.

It will be noted that the Act of Congress under which these moneys are paid expressly provides that this compensation, insurance, etc., shall be exempt from all taxation.

It is the opinion of this Department that so long as these moneys, or property acquired with such moneys, remain in the hands of the guardian, the same are exempt from taxation. This is on the theory that so long as the moneys or the properties in which they were invested are in the hands of a guardian they are in the hands of the United States government. In other words, the guardian is the agency through which the United States government is acting, and so long as the United States re-

tains control in this manner of the funds, they are still to be considered as beyond the power of the State government to tax. In this connection, attention is called to the fact that the Federal Act, Section 450, provides that the director, in his discretion, may suspend such payments to any such guardian, etc., who shall neglect or refuse, after reasonable notice, to render an account to the director from time to time showing the application of such payments for the benefit of such minor or incompetent beneficiary. This statute shows that the guardian, in handling such moneys, is amenable to the laws of the United States government.

In the case of United States vs. Hall, 98 U. S. 343, the United States Supreme Court held that the United States, as the donor of pensions may, through the legislative department of the government, annex such conditions to the donation as they see fit to insure its transmission unimpaired to the beneficiary. The court held that, so long as the moneys were in the hands of a guardian, Congress may pass laws for its protection, "certainly until it passes into the hands of the beneficiary which is all that is necessary to decide in this case." In the case just mentioned the guardian was being prosecuted under Federal laws for embezzling pension moneys which he held for the benefit of a pensioner. It was contended that since the moneys were paid over to the guardian, this constituted payment to the pensioner and that the moneys were beyond the control of the United States government and that Congress no longer had any authority over same. As above stated, the Supreme Court of the United States overruled this contention on the theory that the guardian was in possession of the pension money as a kind of trustee for the United States government so long as they were in the hands of the guardian.

In the case of Manning vs. Spry (Iowa), 96 N. W. 873, the Supreme Court of Iowa held that Federal pension money paid to the guardian of an insane pensioner and by him loaned and held in the form of promissory notes was still under the control of the Federal government and was exempt from taxation. This holding was based upon a Federal statute exempting pension money from attachment, levy or seizure by any legal or equitable process whatever and a State statute exempting United States pensions from taxation. In this case the court said:

"While in the guardian's hands he is a mere trustee or depository for the general government, and the fund no matter what its form, is not subject to taxation. In so far as the pensioner is concerned, it is still a pension within the meaning of Section 1309 of our Code."

In the case of McIntosh vs. Aubrey, 185 U. S. 122, it was held that under Section 4747 of the Revised Statutes, which provides that no sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under legal or equitable process, etc., the fund is protected only while in the course of transmission to the pensioner but when the money has been paid to him and real estate purchased therewith, such

real estate is subject to execution to satisfy the claim of a creditor. It will be noted that in this case the pension had passed out of the hands of the United States government and had been paid over to the pensioner and not to a guardian.

In the case of In re Schaeffer's Estate, 224 N. Y. S. 305, it was held that the provisions of the World War Veterans Act relating to exemption from taxation of insurance payable thereunder, do not exempt from the transfer tax of New York the unpaid balance of monthly installments on a war risk policy paid to the insured soldier's estate upon the death of the designated beneficiary. The court used this language:

"The exemption applies to moneys payable under insurance policies only while such moneys are in the hands of the United States and does not extend to cover such moneys after they have been actually paid to the beneficiaries."

To the same effect is the case of In re Dean's Estate, 225 N. Y. S. 543. The case of In re Shaw's Estate, 224 N. Y. S. 344, seems to be to the contrary on the question as to whether such a transaction is within the provisions of the Inheritance Tax Law of New York.

In the case of In re Cross' Estate (Wash.), 269 Pac. 339, it was held that the proceeds of war risk insurance are not exempt from a State inheritance tax. The opposite view seems to have been taken by the Ohio Supreme Court in the case of Tax Commission of Ohio vs. Rife, 162 N. E. 390.

In the case of Re Geier (La.), 99 So. 26, 32 A. L. R. 383, the Supreme Court of Louisiana held that where a beneficiary, under the war risk insurance act, dies and the insurance is distributed to the heirs of the insured, the inheritance tax levied by the laws of Louisiana does not apply. This was on the theory that the recipients take as beneficiaries under the Federal act and not as heirs.

It will be seen that there is a conflict in the decisions as to whether inheritance tax laws apply in reference to these pension moneys. However, these decisions do not pass upon the question before us, which is whether pension moneys in the hands of a guardian are exempt from taxation.

In the case of Wilson vs. Sawyer (Ark.), 6. S. W. (2nd) 825, the Supreme Court of Arkansas held that compensation paid to a disabled soldier under the World War Veterans Act is not subject to garnishment and that this is true whether the compensation is in the hands of the soldier or his guardian.

In Payne vs. Jordan et al. (Ga.), 110 S. E. 4, it was held that money paid over to a beneficiary under the War Risk Insurance Act, although deposited in a bank, is not subject to garnishment. The court used this language:

"The purpose of the act is not merely to protect an allotment made under the act from legal process while in the hands of the government or its agencies but to preserve the allotment itself from legal process against the beneficiary except as against the claims of the government itself."

In the case of Payne vs. Jordan (Ga.), 138 S. E. 262, the

court even went so far as to hold that a house purchased with proceeds of a war risk insurance policy is not subject to execution.

From the enclosures attached to your letter it appears that under date of January 7, 1930, the Attorney General of Indiana rendered an opinion in which he held that, funds in the hands of a guardian for a beneficiary under the World War Veterans Act are not subject to a State property tax in the State of Indiana.

It also appears that the Attorney General of the State of Illinois, under date of January 6, 1930, rendered a similar opinion. The holding of the Attorney General of Illinois, as shown by his conclusion, is as follows:

"My opinion, therefore, is that State taxing bodies have no authority to impose taxes upon moneys received by guardians and conservators from the United States Veterans Bureau under the provisions of the World War Veterans Act of 1924. That such money is exempt from taxation when it is in the hands of the guardian or conservator; when deposited by the guardian or conservator in a bank subject to check or in a savings account; when invested by the guardian or conservator in secured or unsecured promissory notes, bonds or mortgages; and also when the guardian or conservator has invested the money in real estate or personal property where it can be shown that the entire purchase price was paid out of money received from the United States Veterans Bureau."

You are, therefore, advised that it is the opinion of this department that moneys such as you inquire about while in the hands of guardians of beneficiaries, whether such moneys have been invested in other property or not, are not subject to taxation in the State of Texas.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2811, Bk. 63, P. 431.

TAXATION—SITUS—MOTOR BUSSES—MOTOR CARRIERS—ROLLING STOCK OF MOTOR TRANSPORTATION COMPANIES.

1. Personal property is taxable at the domicile of the owner, except where the same is employed in business at a place other than the domicile of the owner.
2. The rolling stock of a motor transportation company which is operated through five counties is taxable only at the principal office of the owner.

Construing: Art. 8, Sec. 11, Const. Texas; Art. 7153, R. C. S. for 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 5, 1930.

Honorable W. J. (Dick) Holt, Criminal District Attorney, Waco, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 22nd ultimo in which you ask to be advised if McLennan County has authority to tax the motor vehicles which constitute the rolling stock of the Southwestern Transportation Company in its operations over the route between Waco in Mc-

Lennan County and Tyler in Smith County. You state that this company is a foreign corporation and that its principal office in Texas is at Texarkana, Bowie County; that it owns a number of certificates of convenience and necessity issued by the Railroad Commission authorizing the operation of both bus and truck lines as common carriers; that one of the lines operated by this company is between Waco and Tyler; that it has other routes over which it operates, such as from Texarkana to Dallas, and from Commerce to Sherman; that all of these routes are divided into separate operations; that in operating the route from Waco to Tyler the schedules are such that some of the trucks and busses are kept over night at Waco, some at Tyler, and some at Corsicana; that the particular busses or trucks operated over this route are never sent to Texarkana unless for the purpose of being overhauled or to change the same permanently to some other line; that temporary repairs are made at Tyler.

Article 8, Section 11 of the Constitution of Texas, reads as follows:

"All property, whether owned by persons or corporations, shall be assessed for taxation, and the taxes paid in the county where situated."

Article 7153 of the Revised Civil Statutes for 1925 provides:

"All property * * * shall be listed and assessed in the county where it is situated; and all personal property subject to taxation and temporarily removed from the State or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

It is well established that under the common law, personal property of every description is taxable only at the domicile of its owner, regardless of its actual location. See Great Southern Life Ins. Co. vs. City of Austin, 112 Texas, 1, 243 S. W. 778, 26 R. C. L. 273.

In the case of Great Northern Life Insurance Company vs. City of Austin, supra, the court construed the above provisions of the Constitution and statutes, and held that the phrase "where situated" means where situated for the purpose of taxation under the common law as then understood or as defined by statute. While holding to the general rule that under the common law all personal property is subject to taxation at the domicile of the owner, yet the court uses this language:

"But even prior to the revolution the principle had been abrogated to the extent that as between different towns and taxing districts, certain classes of tangible personal property had a taxable situs where employed in business, regardless of the domicile of its owner."

See also Galveston vs. Guffey Petroleum Co., 113 S. W. 585 (writ of error denied, 26 R. C. L. 276).

We conclude, therefore, that tangible personal property can have a taxable situs in a county other than the residence of the owner. The question to determine, then, is whether the rolling

stock of the company mentioned by you has acquired a fixed situs in McLennan County.

The motor transportation business is new, and we are unable to find any court decisions with reference to the situs of the rolling stock for the purpose of taxation. However, we do believe that there is a great similarity between the taxation of rolling stock of railroads and that of motor transportation companies.

As to the situs for taxation of rolling stock of railroads, the question is well settled by Article 8, Section 8 of the Constitution of Texas, and Article 7169 of the Revised Civil Statutes which provide for apportioning the value to the various counties through which the railroad operates. We have no statute pertaining to the method of taxing the rolling stock of motor transportation companies, and, therefore, we believe that the law applicable to the taxation of rolling stock of railroads will apply to the rolling stock of motor transportation companies.

Many other States of the Union provide the same method as Texas for taxing the rolling stock of railroads. It seems well settled that where no special provision has been made by law for the taxation of rolling stock of a railroad, the situs for taxation of same is the city in which the railroad company's principal office is located. See 26 R. C. L. 280; Board of Supervisors vs. City of Newport News, 106 Va. 764, 56 S. E. 801; Union Tank Line Co. vs. Day, 79 So. 334 (Fla.); A. C. L. R. Co. vs. Amos, 115 So. 315 (Fla.).

In the case of G. C. & S. F. Ry. Co. vs. City of Dallas, 16 S. W. (2d) 292, the Commission of Appeals discusses the law in Texas with reference to the taxation of rolling stock of a railroad and held that even though it was shown some switch engines of a railroad had a fixed situs other than the county of the principal office of the railroad, yet the same was taxable only in the county of the principal office. This opinion, however, was based upon the view that the laws of Texas had determined the manner of taxing all rolling stock of railroads by apportionment to the various counties. However, the common law rule with reference to the taxation of personal property was fully recognized and quotation was made from the case of Great Southern Life Insurance Co. vs. City of Austin, supra.

But regardless of whether we should adopt the rule that rolling stock of motor transportation companies is taxable only at the principal office of the owner, we fail to see wherein the rolling stock mentioned by you has acquired a taxable situs in McLennan County. You state that the route is operated daily, both as to trucks and busses, and that the schedules are such that some of the trucks and busses are kept at night at Waco, some at Tyler, and some at Corsicana. In operating the route described by you, the busses and trucks operate over the highways in five counties, towit: McLennan, Hill, Navarro, Henderson, and Smith. Why should these busses and trucks, under the circumstances, be taxed in McLennan County any more than in Hill,

Navarro, Henderson, or Smith County, or in either of said counties any more than in McLennan County? The situs is in one county as much as in any other county. But as a matter of fact, no taxable situs has been acquired in either of said counties. Therefore, we must resort to the common law rule that personal property is taxed at the domicile of the owner, for, in the particular case, it occurs to us that the rolling stock is no more than temporarily situated in McLennan County, and under Article 7153 is taxable in the county of the residence of the owner, towit, Bowie County.

Since the only authorities we have been able to find indicate that the rolling stock is taxable only at the principal place of business of the corporation, since no showing has been made that the property has a fixed situs in McLennan County, and since the Legislature has not enacted a law fixing the situs of such property for taxation, you are advised that, in our opinion, the rolling stock mentioned by you is not subject to taxation in McLennan County.

Yours very truly,
H. GRADY CHANDLER,
First Assistant Attorney General.

OPINIONS RELATING TO MISCELLANEOUS.

Op. No. 2751, Bk. 63, P. 11.

BUILDING AND LOAN ASSOCIATIONS—CONSOLIDATION—VOTING—PROXIES.

General proxies held by the secretary of a building and loan association are ineffectual for the purpose of casting a shareholder's vote at a meeting called for the purpose of consolidating the association with another association.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 26, 1928.

Mr. R. B. Cousins, Jr., Chairman, State Insurance Commission, State Office Building, Austin, Texas.

DEAR SIR: Your letter of the 15th instant advises that it is the desire of the Southland Building & Loan Association, Dallas, Texas, and the Continental Savings and Building Association, Dallas, Texas, to consolidate as is authorized under Article 871 of Title 24 of the Revised Statutes of Texas.

The Southland Building & Loan Association has a provision in its by-laws, which are accepted by shareholders in their application to become a member of the organization, whereby the secretary of the association is constituted a proxy for the member to vote at any election or meeting of the shareholders in the event the shareholder is not in attendance upon the meeting. This provision reads as follows:

"In the event any member does not attend and vote in person at any election, or meeting of the members, the secretary is authorized to cast the vote of such member."

The Continental Savings and Building Association also has a provision in its by-laws authorizing shareholders to vote by proxy. The application to become a shareholder in the association also contains the following provision:

"At all shareholders' meetings of said association at which I am not present, the then secretary-treasurer of said association shall act as my attorney and is hereby appointed as such to vote as my proxy all shares of stock held by me in said association."

You desire to be advised as to whether or not the proxies given by the shareholders, in the above form, of these two associations are sufficient to authorize each secretary of these respective associations to vote in the place of the shareholders for the purpose of consolidation, in the event the shareholders are not present at a meeting called for that purpose, the law governing building and loan associations in this State requiring a two-thirds vote of all shareholders of each association desiring to consolidate.

It is the opinion of this department, and you are so advised that the proxies held by each secretary of these two associations in the above form are insufficient to authorize the secretary to cast a vote of a shareholder at a meeting called for the purpose of consolidation with another association. This conclusion is based upon the following reasons:

E. C. Spinney was secretary of the Home Savings & Trust Company in Polk County, Iowa, and held proxies for shareholders in the association that provided as follows:

"In order to obtain representation, I hereby appoint
to vote in my place and stead as proxy, and authorize him, during my absence, to vote in all matters which may come before any meeting of the stockholders. I reserve the right to revoke this appointment at any time."

Subsequent to the giving of these proxies by the shareholders of this association this institution desired to go into voluntary liquidation and discontinue business. The Supreme Court of Iowa held a proxy in the above form to be a general proxy and coming within the purview, as to its legal effect, of the following well established and recognized principles of law governing stockholders' proxies as laid down in Cook on Corporations, Vol. 3, p. 2132, Sec. 610, 8th Edition: "The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself in general or special terms gives the proxy the power to vote on such questions." The court being governed by this rule of law held that E. C. Spinney was not authorized by proxy of this nature to vote for shareholders for the purpose

of going into voluntary liquidation. McKee et al. vs. Home Savings & Trust Company et al., 98 N. W. 609.

At a meeting called for the purpose of reorganizing the Cieneguita Copper Company, a solvent corporation, into the Cieneguita Copper Company of Nevada, proxies reading as follows were voted which authorized the proxy to vote at all annual meetings and at any adjourned meeting:

"I hereby grant my said attorney all the power that I would possess if personally present at such meeting."

The Supreme Court of Arizona declared that, comprehensive though the instruments are in conferring all the power that the members were possessed of if personally present at such annual or adjourned meeting, it is quite manifest that the authority is not unlimited. The court further holding that the proxies were ineffective as conferring authority upon those who held them to vote for the purpose of reorganization of the corporation. Farish et al. vs. Cieneguita Copper Company, 100 Pac. 781.

The above quoted proxies held by each secretary of the Southland Building & Loan Association and the Continental Savings and Building Association are not any more specific in terms of authority given the secretaries than the proxies discussed in the above two cases. This being true, and in view of the interpretation placed upon the proxies by the court in the cases above discussed, we hold the proxies held by the secretaries of these two associations to be general proxies, and susceptible to a like construction given such instruments in the Home Savings & Trust Company and Cieneguita Copper Company cases above. Being general proxies they are, therefore, ineffective for the purpose of consolidation of these two associations.

A general proxy will not authorize the holder to vote for the sale and disposition of the entire assets of the corporation and for the abandonment of the business enterprise. Shield vs. Lone Star Life Insurance Company, 202 S. W. 211.

It is a well settled rule that all written powers, such as letters of attorney, or letters of instruction, receive a strict interpretation, the authority never being intended to go beyond that which is given in terms or is absolutely necessary for carrying the authority so given into effect. Marie vs. Garrison, 13 Abbott's New Cases (N. Y.), 210.

A proxy can not vote to authorize the transfer of all the property of the corporation, thus effectually dissolving the corporation, where he is not specifically authorized to do so. Ordinary proxies do not carry with them the power to authorize a sale of the business. Abbot ys. American Hard Rubber Company, 33 Barb. (N. Y.) 578. The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself in general or in special terms gives the power to

vote on such matters. Rossing et al. vs. State Bank of Bodo, 165 N. W. 254.

Proxies conferring ordinary powers will not authorize votes for radical and fundamental changes in the organization, or for the dissolution thereof and the formation of a new one. 23 A. & E. Enc. of Law, 299 (2d Ed.).

A proxy to vote in the ordinary concerns of the corporation—and proxies are to be thus construed unless their terms are special—is no authority to vote for the reorganization of the corporation, or for its consolidation with another corporation, or for a sale of all of its property, or for a voluntary liquidation of its affairs. Fletcher Cyclopedia Corporations, Vol. 3, p. 2834, Sec. 1692.

Considering the nature of the organization of building and loan associations and a study of the history of these institutions, it is clear the relationship of mutuality between the members thereof is one of the outstanding and fundamental principles upon which such institutions rest. Everyone who becomes a member of the association necessarily becomes a shareholder whether a lender of money to the association or a borrower of money therefrom. If a lender of money to the association he becomes a creditor of the association—if a borrower of money from the association he becomes a debtor of the association. The property pledged by the debtor when the loan is obtained becomes security for the money loaned the association by the creditor. This being true a meeting of the shareholders for the purpose of consolidation with another association is of twofold significance. It is a meeting simply of the shareholders of the association—it is also a meeting of the creditors of the association. With these facts in mind the following recognized principles of law governing voting by proxy urges us to the conclusion, above expressed, we have reached in this matter.

A proxy to represent a stockholder and to vote his stock at a meeting of the stockholders only authorizes the holders to represent the stockholder as a stockholder, and to do for him those things which pertain to the authority of stockholders as such. It does not authorize him to represent the stockholders in his capacity as a creditor of the corporation. Fletcher Cyclopedia Corporations, Vol. 3, p. 2835, Sec. 1692.

The incorporation of a new company and the changing of the stockholder's status from that of stockholder in one company to stockholder of another company is not within the normal scope of the business of the stockholders' meeting. Farish et al. vs. Cieneguita Copper Company, 100 Pac. 781.

Article 871 of Title 24, Revised Statutes of Texas, providing for consolidation of building and loan associations in this State, reads as follows:

"At the annual meeting, or at any meeting called for that purpose, any two or more building and loan associations organized under the laws of this State may by two-thirds of the vote of all shareholders of each of the different associations resolve to consolidate into one upon such terms as

shall be mutually agreed upon by the directors of such associations. Any shareholder not consenting to such consolidation shall be entitled to receive the withdrawal value of his stock in settlement, or, if a borrower, to have such value applied in part settlement of his loan. Such consolidation shall not take effect until a copy of said resolution, certified by a majority of the board of directors of each association, shall be filed with the Secretary of State and with the Commissioner and recorded in the manner hereinbefore provided."

According to the terms of the above article a shareholder not consenting to the consolidation of the association of which he is a member with another association has the option to either withdraw the value of his stock from the association, if a lender, or to have the value of his stock applied in part settlement of his loan, if a borrower. In view of this privilege afforded by the law to shareholders of building and loan associations to exercise an option in the event a consolidation is undertaken, and in view of the absence of instructions regarding this option in the proxies held by the secretaries of the building and loan associations under discussion, indicates strongly that such proxies are to be properly classed as ordinary proxies, effectual for ordinary business that may come before the shareholders of the association, such as election of officers, amendment to by-laws, amendment to charter, etc., and is ineffective in voting upon extraordinary matters as consolidation.

Very truly yours,

BRANN FULLER,
Assistant Attorney General.

Op. No. 2754, Bk. 63, P. 33.

REWARDS—EXECUTIVE AUTHORITY—PAYMENT OF REWARDS FOR CAPTURE OF CRIMINAL TO SHERIFF MAKING ARREST IN LINE OF DUTY.

The Governor in the absence of restrictions made by himself in his proclamation offering a reward for the capture of a criminal may pay the reward to a sheriff arresting the criminal in line of duty.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 15, 1928.

Hon. Dan Moody, Governor of Texas, Capitol.

DEAR GOVERNOR: You have recently submitted for our consideration a sheriff's claim for payment of a reward offered by you in your official capacity for the arrest of the person or persons guilty of the murder of one Virgil Cox, at or near the town of Hunter, Texas. You request to be advised if this claim is in legal form and if it is a proper claim for payment under the law and the terms of the proclamation.

The facts appear as follows:

On March 21, 1927, you as Governor of Texas, offered a reward of two hundred and fifty ($250.00) dollars for the arrest

and delivery to the sheriff of Comal County, inside the door of the jail of that county, of the person or persons, unknown, who murdered one Virgil Cox at or near the town of Hunter, Texas, the person or persons in question then being at large and fugitive from justice. The reward was made payable on condition of the arrest and return of the guilty person or persons within three months from the date of the proclamation, and conditioned also upon "conviction thereafter." In the proclamation embodying the offer of reward, there are found no limitations excluding any person whatsoever from the offer. The offer is directed "to all to whom these presents shall come," and the reward is offered generally.

Peter Nowotny, Jr., then sheriff of Comal County, has presented to you an affidavit that he arrested one Anaceto Rios pursuant to a warrant of arrest issued by the justice of the peace of Precinct No. 1, Comal County, Texas, on the 24th day of March, 1927. He states in a letter accompanying this affidavit that Anaceto Rios after his arrest was bound over to appear before the grand jury at the September term of court, 1927, and that at the September term, Anaceto Rios was indicted for the murder of Virgil Cox, and a warrant issued by the district clerk in Comal County, for his re-arrest, and that he, Peter Nowatny, Jr., sheriff of Comal County, accordingly re-arrested Anaceto Rios. The affidavit of the clerk of the district court in Comal County shows that at the September term of the District Court in 1927, Anaceto Rios was convicted of the murder of Virgil Cox, that a motion for new trial was overruled, and an appeal was taken to the Court of Criminal Appeals, and that the Court of Criminal Appeals affirmed the judgment of the trial court. A certified copy of the sentence of Anaceto Rios to life imprisonment also appears in the record. The records of the Court of Criminal Appeals show that the sentence in question was affirmed on May 9, 1928; that on June 6, 1928, a motion for rehearing was submitted; that on June 20, 1928, the motion was overruled, and that the mandate of the court issued on July 13, 1928.

From this record it appears conclusively that the terms of the proclamation were complied with, as Anaceto Rios was arrested and placed within the jail doors of Comal County, by Peter Nowatny, Jr., claimant of the reward, within three months after March 21, 1927 (the date of the proclamation), and that Anaceto Rios was thereafter convicted of the murder of Virgil Cox.

You ask first if this claim is "in legal form." There is no legal form for such a claim; all that is necessary is that the claim show to the satisfaction of the Governor that the services for which the reward was offered have been performed by the person or persons claiming the reward. There are numerous small irregularities in the affidavits, papers, warrants and other instruments supporting this claim. It does not fall within our province to discuss these for their force is determined by the Governor alone. It is apparent upon the face of the record,

however, that the irregularities in this instance are entirely immaterial.

The claim is a proper claim for payment under the terms of the proclamation, for all conditions set out in the proclamation have been complied with as we have shown here.

The serious question raised by you is whether you, as Governor, should pay a reward for the capture of a criminal to a sheriff arresting the criminal upon a warrant duly issued, the arrest being made by the sheriff of the county in which the crime was committed and the arrest being made *in* the county where the crime was committed.

The principle is well settled upon considerations of public policy that an officer cannot lawfully receive or recover a reward for the performance of a service which it is his duty to discharge. It is quite evident that knowledge of this principle caused you to doubt the propriety of paying the reward in question, and unless a distinction can be drawn between this claim for reward and such claims generally, it is evident that the payment should not be made, for the principle has been enunciated repeatedly by the courts of this and other jurisdictions.

In our opinion a distinction exists which renders permissible and proper the payment of this reward. The cases which have held that such rewards cannot be received by public officers have been in the main cases where a public officer sought to recover a reward offered by a private individual. In one case it is true a reward substantially of this nature was under consideration, and the eminent Justice Lamm of the Supreme Court of Missouri, indicated that the general rule of public policy would apply. In that case, however, the reward was allowed upon other grounds, and the opinion of Justice Lamm may therefore be regarded as *obiter dicta,* nor would we be disposed to agree with this dicta had it been an absolute opinion. The rule, Justice Lamm states, in order to promote health in the body politic ought to be sustained in undiminished vigor. He states, however, that "in applying it, discretion should be used to fit it only to a case within the common sense of the thing, and where the benefit will be advanced and the mischief retarded." The use of the discrimination prescribed, we believe, indicates that the rules should not be fitted to this case because this case *does not* come within "the common sense of the thing," nor do we believe that by denying the payment of this reward "the benefit will be advanced and the mischief retarded." We call to mind also the language of Chief Justice Stayton in Morris vs. Kasling, 79 Texas, 141, where that great judge states that "the grounds on which officers whose official duty it is to do given acts are not permitted to demand or recover other compensation than the law provides therefore, have been too often stated to require repetition. The rule, based as it is, on public policy, is wholesome and should be applied in all cases to which it is applicable, *but it should not be extended*

to cases to which the reasons on which it is founded, do not extend." (Italics ours.)

What is the nature of this reward? It is first a reward expressly offered by competent legislative and executive authority. Article 1007 of the Code of Criminal Procedure provides that "the Governor may offer a reward for the apprehension of one accused of a felony in this State who is evading arrest by causing such offer to be published in such manner as he deems most likely to effect the arrest. The reward shall be paid out of the State Treasury to the person who becomes entitled to it upon a certificate of the Governor reciting the facts which entitled such person to receive it."

It is plain to be seen that no limitation of the persons to whom the Governor may offer the reward is prescribed by the Legislature, and the statute gives to the Governor general discretion as to whom the offer of reward may be made.

The appropriation out of which rewards are to be paid during the current fiscal year is made in part for the "payment of rewards and other expenses necessary for the enforcement of the laws * * *." Accordingly, no limitation is found which would prevent the payment of this reward to this claimant.

That the Legislature did not intend to exclude sheriffs from receiving rewards of this nature is strongly indicated by the provision found in Section 3 of Article 3883 of the Revised Civil Statutes wherein it is stated that "compensation herein fixed for sheriffs of any county shall be exclusive of any reward received for the apprehension of criminals or fugitives from justice.

We believe that the payment of this reward is supported by the authority of the Supreme Court of the United States in the case of the United States vs. Andrew J. Mathews and Thomas Gunn, 43 Lawyers Edition, page 738. The plaintiffs were deputy United States marshals. They claimed five hundred ($500.00), dollars, the sum of a reward offered by the Attorney General for the arrest and conviction of one Asa McNeil, accused of killing one Wilson, revenue officer of the United States. The reward in question had been offered by the Attorney General pursuant to an act which made, among others, an appropriation "for the detection and prosecution of criminals against the United States preliminary to indictment * * * under the direction of the Attorney General, * * * thirty-five thousand ($35,000) dollars." The claimants of this reward executed a capias, and the trial court found that the arrest of the party in question was due to their exertions.

The court states first that the appropriation empowered the Attorney General to make the offer of reward (as in this case, Article 1007 of the Code of Criminal Procedure, authorizes you to make the offer of reward), and hence in doing so he exercised a lawful discretion vested in him by Congress, as in this case you exercise a lawful discretion vested in you by the Legislature of the State. The court further states that it was clear

that the offer of reward made by the Attorney General was broad enough to embrace an arrest made by the deputies in question, as in this case we have shown that the offer of reward made by you was broad enough to embrace an arrest made by the sheriff of Comal County.

In this case, it was contended that as at common law it was against public policy to allow an officer to receive a reward for the performance of a duty which he was required by law to perform, therefor the statutes conferring power on the Attorney General and the offer made by him in virtue of the discretion in him vested should be so construed as to exclude the right of the deputies in question to recover, since as deputy marshals, an obligation was upon them to make the arrest without regard to the reward offered. This contention, say the court, "amounts simply to saying that though the Act of Congress vested the amplest discretion on the subject in the Attorney General, and although the discretion was by him exercised without qualification or restriction, it becomes a matter of judicial duty in construing the statute and in interpreting the authority exercised under it, to disregard both the obvious meaning of the statute, and the general language of the authority exercised under it by reading into the statute a qualification which it does not contain and by inserting in the offer of reward a restriction not mentioned in it, the argument being that this should be done under the assumption that it is within the province of a court to disregard a statute upon the theory that the power which it confers is contrary to public policy. It cannot be doubted that in exercising the powers conferred on him by the statute, the Attorney General could, at his discretion, have confined the reward offered by him to particular classes of persons. To invoke, however, judicial authority to insert such restriction in the offer of reward when it is not there found is to ask the judicial power to exercise a discretion not vested in it, but which has been lodged by the law-making power in a different branch of the government. Aside from these considerations, the contention as to the existence of a supposed public policy as applied to the question in hand is without foundation in reason and wanting in support of authority.

It is undoubted that both in England and in this country, it has been held that it is contrary to public policy to enforce in a court of law in favor of a public officer whose duty, by virtue of his employment, required the doing of a particular act, any agreement or contract made by the officers with a *private individual,* stipulating that the officer should receive an extra compensation or reward for the doing of such act. An agreement of this character was considered at common law to be a species of quasi-extortion and partaking of the character of a bribe * * *. *The broad difference between the right of an officer to take from a private individual reward or other compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority and sanctioned by the executive officer to*

whom the Legislature has delegated ample discretion to offer the reward is too obvious to require anything but statement."

Upon the question of public policy the court cites numbers of instances where the expediency of offering to public officers a reward as an incentive or stimulation for the energetic performance of public duty was resorted to by the Federal government.

The case is a very strong one and the statute authorizing the offer of reward was held to overrule a prior statute forbidding an officer to receive additional pay for compensation. This last holding was not concurred in by Mr. Justice Brown, and Mr. Justice Harland with Mr. Justice Peckham dissented upon the ground that the offering or payment of a reward to the public officer for the performance of his official duty was against public policy and that the act authorizing the offer and payment of rewards would not authorize the offer or payment of a reward to a public officer for the performance of an official duty. The decision in this case was written by Mr. Justice White, later Chief Justice of the United States.

That the question submitted by you follows squarely within the reasoning of this decision cannot be doubted. Indeed, we have here an even stronger situation in view of the quoted provision found in Section 3 of Article 3883 of the Revised Civil Statutes which indicates a presumption upon the part of the Legislature that *some* rewards would be received by sheriffs for the apprehension of criminals.

Reduced to its simplest elements, the question is one of public policy. Public policy may be gathered from the rules of common law in the absence of constitutional or statutory enactments bearing on the question. In this case, however, we think it conclusively demonstrated that the public policy of this State with regard to the offer of rewards for the apprehension of fugitives from justice vests in the Governor of the State discretion as to the class of persons to whom an offer of reward is made. The discretion vested in you as Governor, you have exercised by making an offer to all persons in general, and accordingly the offer was made to the claimant in this case, and if you are satisfied that the services for which the reward was offered have been performed, it is, in our opinion the proper procedure for you to certify the facts, upon which certificate the reward will be paid out of the State Treasury.

Respectfully,

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

Op. No. 2755, Bk. 63, P. 42.

JUVENILES—STATUS OF MARRIED FEMALE JUVENILES, ETC.

1. A female juvenile delinquent married at the time of delinquency is within the juvenile status relating to delinquent children and should be tried under the juvenile law.

2. A female juvenile committed under conviction of delinquency and who voluntarily marries is not thereby liberated from commitment.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, November 1, 1928.

Honorable R. B. Walthall, Chairman, Board of Control, Capitol.

DEAR SIR: This Department has been called on for an opinion involving the question (1) whether a female juvenile delinquent married at the time of the delinquency is or is not within the juvenile status relating to delinquent children, whether she is to be tried and restrained under the juvenile law or as a person twenty-one years of age or over. (2) Whether a female juvenile restrained under conviction of delinquency and who voluntarily marries is thereby liberated.

The second question is settled by the expressed provisions of Article 5137 (Revised Civil Statutes, 1925) relating to the discharge of girls confined under the delinquency act, which provides that no girl shall be discharged or paroled "until some suitable home has been found for her * * * or unless she has become married with the consent of the board and superintendent." Therefore, marriage of a female juvenile does not *ipso facto* operate to take her out of the provisions of the juvenile law. Such marriage must be with the consent of the Board of Control and the superintendent of the institution where she is restrained, which means, of course, that these officials must be satisfied that her marriage is for her best interest and that of society.

It is true that Article 4625 (Revised Civil Statutes, 1925), relating to the rights of married women, provides that when any female under the age of twenty-one years shall marry in accordance with the laws of this State, she "shall be deemed to be of full age and shall have the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age." But this statute undertakes merely to fix the civil status of a married woman under the age of twenty-one years; she is, by her marriage, relieved of the disability of minority for all civil purposes. The expression "of full age" is not necessarily in all matters, particularly in criminal matters, synonymous with the expression "twenty-one years."

Article 1083 (C. C. P., 1925) defines a delinquent child as "any boy under seventeen years of age or any girl under eighteen years of age who violates any penal law of this State * * *." Here no exception is made in favor of females under eighteen years of age who may be married; and no reason occurs to us why any such exception should be made. On the contrary, every consideration which underlies the law of juvenile delinquency applies equally to females under the age of eighteen years who may be married as applied to unmarried females under the age of fifteen years. As we have observed, Article 5137, relating to juvenile delinquents, expressly provides that the marriage of a female juvenile delinquent and under re-

straint does not operate to release her from the institution where she is confined under conviction of delinquency, but such marriage to have such effect must be with the consent of the superintendent of the institution and the Board of Control who, as above stated, must be satisfied that such marriage would be to her best interest and that of society.

The law on the subject of juvenile delinquency is a special statute relating to the apprehension and conviction of juvenile delinquents, their restraint and reformation, and will prevail over the general law (Article 4625) emancipating married females under the age of eighteen years from civil disability.

A female juvenile who is married at the time of delinquency is not subject to any greater disadvantage in having the provisions of the juvenile act applied to her than a female juvenile who may marry after her conviction, for the reason that the statute makes ample provisions by which the juvenile court may parole her to her husband if that official is of the opinion that such course would be to her best interest and that of society.

It not infrequently happens that the dereliction of the husband of a married female under the age of eighteen years, his neglect or abandonment, may be the moving cause for the young wife's delinquency; and it would be a perversion of the spirit of this law at least if her marriage should operate to deprive her of the benefits and protection of this humane law for the correction and reformation of youthful offenders.

For these considerations, this Department is constrained to hold (1) that female juveniles, though married, are subject to the provisions of the juvenile court act, that they may be tried under its provisions and dealt with as that act provides; and (2) that one who marries after conviction of delinquency is not thereby taken out of the provisions of the juvenile court act unless such marriage is as therein provided with the consent of the superintendent of the institution and the Board of Control; and this notwithstanding the provisions of Article 4625 (Revised Civil Statutes, 1925), which relieves married females under the age of twenty-one years from the general disabilities of minority, under the well-established rule of construction that statutes on special subjects control general statutes.

Very truly yours,

ETHEL HILTON JOHNSON,
Assistant Attorney General.

Op. No. 2760, Bk. 63, P. 76.

CONSTITUTIONAL LAW—JOINT RESOLUTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF TEXAS—VOTE NECESSARY TO CONCUR IN AMENDMENT TO JOINT RESOLUTION PROPOSING CONSTITUTIONAL AMENDMENTS —VOTE NECESSARY TO ADOPT FREE CONFERENCE REPORT ON JOINT RESOLUTION PROPOSING CONSTITUTIONAL AMENDMENTS.

Article XVII of the Constitution of the State of Texas construed.

1. A vote of two-thirds of all of the members elected to a house of the Legislature is necessary to concur the amendments voted by the other house of the Legislature to a joint resolution proposing an amendment to the Constitution of the State of Texas.

2. A vote of two-thirds of all of the members elected to a house of the Legislature is necessary to adopt a free conference report on a joint resolution proposing an amendment to the Constitution of the State of Texas.

OFFICES OF THE ATTORNEY GENERAL,
March 9, 1929.

Honorable Walter F. Woodul, Senator, District No. 16, Senate Chamber, Capitol.

DEAR SENATOR: I have before me your letter of the 7th instant addressed to the Attorney General of Texas.

You present two inquiries; one, is it necessary to have a two-thirds vote by a house of the Legislature to concur in an amendment by the other house of the Legislature to a joint resolution proposing an amendment to the Constitution of the State of Texas? We understand your question to refer to the vote necessary on final passage by a house of the Legislature of a joint resolution proposing an amendment to the Constitution of the State of Texas *as amended* by the other house of the Legislature.

Article XVII of the Constitution of the State of Texas, in so far as that article is applicable to the questions raised by you, reads as follows:

"The Legislature, at any biennial session by a vote of two-thirds of all the members elected to each house, to be entered by yeas and nays on the Journal may propose amendments to the Constitution, to be voted upon by the qualified electors for members of the Legislature, * * *"

You are respectfully advised that, in the opinion of this department a vote of two-thirds of all the members elected to the house concurring in the amendments and finally passing as amended a resolution proposing an amendment to the Constitution of the State of Texas is necessary.

On June 13, 1866, it was so held in the United States Congress when the House of Representatives was considering the Senate amendment to House Joint Resolution No. 127 proposing an amendment to the Constitution of the United States. See Hinds' Precedents, Vol. 5, Section 7034. Again an amendment to House Resolution No. 402 (the Suffrage Amendment) was not concurred in by the House on February 15, 1869, when a Senate

amendment was not concurred in, the vote being less than two-thirds. See Hinds' Precedents, Section 7034.

The same ruling was made by the House of Representatives on February 17, 1869. (Idem.)

Your second question is as to the vote required to adopt the report of a free conference committee upon a joint resolution proposing an amendment to the Constitution of this State.

You are respectfully advised that, in the opinion of this department a vote of two-thirds of all the members elected to the house in question is necessary to adopt the report of a free conference committee upon a joint resolution proposing an amendment to the Constitution of this State.

This was expressly held by the Congress of the United States when on February 25, 1859, the House was considering the adoption of a free conference report on the amendments of the House to Senate Resolution No. 8 proposing an amendment to the Constitution of the United States. A two-thirds vote was required in the House and also a two-thirds vote was required in the Senate upon the said report.

In our opinion the precedents cited are based upon clear and excellent logic. If it were possible to pass a joint resolution proposing an amendment to the Constitution of this State in one house of the Legislature; amend it by a two-thirds vote in the other house, and concur in said amendment by a mere majority vote, then, that portion of the resolution created by the amendment would be submitted to the people without a two-thirds vote of the house where the joint resolution originated, and the purpose of the two-thirds constitutional requirement defeated.

The foregoing statement would be doubly true where a free conference report was adopted in each house by a mere majority vote.

It is the purpose of Article XVII of the Constitution of this State to require a vote of two-thirds of all the members elected to each house upon each and every question and *every part of every question* to be submitted to the people of this State for ratification or rejection as a part of the State Constitution.

While theoretically it might be possible to concur in amendments or to adopt a free conference report upon a joint resolution proposing an amendment to the Constitution of this State by a mere majority vote, still while the amendment might in a sense be "concurred in" or the free conference report considered "adopted," that part of the joint resolution created by the act of the other house or placed in it by the free conference committee would never have received a two-thirds vote of all the members elected to each house and the joint resolution therefore be without the vote required by the Constitution for final passage.

In answer to your inquiries, therefore, we advise you that in

each of the supposed cases there is necessary a vote of two-thirds of all the members elected to the house in question.

Respectfully submitted,

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

Op. No. 2761, Bk. 63, P. 81.

CONSTITUTIONAL AMENDMENTS—DUTY OF SPEAKER.

1. Article 17 of the Constitution which authorizes the Legislature to propose amendments to the Constitution to be voted on by the people is not related or limited by any other provision of the Constitution in regard to legislative procedure.
2. A resolution proposing an amendment to the Constitution is not a bill or a resolution within the contemplation of Section 34 of Article 3 of the Constitution and is not to be controlled by the ordinary legislative procedure.
3. An amendment to the Constitution may be proposed by either branch of the Legislature at any biennial session and may be voted on successively day after day, and when it receives a vote of two-thirds of all members elected to each house by a yea and nay vote, it may be considered as having passed that house, and there is no provision of the Constitution or laws of this State or applicable rules to prevent such resolution being laid before the House for consideration upon the day after it fails on third reading to receive the vote of two-thirds of the elected members necessary for final passage.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 9, 1929.

Honorable Fred H. Minor, Speaker Pro Tem., House of Representatives, Capitol.

DEAR MR. SPEAKER: I have before me your letter of even date directed to the Attorney General of Texas.

I quote from your letter the following language which expresses and sets out the inquiry submitted by you:

"Senate Joint Resolution No. 10 is before the House on third reading, and requires one hundred votes to secure its final passage. * * *

"Should the proposed amendment fail to get the necessary one hundred votes on its third reading, would it be the duty of the Speaker of the House to lay such resolution before the House on the next succeeding day, as provided for in Joint Rule No. 24, or would its failure to secure the necessary one hundred votes on third reading have the effect of finally killing the same, as in the case of a bill."

The question, as we understand it, is simply that if the proposed amendment fails to receive one hundred votes on its third reading, will it then be your duty upon the next succeeding day to lay the resolution before the House for consideration?

Joint Rule of the House and Senate No. 24 provides that:

"During the Regular Session of the Fortieth Legislature the President of the Senate and the Speaker of the House of Representatives shall cause to be placed on the calendar of their respective houses for consideration each day after the morning call any and all pending joint resolutions proposing amendments to the Constitution of the State of Texas, and no other bills or resolutions shall be considered on any particular day by consent

or otherwise until all such joint resolutions are finally disposed of by the house before which such resolutions are pending."

Under this joint rule it is clearly apparent that it will be your duty to lay Senate Joint Resolution No. 10 before the House upon the day succeeding the day on which said Resolution No. 10 fails to receive the necessary one hundred votes unless you are prevented in some manner by the Constitution or laws of this State or the applicable rules.

It is sugested that Section 34 of Article 3 of the Constitution of Texas will control this resolution and will prevent said resolution being laid upon the table upon the day succeeding its failure to receive upon third reading the one hundred votes necessary for final passage. With this suggestion we are not in accord.

Having under consideration Section 34 of Article 3 of the Constitution with regard to its control or lack of control of a resolution proposing an amendment to the Constitution, Attorney General Looney, in an opinion addressed to the Speaker of the House of Representatives on February 13, 1917, said that this provision of the Constitution (Sec. 34 of Art. 3) related to matters of ordinary legislation, and stated the conclusion that:

"A resolution proposing an amendment to the Constitution is not a bill or a resolution within the contemplation of Section 34 of Article 3 and is not to be controlled by the ordinary legislative procedure."

Attorney General Looney shows that Section 15 of Article 4 of the Constitution which applies to "every order, resolution, or vote to which the concurrence of both houses of the Legislature may be necessary except on questions of adjournment" does not apply to joint resolutions proposing amendments to the Constitution. He cites the well reasoned cases of Commonwealth Ex rel. Elkins vs. Griest, 196 Pa. 396, and Hollingsworth vs. Virginia, 1 L. Ed. 644, and logically concludes that since Section 15 of Article 4 which applies to "every order, resolution, or vote," etc., is not applicable to joint resolutions proposing constitutional amendments, neither in Section 4 of Article 3 which refers simply to "resolutions."

It is further suggested that Rule XVIII of the House of Representatives will prevent you from laying this joint resolution before the House on the next succeeding day after it fails to receive the necessary one hundred votes on its third reading. We can not agree to this contention.

Rule XVIII of the House of Representatives reads as follows:

"All amendments proposed to the Constitution shall take the form of a joint resolution, which shall be subject to the rules which govern the proceedings on bills, except that it shall be adopted on any reading after the first, when it receives a two-thirds vote of the members-elect of the House. (Constitution, Art. XVII, Section 1.) When a proposed amendment to the Constitution is under consideration, the vote of a majority of the members present shall be sufficient to decide an amendment thereto, or any collateral or incidental questions thereto short of the final question."

With regard to control of a joint resolution proposing a con-

stitutional amendment by a rule of the House, Attorney General Looney in the opinion to which we have above referred, says:

"This does not mean, of course, that the House is without power to promulgate rules for its own procedure, *but no rule could be promulgated with reference to the submission of a constitutional amendment as provided in Article 17 that it conflicts therewith.* In other words, an amendment to the Constitution may be proposed by either branch of the Legislature at any biennial session; there is no provision that it shall be read on three several days; it may be voted on successively *day after day* and when it receives a vote of two-thirds of all members elected to each house by a yea and nay vote it may be considered as having passed that house." (Italics ours.)

We call particular attention to the language which states that the bill may be voted on "day after day," and, indeed, it has been held by the Congress of the United States that a joint resolution proposing a constitutional amendment *passing to engrossment* by the vote necessary for final passage has finally passed the House. We call further attention to the language of Rule XVIII itself which states that such joint resolutions shall be adopted "*on any reading* after the first" clearly indicating that it was contemplated that there might be more than the usual number of readings in the case of joint resolutions proposing amendments to the Constitution of this State.

It is also significant that the House rules in question were enacted and adopted subsequent to the opinion rendered by Attorney General Looney and hence are presumed to have been enacted and adopted with knowledge of the construction placed upon them by him and in acquiescence therewith in his opinion to the Speaker of the House.

In conformity with the above, and adopting the opinion of Attorney General Looney, we advise you that there exists no provision of the Constitution or laws of this State, or of the applicable rules, which prevents you from laying Senate Joint Resolution No. 10 before the House for consideration on the next succeeding day after it fails to receive the necessary one hundred votes on its third reading, and under Joint Rule 24 it is your duty to lay the resolution before the House.

Yours very truly,

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

Op. No. 2768, Bk. 63, P. 116.

CONSTITUTIONAL LAW—SPECIAL SESSION—SUBJECTS SUBMITTED.

1. The submission by the Governor to the special session of the Legislature of the subject of investigation of claims now existing against the State government in making appropriations for the payment of such claims as may be approved as being valid and subsisting does not authorize the Legislature in special session to make appropriations for any other purpose.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 2, 1929.

Honorable Dan Moody, Governor of Texas, Capitol.

DEAR GOVERNOR: You have requested of this department an opinion as to whether or not a submission by you to the special session of the Legislature of the limited subject of claims and accounts against the State would authorize the special session of the Legislature to make appropriations for other purposes than to pay such claims and accounts.

Article 3, Section 40 of the Constitution, provides that:

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

Article 4, Section 8, provides that the Governor may, on extraordinary occasions, convene the Legislature, and contains this further provision:

"His proclamation therefor shall state specifically the purpose for which the Legislature is convened."

The courts have held that it was not the intention of the provisions of the Constitution to require the Governor to define with precision as to detail the subjects of legislation, but only in a general way by his call, to define the business to particular subjects, and as a corollary to this, have held that this section of the Constitution is mandatory and requires that legislation at a called session shall be confined to subjects presented to the Legislature by the Governor. Casino vs. State, 34 S. W. 769; Brown vs. State, 22 S. W. 601; Long vs. State, 127 S. W. 208.

Our constitutional provisions to which I have referred constitute an exception to the general rule that the powers of the Legislature when convened in special session are general as to all subjects within the jurisdiction of that body, and as stated by Cooley on Constitutional Limitation, Vol. 1, page 325, such a requirement as is contained in our Constitution is mandatory and limits the power of the Legislature to the enactment of such laws as relate to the objects stated in the Governor's proclamation or message."

And again in 25 Ruling Case Law, page 506, the general rule is stated as follows:

"Constitutional provisions limiting the scope of legislation at special sessions, are mandatory, and any law enacted at a special session is void, if it is not the subject, or subjects, designated by the executive's call or message, even though it has been approved by the Governor."

The case of Long vs. State, to which I have referred, lays down the fundamentals governing the question involved, as (1) that the legislation must come within the call of the Governor, and (2) that the provisions of Article 3, Section 40, are mandatory, and that no validity is conveyed by the approval of legislation not originally authorized by the call, *but* that every presumption

will be indulged in favor of the constitutionality of legislation once passed and signed.

There are many cases in books dealing with constitutional provisions such as our Constitution has, and those cases, in which legislation of a special session has been upheld under attack, have universally announced that the Governor in his proclamation actually submitted the subject of legislation.

The case most in point is that of State vs. Woollen, 161 S. W. 1006, decided in the Supreme Court of Tennessee. The call of the Governor was "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices and departments." The appropriation involved in the case was one of $25,000.00 to a corporation created for the purpose of holding expositions, encouraging and supporting agricultural and industrial enterprises, which was contained in the general appropriation bill under the head of "Department of Agriculture." The court held that the appropriation made was not embraced within the call of the Governor on the ground that the call was not to make appropriations in general to promote the welfare of the State, but was limited to such as were necessary to the maintenance of the State's institutions, offices and departments. This language was used by the court:

"Extra or special sessions of the Legislature are usually provided for in the Constitution, and in such cases the Legislature is also usually limited to the transaction of such business as is mentioned in the call. Where this limitation exists, legislation relating to other subjects will be void. In order to determine this question, the courts will take judicial notice of the Governor's proclamation. The Legislature may act freely within the call; may legislate upon all or any of the subjects specified, or upon any part of a subject and every presumption will be made in favor of the regularity of its action."

It has been the almost uniform custom of our Legislature to have two or more appropriation bills, such as appropriations for the support and maintenance of the departments of the government; such as appropriations for educational institutions; such as appropriations for eleemosynary institutions; such as claims and accounts, and this practice has resulted in dividing the appropriations made by the Legislature into several claims, and while the provisions of the Tennessee Constitution may be more strict than those of Texas, they are substantially the same, and it is believed that the decision of the Supreme Court of that State in the Woollen case is applicable to your inquiry submitted; likewise, we believe that the weight of authority of the courts strengthens the opinion that a submission to the Legislature of the subject of payment of claims and accounts against the State would not authorize the Legislature to make appropriations for any other purpose. There is a vitally substantial difference between the subject of making appropriations for the support of the State government, and its departments, or its educational or

eleemosynary institutions, and appropriations to pay claims existing against the State government.

You are advised, therefore, that it is my opinion, which I am sure is sustained by the authorities, that a submission by you to the special session of the Legislature of the subject of "investigation of claims now existing against the State government and make appropriation for the payment of such claims as may be approved as being valid and subsisting," would not authorize the Legislature to make appropriations for other purposes.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2770, Bk. 63, P. 128.

CONSTITUTIONAL LAW—PER DIEM AND MILEAGE OF MEMBERS OF THE HOUSE OF REPRESENTATIVES.

1. Even though members of the House are present at the beginning of the regular session and take the oath of office, they are not entitled to per diem at the special session for days which they have not attended, nor or they entitled to mileage if they have not attended the special session of the Legislature.
2. A member of the House who has been ill during the entire special session and who has not been present at any time during the special session is not entitled to either mileage or per diem.
3. Those members who remain away and do not attend the special session on account of personal business are not entitled to their mileage and per diem.
4. A member who is excused on account of personal business by a vote of two-thirds of the members present under Rule 26 is not entitled to his per diem for the days for which he is excused.
5. Only in case of illness occurring after the member has arrived at the seat of government should per diem be paid to an absent member. If he is absent for any other cause, he must have leave of the House and when this leave is granted for personal reasons, or for personal business, he is not entitled to his per diem during the time he is excused.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 13, 1929.

Honorable W. S. Barron, Speaker of the House of Representatives, Capitol.

DEAR MR. BARRON: In your letter of May 6th you state that several members of the House of Representatives who were present at the beginning of the Regular Session and took the oath of office have written to know if they might have their mileage and per diem vouchers; that one member has written that he is sick and in the hospital, and will not be present at any time during the called session; that two other members have written for their mileage and per diem vouchers, stating that their delay in coming for the special session was due to personal business. On this statement of fact, you ask to be advised as to whether or not members of the House of Representatives are entitled to mileage at the called session when

they do not actually make the trip to Austin, and whether they are entitled to their per diem each week during their absence.

The compensation of members of the Legislature is fixed under the provisions of Article 3, Section 24, of the Constitution, and Article 6818 of the Revised Statutes of 1925.

The Constitution provides that members of the Legislature shall receive from the public treasury "such compensation for their services as may from time to time be provided by law not exceeding five dollars per day for the first sixty days of the first session; and after that not exceeding two dollars per day for the remainder of the session," and further, that in addition to the per diem "the members of each house shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed five dollars for each twenty-five miles," etc. The statute provides that "members of the Legislature shall receive as compensation for *their services and attendance* upon any session of the Legislature five dollars per day for the first sixty days of each session, and after that, the sum of two dallars per day for the remainder of the session." It also contains the constitutional provision as to mileage. The only difference between the provision of the Constitution and the statute passed under it, is that the Constitution provides compensation "for their services" and the statute provides compensation "for their services and attendance."

The Rules of the House of Representatives, under which you now work, provide that no member shall absent himself "from the sittings of the House without leave unless in case of sickness, and further, that it shall require two-thirds vote of the members present "to excuse absentees," and no member shall be excused upon his own motion." They further provide that the names of absentees shall appear upon the Journal. I think it is clear from the provisions of the Constitution and the statutes passed pursuant thereto, especially in view of Rule 26 of the House of Representatives, that the purpose and intent of all was to require the personal attendance of the members of the House at the sittings of the House, and that no absence without leave is excusable except in case of sickness. This being the purpose and intent of the Constitution, the statute, and the Rules of the House, the compensation provided is a per diem compensation for service and attendance.

The question has been before the courts on several occasions. In the case of Ex parte Pickett, 24 Ala. Rep., 91, there was involved a provision of the Constitution of Alabama and the statutes of Alabama, the constitutional provision being that "each member of the General Assembly shall receive from the public treasury such compensation for his services as may be fixed by law." Under this provision of the Constitution, the statute provided that each member should be paid a specified sum for "each day's attendance," and there was a further provision that if any member was detained by sickness "after leaving home in coming to or is unable to attend the House, after

he arrives at the seat of government, he is entitled to the same daily pay as an attending member." The General Assembly by a joint resolution adjourned on December 20, 1853, to meet again on the 9th day of January, 1854, and the question involved in the case was as to whether the members who went home and returned were entitled to mileage and per diem. The decision turned on the meaning of the words "each day's attendance." The court, in disposing of it, used the following language:

"It could never have been intended that the members of the Legislature should receive pay for those days only on which they were actually engaged in the business of legislation; and neither the language employed, nor the purposes of the statute, would force such a construction upon us.

"A member may be engaged in attendance on the General Assembly, during periods of temporary cessations of legislative functions by the respective bodies; and the per diem compensation was intended as a remuneration for the services of the members, as well as to provide for their expenses during the period they were required to be absent from their homes in attending to the duties of legislation, as those duties are usually and ordinarily performed. And the object in limiting this compensation to each day's attendance, was, to secure on the part of the member, who was not within the exemptions provided for by Section 44, the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournments upon holidays, or on occasions of the death of a member. The practical construction of the law, from the organization of the government to the present time, has been otherwise, and we have no disposition to depart from it. These are not regarded as permanent cessations in the business of legislation, but in the nature of adjournments from day to day, when, in legal contemplation, the business is progressing. Indeed, it may often happen, that a temporary adjournment for a few days may tend to facililate the business, since the committees may thus be afforded time to consider of and mature the matter of bills and resolutions referred to them. But when, as in the case before us, there is an adjournment for near three weeks—for such a period of time, as to afford a reasonable reference that it was designed, not to facilitate the business of the session, but to operate a cessation of it for the given period, that the members may return to their respective homes—it would appear absurd to say that a member was in attendance upon the General Assembly, when it was not convened, and could not be, until the period which it had fixed for reassembling had arrived."

In the case of State Ex rel. Boyd vs. Hastings, by the Supreme Court of Wisconsin, 16 Wis. 358, the same question was involved arising under a constitutional provision that each member of the Legislature "shall receive for his services two dollars and fifty cents for each day's attendance during the session." The Wisconsin court adopted the opinion of the Supreme Court of Alabama, holding that where under a resolution the Legislature took a recess for sixteen days, the members were not entitled to their per diem during the recess.

These opinions are important in the general principles announced. While the constitutional provisions and the statutes involved in them provided compensation "for each day's attendance," I think that our constitutional provision taken in connection with the statute lawfully passed under it, especially as construed in connection with your Rule 26, is not different in

its meaning from the provisions of the Constitutions and the statutes of Alabama and Wisconsin, and that, therefore, the same principles announced by the courts of those States should be applied to the inquiry you submit. Under these decisions as applied to our Constitution and law, and as stated by the court, it was not intended that members of the Legislature should receive pay only for those days on which they were actually engaged in the business of legislation, for the reason that there are periods of temporary cessation of legislative functions even during the session of the Legislature, during which members are engaged in the business of legislation. As further announced in these decisions, the object of our Constitution and statute, and especially of the rules of the House of Representatives, in limiting this compensation to the days' attendance of the members, was "to secure on the part of the member the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation."

The practical construction of our law from the beginning has been for members of the Legislature to receive pay for Sundays and for holidays, and for temporary adjournments from day to day which were not regarded as permanent cessation in the business of legislation for the reason that it often happens that a temporary adjournment of active legislative business for a day or several days may facilitate the business in more than one way, such as committee meetings, etc. But the constitutional provisions, the statutory provisions, and the rules of the House could have no other meaning than to require members of the House to be present in the performance of legislative duty during the days which the House deemed necessary to devote to legislative business. This is evident from the rule which authorizes a member to absent himself from sittings of the House without leave only in case of illness, and from the rule that it requires a two-thirds vote of the members present to excuse an absentee, and from the rule that no member shall be excused upon his own motion, and from the rule that the names of the absentees shall appear upon the Journal.

The Legislature of Alabama deemed it necessary under the constitutional provisions of that State to make express provision for cases of illness of a member occurring after leaving home in coming to the session, or, after his arrival at the place of the seat of government. Neither our Constitution nor our statute provides for this exemption, but the uniform construction of the rule of the House is that if a member is absent on account of illness, it is not necessary that he even have the permission of the House. So that the practical operation of this rule would be that if a member is at the seat of government and becomes ill during the session of the Legislature so as to be unable to attend its sittings, his lack of attendance should not be charged against him. Applying these principles, you are advised:

First: That although members of the House were present at the beginning of the regular session and took the oath of office, they are not entitled to per diem at the special session for days which they have not attended, nor or they entitled to mileage if they have not attended the special session of the Legislature.

Second: A member of the House who has been ill during the entire special session and who has not been present at any time during the special session is not entitled to either mileage or per diem.

Third: Those members who have remained away, and have not attended the special session on account of personal business are not entitled to their mileage and per diem.

Fourth: A member who is excused on account of personal business by a vote of two-thirds of the members present under Rule 26 is not entitled to his per diem for the days for which he is excused.

Fifth: Only in case of illness occurring after the member has arrived at the seat of government should per diem be paid to an absent member. If he is absent for any other cause, he must have leave of the House, and when this leave is granted for personal reasons, or for personal business, he is not entitled to his per diem during the time he is excused.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2771, Bk. 63, P. 137.

STATUTES—LEGISLATURE—READING OF BILLS.

1. The provisions of Article 3, Section 32 of the Constitution requiring bills to be read on three several days is complied with by House rules requiring the bills to be read by caption only.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 14, 1929.

Honorable W. S. Barron, Speaker, House of Representatives, Capitol.

DEAR SIR: This Department acknowledges receipt of your letter of the 10th instant in which you ask to be advised if the provisions of Article 3, Section 32, of the Constitution, requiring bills to be read on three several days is complied with by the reading of the caption instead of the entire contents of the bill. You also state that it has been the custom of the House of Representatives for many years to read only the caption of bills.

Section 4 of Rule 19 of the House of Representatives reads as follows:

"Bills introduced from the floor shall be read first time by caption and referred to the proper committee."

Section 14 of the same rule reads as follows:

"When a bill on second reading is before the House, it shall be read in full if demanded by any member, and this right cannot be denied him. When a bill is before the House on its third reading, any member may call for a full reading, but this reading may be dispensed with by a majority vote of the House."

It is a matter of common knowledge, as stated in your letter, that for many years the Legislature has construed the reading of the caption of the bill to be a sufficient compliance with the constitutional provision requiring a bill to be read. This custom has been of such long standing that it has become a part of the fixed rules of the Legislature as shown from the rules above quoted.

It is our opinion that the fact that the Legislature has also adopted rules requiring the printing of bills and an opportunity given members to read the same before they are voted upon, coupled with the long standing custom of reading only the caption, constitutes a sufficient compliance with the constitutional provisions by reading only the caption.

Authority for this view is found in the case of Saunders vs. Board of Liquidation, 34 So. 457 (La.), and McClellan vs. Stein, 201 N. W. 209 (Mich.).

In the first case cited the Supreme Court of Louisiana discussed the question in this language:

"Black, in his work on Constitutional Law (page 326), refers to the word 'reading,' though he does so in connection with legislative action in connection with the enactment of 'statutes.' The author says: 'The Constitutions of many of the States require that a bill, before it shall become a law, shall be read a certain *number* of times (usually two or three) in each house. In respect to the manner of such reading the provision is considered merely directory, but not with respect to the fact itself. If the Constitution *is obeyed* in the latter particular, the statute is void. * * * Where the requirement is that the bill shall be read three times, it is the usual practice of legislative bodies to have it read twice by title merely, and once at length, and this is considered sufficient to make its enactment lawful, unless the constitutional provision is so express as to make it imperative that each reading should be of the entire contents of the bills.'

"We do not understand that a constitutional requirement which simply declares in general terms that a 'bill' should be 'read' twice or three times in each house before it can be enacted into a law, would carry with it the necessity of reading over each section of the bill at each reading, though the word 'bill' in its meaning covers 'the proposed legislation in its entirety.'"

In McClellan vs. Stein, *supra,* the Supreme Court of Michigan construed the provision of the Constitution of that State providing that "Every bill shall be read three times in each house before the final passage thereof." A rule of the House of Representatives of that State reads as follows:

"Every bill shall receive three several readings previous to its passage. The first and second readings may be by its title only, but the third reading shall be in full unless otherwise ordered by the House."

In approving this House rule, which did not require a *full* reading of the bill three times, the court simply quoted from an early decision of Michigan the following:

"The legislative practice of reading the same twice by title, and only once at length, has been maintained too long in this State to be now overthrown by the courts. * * * The Constitution, in terms does not direct that the reading shall be at length, and, while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once. This act, as it passed, was read once in each house at length, as appears from the journals."

We see from the above that the Supreme Courts of two States have approved the custom and the rules of the Legislature in reading bills only by caption, and since we believe that the reasoning in these cases is applicable to the Texas Constitution, you are advised that the rules of the House of Representatives of Texas concerning the reading of bills are a sufficient compliance with Article 5, Section 32, of the Constitution.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2772, Bk. 63, P. 141.

CONSTITUTIONAL LAW—SECTION 18, ART. 3—NEPOTISM LAW.

1. The Constitution does not prohibit the appointment of a member of the Legislature to any office within the gift of the Governor unless the office is one which was created and the salary of which was increased by the Legislature of which he is a member.
2. The Nepotism Law does not prohibit the appointment by the Governor to any office within his gift of a person related within the prohibited degree to a member of the House of Representatives.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 13, 1929.

Honorable W. T. Williams, House of Representatives, Austin, Texas.

DEAR JUDGE: In your letter of May 6, 1929, you refer to Section 18, Article 3 of the Constitution, and to an opinion of this department appearing in the Reports and Opinions of the Attorney General, 1914-16, page 504, in which it was held that a member of the House of Representatives can at the same time hold the office of notary public. Then you inquire that:

"If this is true of a notary public, why is it not also true of any appointment made by the Governor with the advice and consent of the Senate?"

The opinion to which you refer is based upon a construction of the Constitution and of the law that since the House of Representatives is not required to confirm, and has nothing to do with, the appointment of notaries public, the provision of Section 8, Article 3 of the Constitution which provides that "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" has no application.

This opinion to which you refer in my judgment is sound, is a

proper construction of the Constitution and of the statutes, and meets with my approval.

You are advised also that it is my opinion that there is nothing in Section 18, Article 3 of the Constitution, when properly interpreted and construed, which prohibits the appointment of any member of the Legislature to any office within the gift of the Governor unless the office is one which was created or the salary of which was increased by the Legislature of which was increased by the Legislature of which he is a member. If this latter condition exists, the resignation of the member after the creation of the office or after the salary has been increased would not make him eligible to the appointment, but in view of what I have already said, the matter of his resignation would be immaterial.

The inquiries you submit bring into consideration the provisions of Article 432 of the Penal Code known as the Nepotism Statute which provides:

"No officer of this State, or any officer of any district, county, city precinct, school district or other municipal subdivision of this State or 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, or any member of the Legislature shall appoint or vote for or 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, the Legislature or court of which such person so appointing or voting may be a member when the salary, fees 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 whatsoever."

Heretofore, this department has rendered an opinion to the effect that it is a violation of this article of the Penal Code for a Senator to vote to confirm the appointment to any office, position, etc., of any person related within the second degree of affinity, or within the third degree of consanguinity to a member of the House of Representatives when the salary, fees or compensation of such appointee is to be paid directly or indirectly out of or from public funds or fees of office of any kind or character whatsoever. The inquiry arose over the appointment of a member of the Board of Public Accountancy. The facts disclosed that this appointee did not receive any salary, fees or compensation, and the opinion rendered should have been confined to the particular facts before the department and properly based upon the fact that no salary, fees or compensation of the appointee was paid out of public funds by reason of which the Nepotism Law did not apply. But the opinion went beyond the inquiry made and held as I have indicated above.

I have given careful study to the Nepotism Law since the receipt of your inquiry, and I am convinced that the opinion of this department heretofore rendered, as above indicated, is erroneous, and you are advised that it is my opinion that the Nepotism Law does not prohibit the appointment by the Governor of any man

to office (who is not a member of the Legislature creating the office, or during which the salary was increased), although the appointee may be related within the prohibited degree under the Nepotism Law to some member of the House of Representatives and to the extent that the opinion heretofore rendered by this department on February 19, 1929, held otherwise, it is in my opinion erroneous and is overruled.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2777, Bk. 63, P. 175.

POWERS OF BOARD OF CONTROL.

1. The Board of Control must have an estimate from heads of all departments and all institutions of the quantity of supplies needed for the entire year.
2. The Board of Control in advertising should advertise for the aggregate of any particular article as estimated by all of the heads of the departments and institutions which desire the particular article, and should name the estimated quantities in proposals for bids.
3. A failure to comply with the above provisions makes the advertisement void.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 22, 1929.

Honorable R. B. Walthall, Chairman of Board of Control, Austin, Texas.

DEAR MR. WALTHALL: To your letter of May 15th you attach a certified copy of the minutes of the Board of Control of May 6th and May 8th, in relation to bids on gasoline and oils submitted by several oil companies, and request an opinion of this department as to whether or not you have already made a legal and binding contract with the Texas Company for the articles involved.

In addition to a certified copy of the minutes, members of this department have had several conferences with the members of your department, and also with attorneys representing the several oil companies, and I have been furnished briefs by attorneys representing the Texas Company, and attorneys representing the Pierce Oil Corporation. I have also investigated the several proposals of your board for furnishing the articles mentioned in the certified copies of the minutes together with the bids of these various companies in response to the proposals of the board. I also have before me a copy of the advertisements for bids and proposals as printed in one of the daily newspapers by your board.

It is contended by the Texas Company that the Board of Control has entered into a contract with it for furnishing wholesale oil, greases and gasoline for the State Highway Department for the year beginning May 15, 1929.

It is a general principle of law that a board, having the authority to purchase after having advertised in the manner provided by law for bids or proposals to furnish certain articles, if and when under said proposals any bid has been duly and officially accepted by such board, a binding contract has been effected with the party who bid. It is likewise a correct principle of law that a State Board acting within the powers delegated to it by statute may bind the State by its contracts to the same exent and in the same manner as two individuals may be bound. This was ably stated by Judge Gaines in the case of Jumbo Cattle Company vs. Bacon, reported in 79 Texas, at page 13, wherein he says:

"We see no difference between the contract of a State and an individual and a contract between two individuals. The formalities by which they are entered into may be different but the principles effecting the two are essentially the same."

The same principle has been recognized throughout the country. So that if the law regulating the purchase of supplies for the State has been faithfully followed by your board making proposals for bids for such supplies, the bid of one of the parties having been accepted, you have made a contract with the Texas Company which may not be revoked. So that the question is, has the Board of Control substantially complied with the law in making proposals for bids and has the Texas Company complied substantially with the terms and conditions of the proposals?

Your board in this matter has acted under the authority granted in Chapter 3, Title 20, of the Revised Statutes for 1925, which is the only law prescribing your functions in this regard.

Article 642 of this chapter provides that "the Board of Control shall contract for all supplies, merchandise and articles of every description needed for the maintenance and operation of such institutions." (The institutions to which reference is made are defined in Article 634, and include all of the departments, eleemosynary institutions and schools of the State). This article further provides that "the board shall base its contracts upon estimates to be furnished the board by the superintendents the first day of April of each year for the entire year."

Article 644 provides that the board "shall advertise for sealed bids or proposals to furnish the aggregate of the articles and supplies as estimated by such institutions naming the articles and supplies, and the quantities and character required." Article 643 provides that all contracts shall be made after a full notice by advertisement once a week for not less than four weeks in at least four of the leading newspapers of this State. You are given in this chapter the right to reject or accept any and all bids, and it is provided in Article 647 that "the terms and conditions and the period for which such bids or proposals are invited shall be clearly stated in the advertisement."

Again, Article 654 provides that "the estimates upon which

advertisements and contracts are made shall as near as practicable state the quantity and quality of the articles and supplies needed." It is then provided in Article 659 that when any bid has been accepted the board shall require of the successful bidder a bond "in a sum not less than one-third the amount of the bid." This chapter which delegates the purchasing function to your board, and which is the only grant of authority to make the purchases, prescribes a detailed method of procedure in relation to the purchase of supplies for the heads of the State departments and the various eleemosynary and educational institutions. The first requisite is that the superintendents of the institutions (and this term is broad enough to include the heads of the departments) shall by the first day of April of each year furnish to the board an estimate of the supplies, merchandise and other articles which will be needed for the entire year. There is an evident purpose in the provisions of the law in this respect, and that is that in the matter of making competition as effective as possible in the purchase of supplies for the use of the State, the board shall be in a position to give to those who bid to furnish these supplies as accurate an estimate as possible as to the quantity which will be needed. This is material both to the interest of the State and to the bidder for the reason that the matter of quantity and the place of supply might be material in fixing the price. The law is so careful in this matter of quantity that in providing for the advertising by the board for sealed proposals to furnish such supplies, it is made mandatory that the board shall advertise for "the aggregate" of the supplies "as estimated by such institutions." To make this most imperative the law further provides that the board in its advertisement shall name "the quantity" required. It is my opinion that these two elements entering into the matter of purchasing supplies for the State and its institutions are vital to the matter of the validity of contracts made, namely:

First: That the board shall have estimates from all heads of departments, and all institutions, of the quantity of supplies needed for the entire year, and

Second: That the board in advertising shall advertise for the aggregate of any particular article as estimated by all of the heads of the departments and the institutions which desire the particular article, and shall name the estimated quantities in the proposals for bids. This is made evident by the provisions of Article 654 which requires that the estimates upon which advertisements are made shall state as near as practicable "the quantity" needed.

My information is that the board has not received from the various heads of departments and the various institutions any estimates of the amount of gasoline, lubricating oils, etc., which will be needed for the year. In fact the communication to the board on May 10th from the State Highway Department ex-

pressly states that "we did not advertise this business based on any estimated quantity of the different classes."

An examination of the advertisement which the board printed in the daily papers of the State shows that no estimate of any kind of the quantity which would be desired by the State Highway Department and other institutions was given. The law expressly requires in Article 654 that this shall be done, and that the quantity desired shall be based upon the estimates furnished the board by the first day of April of each year.

While the proposals of the board for bids in the fourteenth paragraph of Exhibit "A" requires the bidder to state if the prices submitted for the Highway Department are also tendered to the several other State departments and eleemosynary and educational institutions, still the proposal made for bids is limited only to the supplies needed for the Highway Department. As stated by one of the leading authors on the Law of Public Contracts:

"The purpose of the statutes requiring advertising for proposals is to create genuine competition in bidding * * *."

And further, that "it is essential that bidders, so far as possible, be put upon terms of perfect equality and that they be permitted to bid on substantially the same propositions and upon the same terms."

Again:

"Every substantial requirement of the statute intended for the protection of the public and property owners must be complied with or the contract will be invalid."

Again:

"The preliminary steps leading up to the contract are conditions precedent to the power of the public body to enter into the contract."

Again:

"The advertisement or notice should itself contain the essential elements required to give due notice of the nature and extent of the work or supplies, the quality and estimated quantities as near as possible."

Again:

"Where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract."

Again:

"Provisions of statutes relating to the power to contract, the manner of its exercise or its terms may not be waived but must be strictly pursued." (Donnelly on the Law of Public Contracts, Sections 5 and 114.)

The rule on this subject is undoubtedly that is the material matters, which the statute prescribes to be done by State boards in making proposals for bids are not complied with, a valid contract cannot be made.

It is my opinion, assuming the facts to be as I have heretofore stated them in relation to estimates not having been furnished

by the various State departments, to the Board of Control, and in view of the fact that the advertisement of the Board did not state an estimate of the quantity required as provided in Articles 644 and 654, that the Board cannot make any valid contract based on the proposals for bids made by it for the articles in question. If, as contended in one of the briefs filed with me, the requirement as to estimates to be furnished the Board applies only to eleemosynary institutions, this does not effect the force of the conclusion reached that the advertisement for bids shall give the quantity needed as nearly as it can be estimated by the department for the necessities of which proposals are asked; besides, the advertisement calls for proposals for the State Highway Department "and other State institutions" without giving any quantity needed as to any of them.

Aside from this, it appears from an examination of the bids made that there is such a discrepancy between the bids and the proposals as brings about a condition which would make it desirable that a readvertisement be had.

As hereinbefore stated, the law from which your power to purchase is derived prescribes in detail the procedure to be followed in the letting of contracts on competitive bids after advertisement. This law requires that the articles and the quality and quantity of each be stated; that all bids shall be opened on a specified date at a specified place; that preference shall be given local dealers if the articles offered are equal in *price and quality* to those which can be purchased elsewhere; that preference shall be given "all things being equal" to State products; that "other things being equal" articles offered by bidders who have an established local business shall have preference. I am of the opinion that these articles of the statute negative any authority on the part of the Board to give preferences, if the prices are unequal, and negative any authority to prefer a high price against a low price. The Supreme Court has held in the case of Foster vs. City of Waco, 113 Texas, 352, that where a power is granted and the method of its exercise prescribed, this method precludes all others and must be followed. Our statute authorizes the Board of Control to select between bidders, whose prices are equal and whose goods are of equal quality, and this implies a denial of power to prefer a high price against a low price if the goods are of the same quality.

The Board of Control, for reasons satisfactory to itself, required that the price on transmission oil should be stated upon the basis of weight instead of gallonage. Complying with this proposal for bids and specifications therefor, two of the companies, namely, the Texas Company and the Pierce Oil Corporation, met the requirements of the Board, one making a bid of forty-eight cents per pound and the other six and one-half cents per pound. It appears now that the Texas Company, after the bids have been opened, asks that its bids be interpreted or changed to the price bid per gallon at a certain ratio of pounds

to gallons. The law on this subject is stated in Donnelly on Law of Public Contracts, Section 118, to be that:

"A bidder who submits a sealed bid for public work cannot change it after it is opened nor may the public authorities who receive the bids permit a change in any material respect. To allow such a change, after bids are opened, violates the purpose and intent of the statutes regulating competitive bidding. * * * The public authorities have power to accept or reject bids as submitted, but they possess no power to permit material changes or amendments to be made in the terms or conditions of the bids."

In a case from the Supreme Court of Ohio, which involved an advertisement for the construction of a building asking for bids to be made for the carpenter work alone, a separate proposal for bids having been submitted for the hardware, a bidder submitted a bid for the carpenter work, excluding a higher bid without mentioning the hardware, and after the bids were opened, this bidder contended that he had included the hardware by mistake and insisted upon his right to correct the mistake. The Supreme Court said:

"The proposals are to be in writing and sealed; and the action of the trustees is to be taken on the basis of what those proposals are found to be when opened, and not on what they may have been intended to be, but are not. To hold otherwise would be to nullify or reverse the evident policy of the statute."

My information is that it is claimed by the Texas Company that when they wrote forty-eight cents in the bid, it had in mind gallons and not pounds. This may have been a clerical error, but it is important that all of the other bidders who bid in gallons were careful to accurately state so in the bid. If the contract should be awarded to the Texas Company upon the basis of the bid actually made in writing of forty-eight cents per gallon, it would be very substantially higher than that of the Pierce Oil Corporation on the same quality of goods. This would not be permissible under the law. Neither has the Board of Control, under the condition of facts as exist as to those bids, any authority to change them from what they actually are. I do not believe that this is a technicality which would come within the reserved power of the Board to waive as stated in the proposals for the bids, especially so, when if the Board makes the change it then has to enter into a mathematical deduction of converting gallons to pounds on a basis as to the accuracy of which there is a divergence of custom and practice as between the several bidders.

I think the situation brings about a condition under which, if the Board undertakes to permit the actual bid to be changed from gallons to pounds, by reason of which it then must enter into mathematical deduction of converting gallons to pounds, that the intent and purpose of the law would be violated and, therefore, advise, that in view of the facts existing in relation to these bids, the resolution of the Board awarding the bid to the Texas Company does not constitute a binding contract upon the State.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2782, Bk. 63, P. 234.

STOCK LAW—SENATE BILL NO. 22, THIRD CALLED SESSION OF THE FORTY-FIRST LEGISLATURE.

A bill regularly passed by both houses of the Legislature which is not signed by the Speaker of the House of Representatives, is inoperative and of no force and effect.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 30, 1929.

Honorable Owen D. Barker, County Attorney, Galveston County, Galveston, Texas.

DEAR SIR: Your letter of August 27th, addressed to the Attorney General, has been referred to the writer for attention.

You state in your letter that a petition has been presented to the commissioners court of Galveston County calling for a stock law election; that this petition complies with the terms of Senate Bill No. 22, passed at the Third Called Session of the Forty-first Legislature of this State. You then ask the following two questions:

"(1) Are they (commissioners court) authorized and required to call an election based upon a petition which complies with the provisions of said Senate Bill No. 22, but which does not comply with Article No. 6954, R. C. S., before same was amended?"

"(2) Is Senate Bill No. 22, above referred to, now effective as a valid and subsisting law?"

You are advised that the writer has this day examined Senate Bill No. 22, which is on file in the Secretary of State's office. This bill does not carry the signature of the Speaker of the House of Representatives.

The Journal of the House of Representatives of Wednesday, July 17, 1929, carries an entry which shows that the above bill was signed by the Speaker in the presence of the House after the caption had been read.

The Constitution of Texas, Article 3, Section 38, reads as follows:

"The presiding officer of each house shall in the presence of the house over which he presides, sign all bills and joint resolutions passed by the Legislature after their titles have been properly read before signing; and the fact of signing shall be entered on the journals."

The great weight of authority seems to hold that neither the courts nor any other department of the government are at liberty to regard any provision of the Constitution as merely directory, but, on the other hand, that each and every provision of the Constitution must be treated as imperative and mandatory. It has been the policy of the courts of this State to hold that the various provisions of our Constitution are always mandatory. The Legislature does not exist, except by the provisions of the Constitution, and the same Constitution which created the Legislature, ordered and commanded the Speaker of the House of Representatives to sign all bills passed by the Leg-

islature, after the titles to said bills had been properly read and ordered the Legislature to cause to be entered in the journals the fact that said bills were signed by the Speaker. The same Constitution which delegated to the Legislature the right to enact laws, placed the above limitation upon the exercise of the power granted.

We find an excellent treatise on the question in the opinion of Judge Willson in the case of Hunt vs. State, 3 S. W. 233; in holding that the above provision of the Constitution is mandatory the court adopts the language of Judge Cooley in his work on Constitutional Limitations, from which we quote:

"Constitutions do not usually undertake to prescribe mere rules of proceedings, except when such rules are looked upon as essential to the things to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a Constitution provisions which the people, in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument, which for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the sovereign people themselves."

Quoting further from the opinion in the Hunt case, *supra*, we find this language:

"We can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. * * * If abuse exist by reason of defects in the Constitution, present or prospective, the true source of authority, the people, have the power and doubtless the wisdom and patriotism, to correct them; and this, in the American idea, is the safe and only depository."

In the opinion of the writer, the above construction is not only sound, but based on unassailable reason and wisdom.

In answer, therefore, to your second question, it is the opinion of this Department that the above provision of the Constitution is mandatory, and that the fact that the Speaker of the House of Representatives failed to sign the bill in question renders said bill inoperative and of no force and effect.

In view of the above construction, the writer deems it unnecessary to pass upon the first question. If the bill is inoperative and of no force and effect, the commissioners court is neither authorized nor required to hold an election which would be void and useless.

Very truly yours.

JACK BLALOCK,
Assistant Attorney General.

Op. No. 2786, Bk. 63, P. 270.

BUILDING AND LOAN ASSOCIATION—VOLUNTARY LIQUIDATION.

Any building and loan association organized under authority of the Building and Loan Act (Senate Bill 111), whether solvent or insolvent, may voluntarily liquidate by complying with the provision of Section 56 of said act.

Construing Senate Bill 111, Acts Second Called Session, Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 2, 1929.

Honorable J. E. Roberts, Deputy Commissioner of Banking, Capitol Building, Austin, Texas.

DEAR SIR: Your letter of September 23rd, addressed to Honorable R. L. Bobbitt, Attorney General, has been referred to the writer for attention.

You ask for a conference opinion as to whether or not a building and loan association can go into voluntary liquidation by complying with the requirements of Section 56 of the Building and Loan Act when the assets of such association are less than its liabilities. Section 56 of the Building and Loan Act in part provides as follows: "At the annual meeting or at any meeting called for that purpose, *any* building and loan association of this State may, by vote of shareholders owning two-thirds of the voting shares in force, resolve to liquidate and dissolve the corporation; providing, etc. * * *"

No distinction or restriction is made as to the solvency or insolvency of the association that may voluntarily liquidate under this section. The word "any" is inclusive of all building and loan associations organized and acting under provisions of the Building and Loan Act. This being true, all such associations, whether solvent or insolvent, would be treated alike under this section unless the Legislature was without power to grant this authortiy. Our examination of the authority fails to disclose any legal principle or reason limiting the Legislature in this respect.

Building and loan associations are mutual in character and the stockholders are in the main the parties entitled to distribution of the assets upon liquidation. The amount of liabilities to the parties other than stockholders is limited by statute and such general creditors outside of the stockholders are entitled to preferential payment of their claims superior to the rights of the stockholders. It would thus appear that such general creditors could not be prejudiced by the dissolution or voluntary liquidation of the business. This would leave only the stockholders themselves and their rights to be considered.

The statutes granting authority for voluntary liquidation of banking and other corporations by vote of the stockholders have on numerous occasions been before the courts and have been upheld. Most of the cases have turned upon the point of a protest by the minority stockholders that the majority stockholders should not have the authority to dissolve and liquidate a going

and solvent corporation. The minority stockholders contend that such action prejudices their rights in the good will of the going concern and deprives them of their participation in the practically certain profits that would accrue by the continued operation of the corporation.

These cases, in effect, concede the right to voluntary liquidation of insolvent corporations and direct their reasoning to upholding the authority of the majority of the stockholders to voluntary liquidation of a solvent corporation. The case of Green et al. vs. Bennett et al., decided by the Court of Civil Appeals, Vol. 110, S. W. R. 108, in construing the United States statute providing for the voluntary liquidation of national banks, held that the right of voluntary liquidation conveyed by the statute was not limited to insolvent banks. (Page 115.) A writ of error was granted by the Supreme Court in this case but was later dismissed by agreement. The Supreme Court of Iowa in Rossing et al. vs. State Bank of Bode et al., 165 N. W., page 254, holds in accord with the above cited decision of the Court of Civil Appeals, and cited the same in course of their opinion.

We conclude, therefore, and advise you that a building and loan association acting under the authority of the Building and Loan Act (Senate Bill 111), upon compliance with the provisions of Section 56 of said act, may voluntarily liquidate such association, whether such corporation be solvent or insolvent.

Respectfully submitted,

W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2791, Bk. 63, P. 295.

WATER AND WATER RIGHTS—IRRIGATION—PRESENTATION—PRIORITY DATE.

1. Facts stated under which it is held that a presentation, although not describing the contemplated project, its location and purpose, as fully and accurately as perhaps it should, vested in the person filing same, "priority date" as to the right of diversion at a stated point, as against another claiming such right as to the same point of diversion, both having applied for permits and having designated the same point of diversion.

2. Held that a presentation for investigation of an irrigation project which sets out or designates no land for irrigation, although followed by an application for a permit describing certain lands to be irrigated, does not fix in the person for whom filed any right of "priority date" in the matter of the irrigation of such or any other lands.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 5, 1929.

Board of Water Engineers, Capitol, Austin, Texas.

GENTLEMEN: The Attorney General has your verbal request for advice on the following matter:

On October 23, 1926, a presentation by Jackson and Leherer

was received and filed by you. So much of this presentation as is here material states:

"The proposed location of said proposed project is as follows: On the Brazos River in Fort Bend County, beginning at the intersection of the north line of William Little survey, with the Brazos River, thence downstream to the intersection of said river with the Brazoria County line in Cow Creek, the purpose being to locate a diversion point for the irrigation of about one hundred thousand acres and the use of one hundred thousand acre-feet annually."

The William Little survey here referred to is on the left bank or east bank of the river and the county line intersection in Cow Creek referred to is the right or west bank of the river some distance below the William Little survey.

On January 2, 1929, there was received by you, and filed by you on January 8, 1929, a presentation by R. T. Briscoe. So much of this presentation as is here material states:

"The proposed location of said proposed project is as follows: Brazos River extending both five miles above the Fort Bend-Brazoria County Line and five miles below said line."

The Fort Bend-Brazoria County line here referred to is the line between said counties that intersects with the right or west bank of the river and is the same county line and point of intersection as that referred to in the Jackson and Leherer presentation as being in Cow Creek.

On August 21, 1929, there was received and filed by you the application of Briscoe for a permit to divert certain waters from the Brazos River at a designated point on the left or east bank of the river for the purpose of irrigating certain described lands lying east of the river.

On August 31, 1929, there was received and filed by you the application of Jackson and Leherer for a permit to divert certain waters from the Brazos River at a designated point on the left or east bank of the river for the purpose of irrigating certain described lands lying east of the river.

It so happens that both of these applications for a permit designate the same point of diversion and set out substantially the same lands proposed to be irrigated.

At the time of the filing of these respective applications for permits the time for filling same as upon and in pursuance of the foregoing mentioned presentations had not terminated and our understanding is that each was filed as under and in pursuance of the presentations previously filed in the name of these respective applicants for a permit.

It is being contended by Jackson and Leherer that their presentation was such that the filing of same gave them "priority date" in the matters of this diversion point and the irrigation of these lands.

It is being insisted by Briscoe that his presentation was such that the filing of same gave him "priority date" in the matters of this diversion point and the irrigation of these lands, and that the Jackson and Leherer presentation was such that the

filing of same did not fix in them a "priority date" as to any diversion point on the east bank of the river nor as to the irrigation of any lands on the east side of the river.

A hearing has been had on these permit applications and you request the opinion of the Attorney General on the question of what your action should be in the matter of these respective applications for permits, in so far as this point of diversion and these lands are concerned.

It is our view that the Jackson and Leherer presentation embraces the left or east bank of the river from its intersection with the north line of this William Little survey to the point of the nearest approach of said bank to the point where the Brazoria County line in Cow Creek intersects with the right or west bank of the river; that is, that the river area in reference to which the investigation for a point of diversion was to be made was that part of such area lying between a line across the right at right angles with its course at the intersection of the river with the north line of this William Little survey, and a line across the river at right angles with its course at the intersection of the river with the Brazoria County line in Cow Creek.

This being true, it is our view that by reason of the filing of the Jackson and Leherer presentation they thereby became vested, as a matter of law, with a right to select, and to designate in their application for a permit, such a diversion point as they might choose within this designated river area and, having so selected and designated this point, that their right of diversion at such point is continued and preserved through their application for a permit, and that upon the granting to them of a permit under and in pursuance of their presentation this right will have "priority date" and will be effective from the date of the filing of their presentation. We think this is also true as to their right to appropriate for irrigation purposes, by diversion at this point, so much of the unappropriated water of this stream as may be designated in their permit. This does not mean, of course, that by reason of the filing of their presentation Jackson and Leherer acquired, nor that under such permit as might be issued to them thereon they would or could be vested with, any right to the occupancy or use of any privately owned lands at this point of diversion. Such right cannot be so acquired. Our reference is only to their right of diversion as relating to the waters involved.

No lands are designated or described in the Jackson and Leherer presentation to be irrigated or as constituting any part of their contemplated project. Either, therefore, they acquired no "priority date" under their presentation as to the lands set out in their application for a permit, or under their presentation and permit application, or else they have the right to such "priority date" as to any lands they might choose to set out in their permit application as susceptible of and available for irrigation by diversion of the waters of this stream from their

designated point of diversion. We do not believe that our statutes contemplate that the filing of a presentation which in no way describes, designates or indicates any lands in reference to which the investigation for irrigation is to be made should have the effect of vesting in the person in whose behalf the presentation is filed this statutory "priority date" as to any and all lands, wherever situated, that might be susceptible of or available for irrigation from such diversion point in the river area designated in the presentation as might be selected by such person. Such an application of our statutes would have the effect of excluding all such lands from subsequently instituted proceedings having for their purpose the irrigation of any part of such lands until the person in whose behalf the presentation was filed had chosen the lands he desired to irrigate, irrespective of the location and extent of the lands involved. It would also, for such time, have the effect of precluding the owners of all such lands from contracting or arranging with a subsequent appropriator, or with one in whose behalf a presentation may have been subsequently filed, for the irrigation of their lands. If, in answer to this, it be said that such landowners, notwithstanding such "priority date," would, nevertheless, have the right, as they clearly would have, to contract with a subsequent appropriator for the irrigation of their lands, the answer reduces to a shadow, in fact destroys, the whole theory of "priority date" as to the right to irrigate any part of such lands. Our presentation statutes provide that the presentation "shall describe the contemplated project, its location and purpose," and, in effect, that the one in behalf of whom the presentation is filed shall "have priority date from the time of the filing of such application (presentation) should a permit thereafter be granted thereon." We are not here construing these provisions as such. We are only saying that in our opinion a presentation such as the Jackson and Leherer presentation here under consideration, even though a permit be granted thereon, does not vest in the person in whose behalf it is filed any prior or other right, as against a subsequent or other appropriator, and certainly not as against the land owner, to irrigate any particular lands.

What we have said of the Jackson and Leherer rights in reference to these lands is also expressive of our views of the Briscoe rights concerning same.

While neither of these presentations "describe the contemplated project, its location and purpose," as fully and accurately as perhaps it should, it is our view that the Jackson and Leherer presentation is susceptible of the construction we have given it and was first filed, and we have considered it on this basis rather than from a technical or critical standpoint.

It is our opinion, therefore, that in so far as the right of diversion at this point is concerned Jackson and Leherer have the better right to a permit, but that neither they nor Briscoe acquired by the filing of their presentations, although followed

by applications for permits, any right of "priority date" in the matter of the irrigation of the lands in question, and you are so advised.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2796, Bk. 63, P. 330.

OIL AND GAS.

1. *Oil and Gas.*—Natural gas cannot be produced from wells not operated for oil except for use as light, fuel, and power.
2. *Constitutional Law.*—Article 6008, Revised Civil Statutes, 1925, held constitutional.
3. *Construction of Statutes.*—Article 6008 construed not to apply to natural gas produced from a well found as a question of fact to be operated for oil.
4. *Oil and Gas—Authority of Railroad Commission.*—Railroad Commission has no authority to require that gas produced from a well operated in fact for oil be shut in and confined until used for light, fuel and power purposes.
5. *Construction of Statutes—Authority of Railroad Commission.*—The Railroad Commission has authority under Article 6014 to prevent the escape into open air of natural gas produced from a well operated for the production of oil, except such amount thereof as may be necessary in the drilling and operation of such well.

Articles construed—
Article 6008, R. C. S., 1925.
Article 6014, R. C. S., 1925.
Authorities discussed—
Ohio Oil Company vs. Indiana, 177 U. S. 190.
Lindsley vs. Natural Carbonic Gas Company, 220 U. S. 61.
Walls vs. Midland Carbon Company, 254 U. S. 300.
Montana Gas Products Company vs. Rankin, 207 Pac. 993.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 6, 1929.

Railroad Commission of Texas, Austin, Texas.
Attention—Mr. Parker, Chief Supervisor.

DEAR SIR: We have before us your letter in which you ask our opinion as to the correctness of the holding of your Commission denying the application of the Navajo Oil Company to build and operate a casinghead gasoline plant for the purpose of treating gas produced from a natural gas stratum, and manufacture gasoline therefrom.

Article 6008, Revised Civil Statutes, 1925, in its pertinent part is as follows:

"Any persons * * * in possession * * * of any well producing natural gas, in order to prevent the said gas from wasting by escape, shall within ten days after penetrating the gas-bearing rock in any well, shut in and confine the gas in said well until and during such time as the gas within it be utilized for light, fuel or power; provided that this shall not apply to any well that is operated for oil. * * *"

It will be noted that this article in effect prohibits the use of

gas from a purely gas well in the manufacture of casinghead gasoline, inasmuch as it is conceded the gas so used, is not being used for light, fuel or power. The principal question raised by your inquiry is that the above quoted article is unconstitutional, and, therefore, furnishes no basis in support of the ruling of the Commission referred to herein.

On this question we have had the benefit of an able and persuasive brief from Honorable Charles I. Francis of Wichita Falls. Upon reading the article it would naturally occur to the legal mind that the limiting of the use of gas to certain enumerated purposes and to the exclusion of others, would be seemingly in violation of several constitutional guaranties.

While the question is an open one in Texas, we have, nevertheless, reached a conclusion by the reading of analogous cases of the Supreme Court of the United States, and further by reason of the policy of this department to hold a law constitutional rather than unconstitutional in doubtful cases, that said Article 6008 is constitutional.

The Supreme Court of the United States in the case of the Ohio Oil Company vs. Indiana, reported in 177 U. S. Report, 190, discusses the nature and right of property of the landowner in and to the oil and gas which may lie underneath his premises, and defines it to be a right of privilege to take but not an unqualified ownership. Upon this basis they then reason that the State has a right, by means of legislation, to restrict this right of privilege to reduce to possession, where necessary, to prevent a waste or to effect a conservation. Upon the principles enumerated in the foregoing case, the same court in the case of Lindsley vs. Natural Carbonic Gas Company, 220 U. S. 61, held a statute of New York to be constitutional which prohibited the production of mineral waters for the purpose of extracting therefrom the carbonic gas from the mineral waters and the other mineral ingredients with which it was associated. There was a further holding in this case that a classification on the use of property which has a reasonable basis, would not offend the equal protection clause of the Fourteenth Amendment, because not made with mathematical nicety or because it might result in some inequality, and that the court will assume the existence at the time it was enacted of any state of facts that can be reasonably conceived to support the classification.

In the instant case we hold that it could be reasonably supposed that by restricting the use of natural gas to light, fuel and power purposes, that all other purposes are wasteful, because the heat units of such gas are never fully utilized except where such natural gas is used for light, fuel or power purposes.

The Legislature of Wyoming passed a statute prohibiting as wasteful the burning and consumption of natural gas without fully utilizing its heat for other manufacturing or domestic purposes and forbidding the sale of such gas for the manufacture of carbon black or other resultant products in which the heat

was not so utilized for other manufacturing or domestic purposes. This statute was attacked as unconstitutional in the Supreme Court of the United States. It was held constitutional in the case of Walls vs. Midland Carbon Company, reported in 254 U. S. 300.

The theory of the attached was similar to the point of objection raised in the instant matter, towit, that by the limiting of the uses of the property, property was taken without due process and such limitation created an unreasonable and arbitrary discrimination. The court, in the course of that opinion, holds in effect that the manufacture of carbon black or other resultant by-products of natural gas which did not fully utilize all the units or elements of the natural gas, was an extravagant, wasteful and disproportionate use of the natural gas of the State and that the police powers of the State extended to the prohibition of such use, and that it was for the legislative discretion to choose between the gas and the product and that the relative value of one against the other could not overthrow the discretionary selection between the two as made by the Legislature.

Applying that reasoning to the instant statute, it follows that the Legislature has considered the uses of natural gas and decided that any uses other than for light, fuel and power were a waste and disproportionate use of the same, and that the selection having been made, the objection made went to the wisdom of the legislation and were not tenable on the point of constitutionality.

While the Legislature did not express by the terms of the act that uses other than for light, fuel and power purposes were wasteful, extravagant or disproportionate, it, nevertheless, did establish this classification and on the authority of Lindsley vs. Carbonic Gas Company case, supra, we are entitled to presume any facts which tend to show the reasonableness of such classification. We assume that it will not be denied that any use of natural gas other than for light, fuel or power purposes, would result in waste from a standpoint that all the heat units therein contained would not be fully and actually utilized.

It is true that the Supreme Court of Montana in the case of the Montana Gas Products Company vs. Rankin, 207 Pac. 993, held a statute similar to the one discussed by the United States Supreme Court in Walls vs. Midland Carbon Company, supra, to be unconstitutional. The theory of this decision was that the laws of Montana, as to the property rights of the landowner, are dissimilar to that of the states involved in the rulings of the United States Supreme Court in the cases hereinbefore discussed. It is further true that this same rule of property that is the common law rule that the landowner owns all of the land and things contained therein, from the center of the earth upward, prevails in Texas. Summers in his work on Oil and Gas on page 102, thereof, exposes the fallacy of the reasoning of the Montana Supreme Court. It shows that the United States Supreme Court

decisions are applicable to states in which the common law rule of property obtains.

We conclude, therefore, that Article 6008, Revised Civil Statutes, 1925, is constitutional and its provisions being applicable to the situation presented by your letter, it follows that the ruling of your department denying the application in question was correct.

We note a further question in your letter as follows, whether the Commission has authority to require that a well be shut in and the gas therein reserved for use in domestic and industrial service where the amount of gas produced is disproportionately large as compared with the amount of oil produced, in view of the provisions of Article 6008, which states that the prohibitions of the statute shall not apply to any well which is operated for oil. You then state that cases have been presented before you where a well is producing from five to ten barrels of oil and from seven to ten million cubic feet of gas, manifestly showing that the gas is far in excess of the value of the oil. You then ask if you can not require that such a well be thus shut in, that if it is possible for the Commission to establish that ratio of the amount of gas to the amount of oil produced which will result in the least possible amount of gas being wasted in the air with the least possible interference with the production of oil.

Article 6008 has already been quoted above.

Article 6014 in its applicable portion is as follows:

"Neither natural gas nor crude petroleum shall be produced, transported, stored or used in such manner or under such conditions as to constitute waste; provided, however, this shall not be construed to mean economic waste. The term 'waste' in addition to its ordinary meaning, shall include permitting (a) escape into the open air of natural gas except as may be necessary in the drilling or operation of a well; * * *."

We advise that Article 6008 has no application to a well which is being operated for oil and that whether or not such well is operated for oil is a question of fact to be determined by the proper board or tribunal passing upon the matter involved. This being so, it follows that natural gas produced from a well operated for oil is not limited by said Article 6008 and that the Commission has no authority to require that such gas be shut in and confined until such time as it could be used for light, fuel or power purposes. The Commission would have the authority under subdivision (a) of Article 6014, supra, to prevent the escape into the open air of all such natural gas except such reasonable portion thereof as may be necessary in the drilling and operation of the well.

We think the discussion just above set out answers your question but if we have not given you all the information desired, we will be glad to again consider the matter upon your request.

Respectfully submitted,

W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2797, Bk. 63, P. 337.

CONSTITUTIONAL LAW—APPOINTMENTS—FAILURE OF SENATE TO CONFIRM APPOINTEE.

Where an appointment required to be made "with the advice and consent of two-thirds of the Senate present" is made during a session of the Senate and the Senate adjourns without confirming the appointee, said appointment does not become complete, and the appointee in question is not legally entitled to the office.

Construing Section 12, Article 4, Constitution of Texas.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 3, 1930.

Doctor G. Henry Aronsfeld, 1205 Post Dispatch Building, Houston, Texas.

DEAR SIR: We have given very careful consideration to the question submitted by you, namely, the status of Doctor David L. Wortsman as a member of the Board of Optometry.

The facts submitted to us are as follows: Doctor Wortsman's name as a member of the Board of Optometry was submitted to the Senate by the Governor. The Senate, however, adjourned without confirming Doctor Wortsman and he has never been confirmed. The appointment by the Governor was made while the Senate was in session.

The constitutional provision under which the Governor proceeded in submitting the name of Doctor Wortsman as a member of the Board of Optometry is Section 12 of Article 4 of the Constitution which reads as follows:

"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."

The language particularly applicable to the case is that an appointment "made during its session" (the Senate's) "shall be made with the advice and consent of two-thirds of the Senate present." 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."

Doctor Wortsman's appointment being made *during the session of the Senate,* was required, under the constitutional provision

above set out, to be made "with the advice and consent of two-thirds of the Senate present."

Speaking of appointments "with the advice and consent of the Senate" Mechem On Public Officers, uses the following language:

"It is frequently provided by the Constitutions of the States, as by that of the United States, that the executive—the Governor or President—shall have power to fill certain vacancies by appointments made 'by and with the advice and consent of the Senate.' Where such a provision exists, the executive can only exercise the appointment without such advice and consent where, since the adjournment of the Senate, a vacancy exists or has occurred (words held to mean the same thing) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged. If the Senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of that body unless the Senate has adjourned before the vacancy is filled."

Twenty-two Ruling Case Law has this to say of the effect of failure of confirmation at page 433:

"Wherever under a constitutional or statutory provision the appointment is required to be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office. If on the expiration of the term of a public officer, an appointment of a successor is made by the Governor but it is not confirmed by the State Senate as required by a law of this type such successor does not obtain the right to enter on the duties of the office but the former incumbent may hold over until a successor is properly appointed and confirmed."

Forty-six Corpus Juris states at page 953 that "where the appointment is made as the result of a nomination by one authority and confirmed by another, the appointment is not complete until the action of all bodies concerned has been had."

From a consideration of the above authorities together with every case which we have found discussing the subject of appointments of this nature, we arrive at the conclusion that Section 12 of Article 4 of the Constitution of the State contemplates that appointment of this nature should be made by the *concurrent* action of the executive and the Senate. It was intended that the office in question should be filled by the *joint action* of the Governor and the Senate, and that responsibility for the appointment should rest upon the Governor and the Senate alike.

This conclusion is not opposed by any case which we have found and this conclusion expresses the practice in so far as we are advised in State and Federal jurisdiction alike.

In view of these facts that Doctor Wortsman was appointed *during the session of the Senate* and that the Senate adjourned *without confirming* the appointment, we must advise you that the appointment never became complete and effective.

Assuring you that we have attempted in this matter to search all the authorities available to us and have given this matter our careful and extended consideration, I remain,

Very truly yours,

ROBERT LEE BOBBITT,
Attorney General.

Op. No. 2804, Bk. 63, P. 395.

GAS PUBLIC UTILITIES.

1. Any person, etc., doing business as defined by Article 6050, is a public utility and subject to the provisions of the law with reference thereto and also subject to the tax imposed by Article 6060, Revised Statutes.

2. Gas utilities—the owners of gas wells producing and selling to a person, pipe line, etc., not directly engaged in distributing or selling natural gas to the public is not within the purview of Article 6050 or 6060, Revised Statutes.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 22, 1930.

Honorable C. L. Stone, Chief, Gas Utilities Division, Railroad Commission of Texas, Capitol.

DEAR MR. STONE: We are in receipt of your recent communication asking our advice upon the following statement of facts:

"Where a person, partnership, corporation or other concern, which is engaged in a business in which they do not undertake directly or indirectly to render a service to or for the public, but, as an incident to the business engaged in, or otherwise, they become the owners of one or more gas wells in this State from which natural gas is produced, and then sell same to a pipe line or other public utility or municipality, is such person, partnership or corporation owning such gas well or wells a public utility as that term is defined in Article 6050, Revised Civil Statutes of this State, and subject to the gross receipts tax imposed in Article 6060, Revised Civil Statutes of this State?"

We note your discussion and the authorities defining what legally constitutes public utilities and also your proposition that the Legislature may not by its enactments declare a thing to be a public utility which does not in fact meet the legal definition therefor.

Article 6050, Revised Statutes, sets forth a variety of activities in connection with natural gas which shall be held and determined to be the activities of a public utility. You ask our determination of these various definitions set forth in Article 6050 in the light of the definitions and propositions of law cited by your letter. This department, of course, must recognize that a mere legislative fiat can not change the leopard's spots, but we are not prepared to say that any of the definitions set forth in said Article 6050 as a matter of law comprehend an activity not that of a public utility. We therefore advise that any situation comprehended by Article 6050 and coming fairly within the language of said article would constitute the person or corporation meeting such situation a public utility and subject to the gross receipts tax imposed by Article 6060, Revised Statutes.

We think that in the case of an owner of one or more gas wells in this State from which natural gas is produced who sells such gas to a pipe line or other person or corporation, which such buyer does not itself distribute or sell directly to the public but buys the same for resale to some other person or corporation, the original producer would not be a public utility under the

terms of Article 6050, and therefore not subject to the tax imposed by Article 6060.

On the other hand, the original producer that sells directly to a pipe line, public utility, municipality, or other person, corporation, etc., who is directly engaged in distributing and/or selling natural gas to the public, would be within the purview of both Article 6050 and Article 6060.

We base this opinion upon subdivision B, Section 1, of Article 6050, since this is the portion of said article which comprehends the situation presented by your letter if it is touched. Subdivision B, with the pertinent parts of the language preceding it in Article 6050, is as follows:

"The term 'public utility' includes persons, etc., owning within this State, any well * * * for the following kinds of business: producing natural gas for sale to municipalities, or persons or companies, in those cases referred to in paragraph 3 hereof, *engaged in distributing or selling natural gas to the public.*"

It will be seen that the situation covered by this language is limited by the phrase italicized above, and it is upon this limitation that we make the distinction in the opinion above given.

Any former opinion holding contrary to this opinion is expressly overruled.

Trusting this may give you the information you desire, I beg to be,

Very truly yours,
W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2806, Bk. 63, P. 405.

STATUTES—TIME OF TAKING EFFECT.

1. House Bill No. 12 passed the House by a two-thirds record vote and passed the Senate with amendments by a two-thirds record vote. The House refused to concur in the Senate amendments and the bill was referred to a free conference committee. The report of the free conference committee was adopted by the Senate by a two-thirds record vote and by the House was adopted by a viva voce vote. Held: That the bill takes effect from and after its passage in accordance with the emergency clause.
2. Said bill was received by the Governor on the last day of the session and was neither approved nor vetoed by the Governor within twenty days after adjournment. Held: That since the act contains the emergency clause placing it in immediate effect and got a two-thirds record vote in each House, the same will take effect twenty days after adjournment.

OFFICES OF THE ATTORNEY GENERAL,
April 10, 1930.

Honorable Jane Y. McCallum, Secretary of State, Capitol.

DEAR MRS. MCCALLUM: The Attorney General is in receipt of yours of the 9th instant requesting an opinion as to the effective date of House Bill No. 12, the same being an act passed

by the Forty-first Legislature at its Fifth Called Session and relating to corporate franchise taxes.

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

It will be noted that a bill cannot take effect sooner than ninety days after adjournment unless the Legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house.

House Bill No. 12 passed the House of Representatives by a vote of 100 yeas, 3 nays; it passed the Senate with amendment by a vote of 23 yeas, 2 nays; the House refused to concur in Senate amendments and requested the appointment of a free conference committee to adjust the differences between the two houses; the Senate granted this request and a free conference committee was appointed; the House adopted the free conference committee report by a viva voce vote; the Senate adopted the free conference committee report by a vote of 29 yeas, no nays. The journals of the Legislature will show that the free conference committee amended the bill and reported it back to each house in its amended form and each house adopted the bill as amended.

It will be seen that the bill received a two-thirds record vote in each house upon the passage of the bill, but that after the bill was amended and referred to the free conference committee the report of the free conference committee was not adopted by a two-thirds record vote in the House of Representatives. Under these circumstances the question is, whether it can be said that the Legislature, by the necessary two-thirds vote in each house, directed that the bill go into effect sooner than ninety days after adjournment.

Whatever doubt there might be on the question as an original proposition, this department is of the opinion that we should follow the decision in the case of Wilson vs. Young County Hardware & Furniture Company, 262 S. W. 873. Substantially the exact question now under consideration was passed upon in that case. In that case a bill passed the House by the necessary two-thirds vote and passed the Senate after amendment by the necessary two-thirds vote and the House then concurred in the Senate amendments without a record vote. The court in the case just cited held that the act went into immediate effect notwithstanding the fact that the House concurred in the Senate amendments without a two-thirds record vote.

The court cites Ruling Case Law and other authorities in support of its holding and it is not necessary to go into these authori-

ties at length. The case above mentioned is the only one in this State that we have found passing upon this question.

You are, therefore, advised that in the opinion of this department, House Bill No. 12 takes effect "from and after its passage" as provided in the bill.

This bill was received in the executive office March 20, 1930. The Legislature adjourned on March 20, 1930. The Governor did not file this bill with his objections in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment. Neither did the Governor sign or approve the bill. In other words, the Governor neither approved nor vetoed the bill. Under these circumstances the question arises as to when the bill becomes a law.

The Constitution itself seems to answer this question. Under Section 14 of Article IV it is clear that there are three ways by which a bill can become a law. (1) When the Governor signs it if he does so within the time which he is permitted to hold it in his possession. (2) When it is passed over his veto. (3) When he fails to act upon a bill, one way or the other within the time during which he is permitted to hold the same for consideration.

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

In this case the adjournment of the Legislature prevented the Governor from returning it to the Legislature and, therefore, he had twenty days after adjournment to consider the bill. During that twenty days he neither approved nor vetoed it. It is clear that he had the full twenty days to consider the bill; therefore, it could not become a law until the expiration of this twenty-day period.

You are, therefore, advised that in the opinion of this department, House Bill No. 12 became a law twenty days after adjournment of the session at which it was enacted, the bill having received a two-thirds yea and nay vote in each house and containing a provision placing it in immediate effect.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2809, Bk. 63, P. 421.

OIL AND GAS.

1. Oil and Gas—Royalties on Casinghead Gas.—A lease which only stipulates a royalty for oil produced and for gas sold entitles the lessor to receive for casinghead gas the royalty provided by the lease on the oil produced.
2. Oil and Gas—Royalty on Residue Gas.—The royalty on casinghead gas being measured by the value of the casinghead gas as produced and saved at the casinghead, payment of royalty on this basis would include a payment of any royalty that might be due on residue gas since the value of casinghead gas at the casinghead would be inclusive of the value of all the constituent elements of casinghead gas, residue gas being one of these.
3. Oil and Gas—Determination of Gasoline Content of Casinghead Gas.—In leases where royalty is based on the value of casinghead gas at the well, it is unnecessary to determine the actual gasoline content of such casinghead gas since the valuation of the casinghead gas at the well should be inclusive of the value of the casinghead gasoline.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 11, 1930.

Honorable J. W. Calhoun, Comptroller, The University of Texas, Austin, Texas.

DEAR SIR: Receipt is acknowledged of your favor of March 31st, addressed to the Attorney General, as well as your later favor of April 9th, making certain enclosures requested by us in connection with your former inquiry.

Your communications propound for our determination three questions, as follows:

1. Should the royalty basis of casinghead gas on University lands in Reagan and Crane Counties be one-tenth or one-eighth?
2. Should the University receive a royalty on residue gas sold?
3. Should the value of the casinghead gas for royalty basis be based on the actual gasoline contained in the casinghead gas or upon the content determined by theoretical computation?

Our reply to these questions is based upon the provisions of the oil and gas lease submitted by you in this connection. We take it that the form submitted is representative of all the leases covered by your inquiry.

The provisions of the lease pertinent to the questions under consideration are as follows:

1. "The owner of the rights herein conveyed shall pay to the State of Texas at the General Land Office at Austin, Texas, a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum and shall pay a sum of money equal to ten per cent of the value of all gas sold."

* * * * * * * * * * *

4. "The owner of the rights herein conveyed shall have the exclusive right during the life of this lease to drill for petroleum and gas on the area leased, together with the right of way for laying and the right to lay pipe lines therein to convey water, petroleum, steam or gas."

We further assume that by residue gas as used in your question, reference is had to the gas remaining after the extraction of casinghead gasoline from casinghead gas.

It may be taken in Texas to be well settled that casinghead

gas is a constituent of oil and that in the absence of language in the lease evidencing the particular amount of royalty to be paid on casinghead gas, that the lessor is entitled to royalty thereon at the same rate as is provided for oil.

Livingston Oil Corporation vs. Waggoner, 273 S. W. 903.
Reynolds vs. McMan Oil and Gas Company, 11 S. W. (2d) 778.
Magnolia Petroleum Company vs. Connellee et al., 11 S. W. (2d) 158.

It will be noted that the lease in question herein makes no provision as to the amount of royalty payable for the production of casinghead gas, but merely provides a basic royalty for oil produced and another rate of royalty on the gas sold.

Upon the authority of the cases above cited, we advise in answer to your first question that the royalty basis of casinghead gas produced under such leases should be one-eighth rather than one-tenth.

Justice Speer in a very able and exhaustive opinion in the case of Reynolds vs. McMan Oil and Gas Company, *supra,* on page 786, uses this language:

"The measure of damage, however, will not be a one-eighth of the gasoline manufactured by defendants in error from the casinghead gas, but rather it will be one-eighth part of the value of the casinghead gas as it was produced and saved from the wells; * * *"

This holding was expressly approved by the Supreme Court. It follows from this that the royalty is collectible on the value of the casinghead gas as it is produced and recovered at the casinghead. Casinghead gas includes both the casinghead gasoline content and the residue gas. The true value of the casinghead gas after the same is produced and recovered at the casinghead of the well, should therefore reflect the net value of the casinghead gasoline to be extracted therefrom and also the value of the residue gas remaining after such extraction. If this measure of damage is followed, it seems to us that the University and the State would be, by this method, receiving its proper royalty on residue gas.

The third question is practically answered by the discussion with reference to the second question. As suggested by the quotation from the Reynolds case, *supra,* the proper method for determining the value of the casinghead gas for royalty purposes is to ascertain the value of the casinghead gas actually produced and saved from the wells. When the value of the actual casinghead gas as produced and saved has been determined, this would be inclusive of the casinghead gasoline, thereby eliminating the necessity of determining the gasoline content, either by actuality or by theoretical computation.

We trust that we have been able to give you the information desired.

Very truly yours,
W. DEWEY LAWRENCE,
Assistant Attorney General.